

IN THE PRIVY COUNCIL

34/85
No. 16 of 1985

ON APPEAL FROM THE FULL COURT
OF THE SUPREME COURT OF QUEENSLAND

BETWEEN:

JAMES JOSEPH WATSON and
PAULINE ELAINE WATSON
(Defendants)

Appellants

-and-

GLEN ROBERT PHIPPS
(Plaintiff)

Respondent

RECORD OF PROCEEDINGS

COWARD CHANCE,
ROYEX HOUSE,
ALDERMANBURY SQUARE,
LONDON,
EC2V 7LD

Messrs. Waltons & Morse
Plantation House
31-35 Fenchurch Street
London
EC3M 3NN

Solicitors for the Appellant

Solicitors for respondent,
142 Brisbane Street,
IPSWICH.

ON APPEAL FROM THE FULL COURT
OF THE SUPREME COURT OF QUEENSLAND

BETWEEN:

JAMES JOSEPH WATSON and
PAULINE ELAINE WATSON
(Defendants)

Appellants

-and-

GLEN ROBERT PHIPPS
(Plaintiff)

Respondent

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2.	Notice of Motion	19 November 1981
3.	Affidavit of Glen Robert Phipps, with Exhibits	18 November 1981
4.	Exhibit "A" - Copy letter, then Solicitors for Defendants to Solicitors for Plaintiff	19 December 1977

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9.	Exhibit "F" - Copy letter, Solicitors for Plaintiff to then Solicitors for Defendants	6 December 1978
10.	Exhibit "G" - Copy letter, then Solicitors for Defendants to Solicitors for Plaintiff	17 September 1980
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14.	Exhibit "A" - Copy letter, Solicitors for Plaintiff to Defendants	11 February 1982
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17.	Affidavit of Allan Leslie Mitchell, with Exhibit	25 February 1982
18.	Exhibit "A" - Duplicate requisition slip	22 February 1982
19.	Affidavit of James Joseph Watson, with Exhibits	24 February 1982

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20.	Exhibit "A" - Copy Caveat Forbidding Registration of Dealing	3 August 1981
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35.	Exhibit "A" - Copy Statement of Claim	25 February 1982
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44.	Praecipe for Subpoena	22 July 1983
45.	Praecipe for Subpoena	22 July 1983
46.	Order of Master Lee Q.C.	21 July 1983
47.	Consent	16 November 1983
48.	Order	24 November 1983
49.	Bill of Costs	15 March 1984
50.	Entry of Appeal	16 April 1984
51.	Supplementary Order Sheet	
52.	Notice of Motion	28 December 1984
53.	Affidavit of John Joseph Hoare	28 December 1984
54.	Draft Index of Reference	
55.	Affidavit of James Joseph Watson, with Exhibit	31 December 1984
56.	Exhibit "A" - Copy Valuation Report by F.P. Manners	28 December 1984

IN THE SUPREME COURT OF QUEENSLAND

This writ was served by me on the defendant at _____ day of _____ 19 _____ day of _____ 19 _____

(Signed)

(Address)

GLEN ROBERT PHIPPS

-v-

JAMES JOSEPH WATSON and PAULINE ELAINE WATSON

Writ of Summons

* the lessees of the defendants in respect of the subject lands for a period of five years from the seventeenth day of February, 1978;

(d) an order that clause 3(a) of the lease document be rectified to provide to the plaintiff an option to purchase the subject lands during the five year term of the lease or at the expiration thereof for a consideration equivalent to ONE THOUSAND DOLLARS (\$1,000.00) per acre.

DALE & FALLU, Solicitors for plaintiff 142 Brisbane Street, IPSWICH.

Telephone No. 281 4999

By authority: The Law Book Company Limited

The plaintiff's claim is for:-

- (a) an injunction restraining the defendants by themselves, their servants or agents from selling and/or leasing or otherwise dealing with their interest as registered proprietors in all that piece or parcel of land described as Subdivision 1 of Resubdivision 1 of Portion 126 containing an area of 29 acres 2 roods 18 perches situate in the County of Churchill Parish of North and being the whole of the land contained in Certificate of Title Volume 4865 Folio 142 and Subdivision 1 of Resubdivision C of Subdivision 1 of Portion 126 on Registered Plan No. 45048 containing an area of 10 acres 31 perches situate in the County of Churchill Parish of North and being the whole of the land contained in Certificate of Title Volume 4865 Folio 143 and Subdivision 2 of Resubdivision A of Subdivision 1 of Portion 126 containing an area of 37 acres 3 roods 29 perches situate in the County of Churchill Parish of North and being the whole of the land contained in Certificate of Title Volume 4865 Folio 144 contrary to the interests conferred upon the plaintiff by a certain lease dated the first day of February, 1978;
(b) a mandatory injunction requiring the defendants, their servants and/or agents to do all necessary acts and things on their part to secure registration in the office of the Registrar of Titles of the plaintiff's interest as lessee of the said land pursuant to a lease entered into between the parties on the first day of February, 1978 whereby the plaintiff was to become lessee of the lands for a period of five years from the seventeenth day of February 1978;
(c) in the alternative, specific performance of an agreement in writing dated the first day of February, 1978 between the plaintiff and the defendants whereby the plaintiff became * THIS WRIT was issued by Messrs. Dale & Fallu, Solicitors of 142 Brisbane Street, Ipswich, whose address for service is C/- Messrs. Nicol Robinson & Kidd, of 360 Queen Street, Brisbane town agent for Messrs. Dale & Fallu solicitors for the plaintiff who resides at Ipswich

Supreme Court

No. 1 Writ of Summons (indorsement of Claim only) 19 November 1981

IN THE SUPREME COURT
OF QUEENSLAND

No. 4554 of 1982

BETWEEN:

GLEN ROBERT PHIPPS

Plaintiff

AND:

JAMES JOSEPH WATSON and
PAULINE ELAINE WATSON

Defendants

AMENDED STATEMENT OF CLAIM

Delivered the _____ day of _____ 1983.

AMENDED
STATEMENT OF CLAIM

1. At all times material to the issues in this action the Defendants were the Proprietors in fee simple of: 20

(a) All that piece or parcel of land described as Subdivision 1 of Resubdivision ^{of Subdivision 1.} A₁ of Portion 126 situate in the County of Churchill Parish of North containing an area of 29 acres 2 roods 18 perches and being the whole of the land contained in Certificate of Title Volume 4865 Folio 142; 30

(b) All that piece or parcel of land described as Subdivision 1 of Resubdivision C of Sub-division 1 of Portion 126 on Registered Plan No. 45048 situate in the County of Churchill Parish of North containing an area of 10 acres 31 perches and being the whole of the land contained in Certificate of Title Volume 4865 Folio 143; and 40 50

(c) All that piece or parcel of land described

Supreme Court

No.2 Amended Statement
of Claim
Undated

FALLU,
solicitors,
175 Brisbane Street,
MELBOURNE.
Telephone: 2814999

AGENTS:
ROBINSON & KIDD,
solicitors,
175 Queen Street,
MELBOURNE.
Telephone: 311256

as Subdivision 2 of Resubdivision A of Sub-
division 1 of Portion 126 situate in the
County of Churchill Parish of North
containing an area of 37 acres 3 roods 29
perches and being the whole of the land
contained in Certificate of Title Volume
4865 Folio 144.

2. By an Agreement for Lease made on the ^{7th}~~4th~~
day of ^{April}~~February~~, 1978 and made between the Plaintiff
and the Defendants, it was agreed that the Defendants
would lease to the Plaintiff for a period of Five (5)
years commencing from the 17th day of February, 1978
the land described in paragraph 1 hereof.

3. By an oral agreement made in or about the
month of December 1977 between the Plaintiff and the
Defendants it was agreed that the said Agreement for
Lease would contain a clause conferring upon the
Plaintiff an option to purchase the Defendants' land
during the subsistence of the Lease or at the
expiration thereof for a consideration equivalent to
ONE THOUSAND DOLLARS (\$1,000.00) per acre.

4. The said Agreement for Lease was intended to
embody the agreement made between the parties as set
out in paragraph 3 hereof and not otherwise.

5. The said Agreement for Lease was so signed
by the Plaintiff and by the Defendants in the belief
that it embodied the agreement set out in paragraph 3
hereof, but it does not in fact contain or embody the
said agreement.

6. Particulars of the way in which the written agreement differs from the oral agreement are as follows:- 1

The actual agreement and true intention of the parties was to confer upon the Plaintiff an option to purchase the said land from the Defendants at any time during the term of the said Lease, or at the expiration thereof for a consideration equivalent to ONE THOUSAND DOLLARS (\$1,000.00) per acre whereas the written agreement provides for the Plaintiff to offer to purchase the said land at the agreed price. 10 20

7. The said written agreement was drawn up and signed as aforesaid under a mutual mistake of fact in both the Plaintiff and the Defendants were at all material times of the belief that the agreement contained a valid and enforceable option clause. 30

7A. In the alternative, if there was no prior oral agreement as alleged in paragraph 3 hereof, it was the common intention of the Plaintiff and the Defendants continuing up to the time of execution of the Agreement for Lease that a term as alleged in paragraph 3 be included in the Agreement for Lease and by mistake it was not. 40

8. On the 11th day of February, 1982 the Plaintiff by his Solicitors purported to exercise the option to purchase which he believed was conferred upon him in the written agreement. 50

9. On the 17th day of February, 1982 the Defendants by their Solicitors refused to recognize the existence of any option to purchase and rejected

Supreme Court

No.2 Amended Statement
of Claim
Undated

the purported exercise of the option.

10. The Plaintiff is ready and willing to sign and execute a written Contract of Sale embodying the terms of the oral agreement, but the Defendants have refused to be bound by the terms of the agreement.

11. AND the Plaintiff claims:-

(a) An Order that the written agreement dated the 1st day of February, 1978 and signed by the parties be rectified so as to embody an option to purchase conferring upon the Plaintiff the right to purchase the lands described in paragraph 1 hereof during the subsistence of or at the expiration of the Lease referred to in paragraph 2

hereof at the price of ONE THOUSAND DOLLARS (\$1,000.00) per acre and to have the said agreement treated as being so rectified;

(b) A Declaration that the Plaintiff's purported exercise of the option to purchase on the 11th day of February, 1982 be deemed to be a valid and proper exercise of the said option;

(c) Specific performance of the agreement as rectified.



Solicitors for the Plaintiff

Supreme Court

No.2 Amended Statement
of Claim
Undated

This Pleading was settled by Mr. Myers of Counsel.

NOTICES

The Defendants are required to plead to the within
Statement of Claim within twenty-eight (28) days from
the time limited for appearance or from the delivery
of the Statement of Claim, whichever is the later,
otherwise the Plaintiff may obtain Judgment against
them.

IN THE SUPREME COURT
OF QUEENSLAND

No. 4554 of 1981

BETWEEN:

GLEN ROBERT PHIPPS

Plaintiff

AND:

JAMES JOSEPH WATSON and
PAULINE ELAINE WATSON

Defendants

DEFENCE OF THE DEFENDANTS, JAMES JOSEPH WATSON and
PAULINE ELAINE WATSON

DELIVERED the *Seventeenth* day of *May* 1982.

1. The Defendants admit the allegations contained in paragraph 1 of the Statement of Claim.

2. The Defendants admit the allegations contained in paragraph 2 of the Statement of Claim; the Defendants will, on the Trial of this action, refer to the said Agreement for Lease for its full meaning and effect.

3. The Defendants deny the allegations and statements of fact made in paragraphs 3, 4, 5, 6 and 7 of the Statement of Claim.

4. The Defendants do not admit the allegations and statements of fact contained in paragraphs 8, 9 and 10 of the Statement of Claim.

5. Both the Plaintiff and the Defendants, in making the Agreement for Lease referred to in paragraph 2 of the Statement of Claim, believed that the said Agreement

Supreme Court

FENCE

COCA & MITCHELL,
SOLICITORS,
110 RIVERSIDE STREET,
BRISBANE 4305
PHONE: 281 2277
SOLE AGENTS:
M. SCIACCA &
ASSOCIATES,
110 CORP HOUSE,
110 RIVERSIDE STREET,
BRISBANE 4000

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expressed the oral agreement made between the Plaintiff and the Defendants.

1

6. If the Plaintiff signed the said Agreement for Lease under a mistake of fact (which is denied) as to the Agreement containing a valid and enforceable option clause, then such mistake was a unilateral one on behalf of the Plaintiff.

10

7. Although the Plaintiff was at all material times fully aware of the facts relied on in his Statement of Claim, he was nevertheless guilty of prolonged, inordinate and inexcusable delay in bringing this action and seeking the relief claimed herein, and he thereby caused or permitted the Defendants to believe, as in fact he did, that he, the Plaintiff, did not intend to make the claim herein or any claim against the Defendants, and in this belief the Defendants acted to their prejudice, and they have otherwise been prejudiced.

20

30

PARTICULARS:

On the First day of February 1978, the Solicitors for the Defendants forwarded an Agreement for Lease in triplicate executed by the Defendants, which Agreement became, upon execution by the Plaintiff, the Agreement for Lease referred to in paragraph 2 of the Statement of Claim. Under cover of a letter dated the Ninth day of February 1978, the Solicitors for the Plaintiff returned the said Agreement for Lease duly executed by the Plaintiff. In the premises, the Plaintiff, by his

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conduct, waived his right, if any (which is denied) to claim the alleged or any relief against the Defendants, and it is inequitable and unjust to grant the Plaintiff the alleged or any relief.

8. Save as hereinbefore expressly admitted, the Defendants deny each and every allegation contained in the Statement of Claim as though the same were herein set out and traversed seriatim.

James A. McMillan
Solicitors for the Defendants

This Pleading was settled by Mr W T McMillan of Counsel.

The Plaintiff is required to reply to the within Defence within fourteen (14) days otherwise the pleadings will be deemed to be closed and all material statements of fact in the Defence will be deemed to have been denied and put in issue.

To: The Plaintiff

And To: His Solicitors

MESSRS DALE & FALLU
142 Brisbane Street
 Ipswich

TOWN AGENTS:

MESSRS NICOL ROBINSON & KIDD
 Solicitors
 360 Queen Street
 Brisbane.

IN THE SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

No.4554 of 1981

BEFORE MR. JUSTICE SHEPHERDSON

BRISBANE, 26 JULY 1983

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BETWEEN:

GLEN ROBERT PHIPPS

Plaintiff

-and-

JAMES JOSEPH WATSON and
PAULINE ELAINE WATSON

Defendants

Mr. Davies, Q.C., with him Mr. Myers (instructed by Messrs. Nicol, Robinson & Kidd, town agents for Messrs. Dale & Fallu, Ipswich), for the plaintiff.
Mr. McMillan (instructed by Messrs. C. A. Sciacca & Associates, town agents for Messrs. Sciacca and Mitchell, Ipswich), for the defendants.

HIS HONOUR: I have had a look at the pleadings.

MR. DAVIES: We ask leave to amend the statement of claim in accordance with that part of the statement of claim which is underlined in red in the copy which I hand up to Your Honour.

HIS HONOUR: Inserting the new clause 7A. What do you say to that Mr. McMillan?

MR. McMILLAN: I have no objection to that amendment at this stage.

HIS HONOUR: Leave is given, and I would be pleased if you would let me have a copy, no, do not worry about that.

MR. DAVIES opened the case for the plaintiff.

During the opening -

MR. DAVIES: I tender at this stage the original of that contract between the defendants as vendors and the plaintiff as purchaser dated 6 January 1978.

HIS HONOUR: What is your attitude to this, Mr. McMillan?

MR. McMILLAN: I have no objection to its being tendered.

(Admitted and marked "Exhibit 1.")

MR. DAVIES: Continued opening the case for the plaintiff.

During the opening -

MR. DAVIES: I call for the original lease dated 7 April 1978.

(Document produced.)

MR. DAVIES: I tender that.

HIS HONOUR: This one is dated 7 April, and the one pleaded is dated 1 February.

MR. DAVIES: Yes, Your Honour.

HIS HONOUR: Do you want to amend your pleadings?

MR. DAVIES: Yes.

HIS HONOUR: Have you any objection to that being done, Mr. McMillan? Perhaps you needn't answer me straight away because Mr. Davies did say there was another document.

MR. McMILLAN: Yes, there is another document. In fact, the other document my learned friend referred to on 1 February was also signed by both parties.

HIS HONOUR: Mr. Davies, you had better straighten it out. Which one are you suing on - this one, Exhibit 2?

Yes.

MR. DAVIES: It probably doesn't matter-----

HIS HONOUR: It might - you never know. It depends how the evidence comes out.

(Admitted and marked "Exhibit 2.")

MR. DAVIES continued opening the case for the plaintiff.

During the opening -

MR. DAVIES: It might be convenient at this stage to tender some of the correspondence. I tender a letter from Richard Zande & Associates to Dale and Fallu dated 19 December 1977.

(Admitted and marked "Exhibit 3.")

1 MR.DAVIES: I call for letter dated 21 December 1977
from Dale and Fallu to Richard Zande and Associates.

(Document produced.)

MR. DAVIES I tender that.

Ex.4 (Admitted and marked "Exhibit 4.")

10 MR. DAVIES: I tender a letter dated 25 January 1978
from Richard Zande and Associates to Dale and Fallu.

Ex.5 (Admitted and marked "Exhibit 5.")

MR. DAVIES: I tender a letter dated 1 February 1978
from Richard Zande and Associates to Dale and Fallu.

Ex.6 (Admitted and marked "Exhibit 6.")

20 MR. DAVIES: It has been produced to me and I tender
letter dated 9 February 1978 from Dale and Fallu to Richard
Zande and Associates.

Ex.7 (Admitted and marked "Exhibit 7.")

MR. DAVIES: I have had produced and I tender letter dated
7 April 1978 from Dale and Fallu to Richard Zande and Associates.

Ex.8 (Admitted and marked "Exhibit 8.")

1
MR.DAVIES: I call for a letter dated 11 February 1982 from Dale and Fallu to Mr. and Mrs.Watson. It is produced, and I tender it. That is a letter exercising, or purporting to exercise an option.

Ex.9

(Admitted and marked "Exhibit 9.")

HIS HONOUR: I am ignoring the mark at the bottom.

10
MR.DAVIES: And a reply to that letter of 17 February 1982 from Sciacca and Mitchell to Dale and Fallu.

HIS HONOUR: You had better have a look at these notes that are on the bottom, both counsel.

MR.DAVIES: Yes. I certainly did not intend them to be part of the exhibit.

HIS HONOUR: I am ignoring it.

Ex.10

(Admitted and marked "Exhibit 10.")

GLEN ROBERT PHIPPS, sworn and examined:

BY MR. DAVIES: Is your full name Glen Robert Phipps?-- That is correct.

30
Do you reside at Fernvale, and are you a dairy farmer by occupation?--That is correct.

In 1977, about the middle of December, did you hear from your brother that Mr.Watson, the male defendant in this action, had his property up for sale?--I did.

Did you go to see Mr.Watson ?--Yes, I did.

40
Was that still in the middle of December?--That is correct.

Did you go out to see him on your own or with someone else?--No, I was accompanied by my brother.

Can you recall what was said on this occasion?--There was a lot of general conversation as to Mr.Watson's health, but-----

50
About the property, though?--About the property - I asked Mr.Watson in the presence of my brother was he for sale, and he said, "Yes," he was, and I also asked him would he be interested in selling the top portion of his land and leasing me the remainder of the property with the machinery.

Let us just pause there for a moment. The top portion of Mr.Watson's property; what did that have on it?--It has a house, dairy.

The dairy building, you mean?--Yes, a dairy building, registered dairy and several other outbuildings.

60

Supreme Court

per calendar month.

When you are talking about machinery here, you are not talking about dairy machinery?-- No. - cultivating machinery, tractors, things of that nature.

Was the amount for your house mentioned in this conversation, do you think?-- It could have been suggested, or it could have been - there is one - I'm not sure which ----

What was the amount that was concerned, either in this or the earlier conversation?-- \$25,000 I wished for my own home.

BY HIS HONOUR: Was it proposed you would put that in as part of the purchase money?-- That is correct.

That is what was discussed?-- Yes.

BY MR. DAVIES: Then, shortly after that conversation, did he again a day or two later - did he come to Ipswich----

MR. McMILLAN: I object to this leading.

HIS HONOUR: Well -----

BY MR. DAVIES: What happened after that conversation? When was the next time you saw him?-- It was then up to Mr. Watson to view my property, my house, and to see whether he felt it was worth \$25,000.

Did he do that?-- Yes, he did, and to the best of my knowledge, I believe his wife had come with him.

BY HIS HONOUR: Were you there with him?-- I was at the house when he did come.

BY MR. DAVIES: As far as you can recall, his wife came too?-- I think she may have been with him. I'm not sure.

What was said?-- He had a look through. He was quite happy. He agreed that the house would be worth \$25,000, and we both agreed that - well, I agreed that his property - I would be prepared to take it on for the amount of money he was asking.

That was?-- \$39,500 for the top portion bare, and the five-year lease over the rest of the land for \$200 per calendar month.

Shortly after that conversation, did you go to see some solicitors?-- Yes. Some time after I went to Dale and Fallu and they referred me to Mr. Bloxsom of their office.

After initial talks to Mr. Bloxsom did you go back to Mr. Watson?-- I did, because Mr. Bloxsom advised -----

Do not tell us what Mr -----

Supreme Court

No.4 Plaintiff's evidence
G.R. Phipps
Exam.-in-chief

1 BY HIS HONOUR: Mr. Bloxson gave you certain advice, as a result of which you went back to see Mr. Watson; is that correct?-- That is correct.

You cannot tell us what that advice was. Go on?-- I went back to see Mr. Watson that same afternoon, and it was late. It was about 4 or 5 o'clock. He was milking the cattle at the time.

10 BY MR. DAVIES: First, I want to ask you was anyone with you when you went to see him on that occasion?-- Yes, my wife accompanied me at the time. She hadn't seen the top of the land and she went with me because she wanted to view the land herself as well.

This is still in mid-December?-- I believe so, yes.

You said about four or five o'clock in the afternoon?-- Yes.

20 He was milking at the time?-- He was milking at the time, and when we walked up, my wife and I parked the car, walked up to the dairy and he was in with the cattle milking, and he came out to us at the side gate over - out into the yard to talk to us. I believe his - one of his sons were helping him milk at the time. I don't know which one. I believe it may have been Tim. His son stayed inside and carried on milking and he came out to the side gate and I asked him had he thought who was going to pay the rates and he said that he believed that was up to me, and I said to him, "Well, I believe", you know, the rates would be still in his name although I was leasing the land and the notice would go to him, I believe that it would be up to his part to pay the rates. Anyway, it was sort of a stalemate so I said to him, "Look, what say I give you and extra \$20 per calendar month on the land or the lease and you keep - you look after the rates?".

40 Which makes up the \$220 a month instead of \$200?-- That is correct. He agreed - he said, "Yes, that would be right." After that I asked him would he give me an option to purchase the 79-acre block of land that I was going to lease, and he said he would and he then went on to explain to me how good they were -----

50 How good what were?-- How good the land was. He said it was very good land. It was river soil, and he also said that considering the lease is a five-year lease he believed he would have to ask \$1,000 per acre.

How did that price compare so far as you knew with current prices of land of that area?-- Well, I believed it was rather steep. I also know that -----

60 What was the going rate?-- Well, the going rate, I believe, was about \$600, \$700 to \$800, depending on the land, of course, but similar land, and that was top going in my opinion at that time.

I interrupted you. You said that he said seeing as the lease had another 5 years to run he would have to ask \$1,000?--That's correct.

What did you say to that?--I agreed to it.

Was anything further said? What else was said then?-- There may have been other ordinary general conversation. It wasn't just simply cut off as quick as that, but he was milking at the time and we left him to get back to it - the job that he was doing - and we also asked would he mind if we took a walk up the back and had a look over the property and he said that would be quite okay, and my wife and I walked off.

Did you then go back to your solicitors and tell them about the-----?--Yes, told them that we had come to an agreement about the rates and that he had accepted the option to purchase.

At that stage ^{were} you thinking of using the land as a dairy farm -the property as a dairy farm?--No, not at that stage at all.

What did you have in mind for it?--Lucerne and other grain crops.

Did you have some further discussions with your brother?-- I did.

Was he more experienced in this area than you?--Well, he is my older brother and I always took pretty good confidence in his advice.

After having some advice from your brother did you decide you would like to go into dairying?-- Yes, that's correct.

Incidentally, shortly after this conversation you have related did Mr. Watson do something with respect to his cattle and his dairy equipment?--Yes. He had a clearing sale of his cattle and dairy equipment.

Did he sell it all?--Most was sold, I believe, except, the bulk milk vat.

Then did you have some discussion with him about his bulk milk vat?--Yes. It initiated, actually, from my brother. I discussed -----

I don't want you to go into that, but you had some discussion with him about that?--Yes, we did.

And did you have some discussion with him about his milk quota?--Yes.

And in fact ultimately did you and he sign an agreement about the milk quota?--We did.

In the course of those discussions did he agree to go with you to a meeting of the Queensland Farmers Cooperative Association

Limited?--Yes, he did.

Can you recall attending a board meeting - a meeting of the board of directors of that association on 27 January 1978?--Yes, I do.

The purpose of you and he going was to see if his milk quota could be assigned to you?--That was correct.

You were called into that meeting - you and Mr. Watson?--Yes.

Can you recall now what was said at that meeting?--No, I can't recall word for word what was said at that meeting because I was fairly nervous. I only vaguely knew the directors. Mr. Watson knew them very well as he had been in the industry and he did most of the talking.

He did most of the talking?--That is correct.

Can you recall what he said?--No, I couldn't say for sure what he said. I know we just talked about the lease and things like that. I do recall that the board on the first occasion when we went into them requested-----

Don't say it. I just want to know if you know what Mr. Watson said. I don't want to know anything the Board may have said to you?--Not exactly, no.

You then moved into the property and you commenced dairying on that property; is that right?--Yes, after some time.

And you have been dairying there ever since?--That is correct.

There has been tendered in evidence a letter from your solicitors to Mr. and Mrs. Watson exercising an option. That was in February 1982. Did you have a conversation with Mr. Watson in 1981?--Yes.

About when?--Well, to the best of my knowledge I would believe it was about April 1981.

About April 1981?--Yes.

What was that conversation?--The conversation was - Mr. Watson said to me, "Now, Glen, what's your intention about this lease land?", and I said, "Well, look, Jim, I won't tell you a lot of nonsense; I'll come straight to the point. I've recently put my 30 acre block of land up for sale and I intend to use the money from the sale of that land to purchase the leased area."-----

MR. MCMILLAN: I wonder at the relevance of this evidence.

HIS HONOUR: Are you objecting?

MR. McMILLAN: Yes, I am objecting.

HIS HONOUR: On what grounds?

MR. McMILLAN: On the grounds that it is irrelevant to this suit. This is a rectification suit and the relevance of the

Supreme Court

No.4 Plaintiff's evidence

G.R. Phipps

Exam.-in-chief

intention of the parties goes only to the time it was executed. This took place in 1981 and I am submitting it is not relevant to the intentions of the parties to have evidence of what was said in 1981.

(Argument ensued.)

HIS HONOUR: I will allow the question.

BY MR. DAVIES: You said you had come to the point where you had put your top block on the market-----

HIS HONOUR: He said, "I have recently put my 30 acre block up for sale and I intend to use the money" - that is as far as he got.

BY MR. DAVIES: Yes. You intended to use the money----?-- The money to purchase a leased area, and it was then that Jim replied, "I don't believe that Pauline and I wish to sell that area of land now."

Did you say anything to that?--I said, "Well, as far as I'm concerned I don't think you have any option at all."

What did he say to that?--He said he would have to look into that.

Was there any further conversation?--Yes. He had some house plans in his hands and he was about to build a house-----

Nothing to do with this land?--Nothing to do with this land, and we want on to discuss these house plans.

MR. DAVIES: I have nothing further, Your Honour.

CROSS-EXAMINATION:

BY MR. McMILLAN: It has been said that you were in the area, or you grew up for five years, anyway, on that block of your mother's; is that right?--That is correct.

Were you born in the area?--I was born at Beenleigh.

And you came to that area at approximately what age, can you tell me?--The age of 1.

And you stayed there for how many years in that area?-- I was there for about 10 years and then we moved for 18 months, and when I returned to the farm next it was for a further 5 years.

That is your brother's farm, is it?--That is correct.

What is your brother Ken?--Ken Phipps.

And you were there for a while and then left again, did you?--Yes. My father passed away - at that stage the farm didn't belong to my brother; it belonged to my father. My father passed away and there was only my mother and myself.

1
My other brothers were away and at that stage we didn't want to carry on, must my mother and myself, and my older brother wished to purchase the farm and he subsequently bought the farm and I moved to Ipswich with my mother at that stage.

Did you ever work on the property you subsequently bought from Mr. and Mrs. Watson?--I did.

In your younger years?--Yes.

10
In fact, would it be correct to say that most of your family - your brothers - have worked on that farm and neighbouring farms?--Yes, that would be correct. My brothers I do not believe ever worked on that farm, but they worked on neighbouring farms.

The area that is in dispute, the leased area, we will refer to as the riverflats, because it actually borders the Brisbane River, doesn't it?--That is correct.

20
That area was well known to you before you approached Mr. Watson?--Yes.

And it is a fairly good property, isn't it?--Yes, it is a good dairy farm.

Is it also useful for growing lucerne and other crops?--Yes, it is.

30
You had in mind, of course, that you were going to grow lucerne on it; is that what you said?--That is correct.

And you moved into Ipswich and you were in Ipswich for a while, were you?--That's right.

-For how many years, approximately?--Approximately 4 or 5 years.

40
Then did you come back into the area after you left Ipswich?--I came back. That was when I bought the property from Mr. Watson.

So you were still in Ipswich and you had had it in mind to come back to that area?--I had it in mind to come back to the land and at the time my brother said that Mr. Watson's was for sale.

Did you and your brother approach him initially?--Yes - Ken Phipps - yes, he went with me - my brother.

HIS HONOUR: You mean this is on the first visit?

50
WITNESS: The very first visit.

HIS HONOUR: No, Mr. McMillan-----

MR. McMILLAN: Yes.

60
BY MR. McMILLAN: Initially the first approach to Mr. Watson was with your brother Ken?--That is correct.

1 Who did most of the talking from your side?--I'd say it was a pretty 50/50 situation because Mr. Watson and my brother had been neighbours for approximately 3 years or so. My brother knew Mr. Watson much, much better than myself. I only knew Mr. Watson by sight, and my brother talked to Mr. Watson as well as myself.

10 Can you tell the court how the question of the property for sale, came up? Did you bring it up first or did your brother?-- I couldn't answer that for sure but - I don't know who brought it up first, but we did discuss it.

And when it is said that the property was up for sale what property was being talked about?--The whole property was up for sale, I believed. That was what my brothers had told me.

You were led to believe, and when you went to the meeting you were under the impression that the whole of the property was for sale?--Which meeting?

20 The first meeting?--Yes.

What do you mean by "The whole of the property"?--That was the area that I eventually purchased, plus the leased area.

Did you suggest that to Mr. Watson, that you were interested in buying the whole of the property?--No, I did not.

30 What did you actually offer to Mr. Watson at that first meeting?--To purchase the top block portion of lands, which was the 30 acres, and leave the remainder of the farm with the machinery.

Was your brother present during the whole of the conversation?--Yes, he was present.

Was there anyone else there other than Mr. Watson?--We spoke to Mr. Watson outside near the garage. If there was anyone else present they would have had to be inside.

40 BY HIS HONOUR: You didn't see anybody?--No.

You can only say what you saw-----

BY MR. McMILLAN: Can you give any indication of how long that conversation took?--It could have been quarter of an hour; could have been half an hour. It wasn't long.

50 And was there an arrangement made to continue talking about it or was it left up in the air?--No, it was left to Mr. Watson to come back to us with a price for his top block and a lease.

When did the next conversation between you and Mr. Watson take place?--I believe it was only a day, maybe two days later.

Would it have been the next day?--That is possible.

60 Who initiated that meeting - who started it off - who brought it about?--What, who spoke first, do you mean?

1
Yes, who arranged the meeting, do you recall?--It was left to Mr. Watson to get back to us.

Are you saying Mr. Watson arranged the meeting?--He would have, yes.

Did he or didn't he; can you recall?--I can't recall for sure, but he would have because it was left to him to get back to us.

10
What if I was to suggest it was your brother who arranged a meeting the following day after that first visit - I will go on and put it in perspective - and the meeting was arranged about the milk and the dairying aspect of the property?--No, that is not correct.

That is not correct at all?--No.

20
It might be that you or your brother arranged the meeting, nevertheless - it is possible?--I don't believe so because it was some time later before we had discussed milking cows.

1 You have discounted milking cows at that meeting -
I will come back to that later?-- Yes.

But you cannot say one way or the other whether -
who arranged that meeting, the second meeting?-- Well, it was
left to Mr. Watson.

That is all you can say about it?-- Yes.

10 Where did that meeting take place?-- I believe it may
have been at my brother's, but I can't say for sure.

That is your brother Ken?-- That is correct.

BY HIS HONOUR: That was the old family property?--
The old family property, yes.

BY MR. McMILLAN: Who was there at that meeting?-- I
couldn't say for sure.

20 Is that his place, is it likely he was there?-- No,
I don't think he was there.

You do not think he was?-- No, I don't know for sure.

You were obviously there and Mr. Watson was there?--
I can't say that for sure either, because I'm not sure whether
we spoke about it or whether he left us with the price, with
papers.

30 So it could have been in writing; it might not have been?--
It might have been.

Mouth to mouth, speaking, but whether it was talking or
whether it was you getting some information in writing,
it took place on Ken's property?-- I believe it did.

You believe so?-- I believe so.

40 Was it in the house at Ken's property or on the land
away from the house?-- I don't recall.

If it was in writing, do you have that writing still?--
No, I don't.

Would you have given it to your solicitors?-- No, I don't
believe I have that writing.

50 But you said it could have been in writing?-- It could
have been. I can't remember specifically. That went back
five years ago.

Something as important as figures, if it was given to
you in writing, you would have given it to your solicitor,
would you not?-- I believe not. It was only up to me to
tell my solicitor what we'd agreed.

60 Whether it was in writing or whether it was by word of
mouth, can you recall what you got from Mr. Watson?-- He wanted
\$39,000 for the top portion of land bare and he was willing

1 to give a five-year lease on the remainder of the property at \$200 per calendar month. 1

Did you debate that with him at all?-- No, never on any occasion did I debate the prices he had asked.

You just accepted what he said on prices?-- Exactly.

10 Even as to the length of time in the lease?-- From the initial discussion there was no time limit talked about of the lease. That was up to Mr. Watson, and his proposal was for a five-year lease. 10

Did you ever suggest a three-year least to him?-- No, I did not.

Did your brother ever suggest a three-year lease?-- I can't say what he may have said.

To your knowledge, in your presence?-- No.

20 Armed with that information, whether it was in writing, what had been told to you, what did you do with it then, the price of the house property, we will call it that, the lease for five years at \$200 a month?-- Yes, well, it was up to Mr. Watson to view my home to see if he felt my home was worth \$25,000. 20

Did you discuss the machinery at all?-- That was part of the lease. I wanted to lease the machinery from Mr. Watson. 30

Was that discussed on the second occasion?-- That was in the very initial discussion when we first went there.

The first discussion?-- Yes.

No time of a lease was mentioned on the first occasion?-- No.

40 So, we get to the point where you said it was up to Watson to view the house?-- That is correct. 40

That is at Coal Falls?-- That is correct.

Was that a matter of days or weeks after that second conversation?-- Be more like days.

You are not sure whether Mr. Watson's wife came with him?-- No.

50 Was your wife present at the house on that occasion?-- Yes, she was. 50

Either Mr. or Mrs. Watson, both of them, or Mr. Watson went through the house, did they?-- That is correct.

Was there any other discussion about the buying of the property at Fernvale or the leasing of the land on that occasion?-- I don't believe so, not to my recollection.

1 Did Mr. Watson express an attitude to you about the house after he had been through it?-- Yes. He said it was quite good and he felt that it had the value of \$25,000 that I was asking.

The difference, which is \$14,500, was cash that was going to be provided; is that right?-- Yes.

10 At that stage you had in mind that you would not be dairying or milking cows on that property?-- That is correct.

When do you say the subject of milking came up?-- Well, it was some time after Mr. Watson had sold his herd because he was having difficulty in selling the bulk tank, bulk milk vat.

20 Would that be December or January?-- That would be in January, I would say.

Did you go to the sale?-- Yes, I was there.

Did your brother buy any of the cows?-- Yes, he did.

That was Ken?-- That is correct.

Were you present when Mr. Watson spoke to your brother about buying some of the cows at the sale?-- No, I don't know anything about that conversation.

30 The milk vat was an old one, was it not?-- No, not very old at all.

You said Mr. Watson had difficulty selling it?-- That is correct.

He did not sell it in fact, did he?-- No, he didn't sell it at the sale, no.

40 Did he not say to you, "It can stay there. It was an old one."?-- I think you're mixed up, because I say the article you are talking about is the dairy can fridge that hadn't been used for quite a number of years. I am talking of the bulk milk vat.

You say it was not an old one?-- No. No, not the bulk milk vat. Dairies had only changed to two bulk vats some years prior. It may have been five, seven years.

50 It was after that clearance sale that the subject of milking came up. Who brought it up between you and Mr. Watson?-- I believe it may have been my brother that spoke to Mr. Watson first.

As a result of that conversation your brother spoke to you and approached Mr. Watson; is that the scenario?-- Basically, yes.

60 Then you saw Mr. Watson, whereabouts, on his property or your brother's property, or where?-- I don't really recall, but I believe it would have been at his property. Supreme Court

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No.4 Plaintiff's evidence

G.R. Phipps
Cross-examination

1
You made the initial approach - you had the initial discussion about milking, did you?--It was my brother's idea.

But at that conversation you brought up the matter, did you?-- I couldn't say.

You can't remember?--No.

10 HIS HONOUR: Mr. McMillan, when is this event said to have occurred? Is it the same as what is called the fourth meeting or was it before then? 10

MR. McMILLAN: It was after that; if the third meeting is the inspection of the house this would be the fourth meeting.

20 HIS HONOUR: I had a note that there was a fourth meeting when Mr. Watson was milking the cattle and the plaintiff and his wife went. What I want to know is, is this discussion you are referring to now that fourth meeting or another one? 20

MR. McMILLAN: I don't know. I am going to put that to the witness.

HIS HONOUR: Because I understood the witness to say in evidence-in-chief what I am calling the fourth meeting when Mr. Watson came out the side gate was in mid-December. Now he said to you this discussion came up some time in January. That is what I want to get clear.

30 BY MR. McMILLAN: That is so - your discussion about getting into the milking game took place in January after the clearing sale?--That is correct. 30

And you believe it was on Mr. Watson's property, as it then was. It is now your property - is that the-----?--That is correct.

40 And this took place, did it not, after the conversation at the side gate?--Yes, quite some time after. 40

The side gate discussion took place, you said in evidence earlier, in mid-December?--Yes.

At four or five o'clock?--Yes, it was late afternoon.

Can you remember the time of day you had this conversation with Mr. Watson in January about the milk quota?--No.

50 You can't?--No. 50

How did you find Mr. Watson's approach to you when you brought up the question of taking on the milk quota?--I don't recall. He must have been happy about it because we subsequently went through with the deal.

Well, he may not have been happy initially, might he? You might have broken him down to a degree?--I don't know.

60 Your brother was present at that meeting, was he?--I don't believe so. 60

1 But he could have been?--No, I don't think so. It was my brother who initially-----

Yes, who arranged the meeting with the milk factory?-- I can't say. It was between Mr. Watson and myself. I don't know. As a matter of fact, I do recall that we didn't have - oh, what do you say - I can't think of the word at the moment.

10 Take your time?--We hadn't arranged with the Board to meet with them.

10 You hadn't made an appointment?--That's correct. We went down, and it must have been a Friday, because I believe that is when they have their board meetings, and we asked could we get in to see them. I went with Mr. Watson. He took me up, and I went with him.

20 Do you know a Mr. Zabell who is on that committee?--There were two members on that committee by the name of Zabell, father and son.

20 Do you know either of them?--Yes, I do.

You knew them before this meeting?--I knew the elder one but I wasn't - I didn't know the son. I believe I didn't know him. If I did, it was only by sight.

30 Your family and the Zabell family know each other?--Oh, yes.

30 And you were lucky to get into the meeting?--I believe so, yes.

The meeting you turned up for without an appointment you were able to----?--We were able to get in to see them.

And both you and Mr. Watson were asked questions?--Yes, I believe we were asked some questions, yes.

40 Do you know much about the milk quota scheme?--Are you talking about at the present moment?

40 No, then?--Well, then - no, very little.

What little did you know about it?--A quote belonged to a property - well, I believed it went with the property, but it actually was given out or belonged to the factory and was allocated to each dairy farm.

50 Did you know whether the property had to be in the ownership of the person it was going to be given to, or could it be given to a lessee?--I never had any idea but I always believed that in the past it had always been that it went to the owner of the property.

60 And as a result of advice given to you by a member of your family you were keen on getting that quota; is that right?--Yes. I was persuaded to change my mind and milk cows instead if it was possible to be granted a quota.

1 So you went there with the idea of perhaps convincing
the Board that the quota should be transferred to you?--Yes.

The quota, in fact, was eventually transferred to you?--
Yes, eventually - no, that is incorrect. Part of the quota
was eventually transferred to me and the remainder was lent
to me during the period of the lease by the factory.

10 And what is the history of the quota since then? Have
you been able to keep it up?--Yes, no worries at all.

10 And your dairy herd - have you been able to keep it up
to good strength?--Yes.

BY HIS HONOUR: Just tell me, what do you mean by
"the factory"? Is that some form of cooperative?--Yes,
Queensland Farmers. I call it the factory.

20 That is the Board to which you went on that day?--That is
correct.

20 BY MR. McMILLAN: Did you have to go back and see the
factory after that initial meeting with them?--We went twice
to see that Board in that same day. On the first meeting they
requested to see the lease and we hadn't brought a copy with
us so they sent us away to get a copy, and we were allowed
back in in the afternoon, I believe it was.

30 After that day did you have any further contact with the
Board or an officer of the factory?--By writing, yes.

30 MR. McMILLAN: I was about to go on to another matter.

HIS HONOUR: We will adjourn now till 2.30.

The Court adjourned at 12.59 p.m. till 2.30 p.m.

GLEN ROBERT PHIPPS, further cross-examined:

BY MR. McMILLAN: Would you agree that at the time the first meeting was held the meeting was held on the lawn of Mr. Watson's house property that you now own?--Yes. Just outside the garage on the lawn.

And I suggest to you that at that meeting actual prices were discussed - that is, of the land that you eventually bought?--Not to my recollection.

What if I were to suggest that the price of \$39,500 was mentioned by Mr. Watson and that on a number of occasions you repeated the figure of \$39,000 and that Mr. Watson said to you, "Look, don't get upset."; do you remember that?--No. That was definitely not correct.

You don't remember it and it is not correct?--No.

I do suggest that that did happen, and I suggest the price was definitely discussed on that first occasion?--(No answer.)

You have got to answer; don't just nod your head -----

BY HIS HONOUR: What do you say?--What do I say? No. That didn't happen at all.

BY MR. McMILLAN: On the second occasion I would suggest that you were invited to come along to talk about the milk quota by your brother and that was the main point of discussion at that second meeting?--No. I believe not.

Even on the first occasion I would suggest that you, in answer to a statement by Mr. Watson, said, "I don't want to milk stinking cows."?--I don't recall saying those words, but I had no intention of milking the cows, no.

After that second - and you do agree there was a second meeting that occurred very soon after the first one?--Yes.

We discussed that earlier. You thought it was a day or so afterwards?--Yes.

Was there a meeting in Mr. Zande's - the solicitor for Mr. Watson - office at which you and your mother were present?--That is correct, but this was some time - quite some time - later. It wasn't a day or so after that first meeting.

I didn't suggest it was. I suggested it was after that second meeting?--Could you please ask me again.

After that second meeting?--Yes.

In December you and your mother were present at a conference in Mr. Zande's office?--Yes.

1
With Mr. Watson being present?--Yes, that's correct.

And that would have occurred, would you agree, perhaps a week or so after the first occasion?--No. I would agree that it could be quite some time longer than that.

Quite some time, you say?--Yes.

10
10
Could you give any estimate of time?--Could have been three weeks to a month at least from after the first visit or the first meeting.

So in your view it couldn't have been before 19 December?--
Can you ask me again, please?

On your estimation then it could not have been before 19 December?--In '77 you are talking about?

20
20
Yes?--No. It couldn't have been before the 19th.

Did Mr. Watson say what the meeting in Mr. Zande's office was about?--Yes. It was to - it was about the milk agreement that we had come to, and Mr. Watson was going to have the agreement drawn up by his solicitor, and we were to go and look it over and sign it if we agreed with it.

So it was only the milk agreement, nothing related to the agreement to sell the land?--No. I believe not.

30
30
Do you know when you first saw the contract of sale?--
I could not say for sure, no.

Perhaps if the witness could have a look at the contract of sale, which is Exhibit 1?--(Handed to witness.)

You agree, do you, that the signature of the purchaser shown there is your signature?--Yes, I do agree.

40
40
In fact, does that contract represent the contract relating to the sale of the land of which you still are the owner?--Yes. I believe it would. It has my signature on it.

You see that the date is 6 January, don't you - at the foot of the first page?--Yes.

You say that the meeting in Mr. Zande's office would have been after 6 January?--I could not say for sure.

50
50
So it was - just pinning times down, it would be sometime between 19 December and 6 January - or it could be after 6 January - that you had the meeting in Mr. Zande's office - I will stop at that point?--Can I think about that for a few seconds? I know it would have had to have been before 5 February.

60
60
Why do you say that?--Well, I know on - 5 February was when we took up the dwelling on Mr. Watson's property, and it was before then.

Was it before you had the meeting with the milk factory?-- That is very possible if it was - either before or right around that specific time.

Can you recall when you had the meeting at the milk factory?--Was it - 27 January I think it was.

If you turn over to the back page of that contract - page 4 - the very back page - you've got the middle there?-- (Witness looks.)

You will see the clauses - paragraphs - are typed in on the back at the top?--Yes.

Do you see that?--Yes.

The first type-written sentence is "This contract is subject to the vendors ..."; do you see that?--Yes.

And then there is set out how the price is going to be made up, how you are going to arrive at that. There is the exchange for your Coalfalls house, and then there is "Cash"?--Yes.

Then you see "The next paragraph in this contract is also subject ..."?--Yes.

"... to the vendors granting to the purchaser a lease."?-- Yes.

That says, "For five years over approximately 78 acres adjoining the property the subject of the then contract."?-- That's correct.

You agreed to that clause going in, did you?--At that time?

Yes. That is your signature at the bottom of that page?-- Yes. That was so that if I - I wasn't left signing a contract on a piece of the land and then suddenly perhaps changed his mind, said, "I don't want to lease the other now. I've got my money." That's why it was set out that way - so the whole deal had to follow through.

Was it explained to you in that form?--Roughly, yes.

By your solicitors?--Yes.

The typing of that clause - do you see it there - paragraph C?--Yes.

Do you see any difference in typing between that clause and the clause above it?--It looks slightly lighter in colour.

Can you assist the court in any way to suggest how that may have happened?--No. No, I wouldn't have a clue.

You don't know whether you looked at the contract and that clause wasn't in it and you asked for it to go in afterwards;

1 is that a possibility?--Don't know.

You don't know?--No. I don't know why it's like that.

That paragraph does not refer to an option, does it?--
10 No.

When you looked at it, it was obviously before - either
10 on 6 January or before that you looked at this contract,
wasn't it?--Obviously, if it was signed on the 6th.

Or am I wrong there? Perhaps it might have been dated
after you signed it?--Oh, well, that I wouldn't know.

But, in any event, whenever you signed it you saw there
that the reference to you getting an option was not included
in that clause?--I suppose I did, but I don't read - write -
through everything. That was left to my solicitor.

20 You left it to your solicitor?--That's correct.

Did you ever ask him about it - the fact that the
word "option" or granting an option was never put in that
clause?--No.

You didn't?--No.

30 What do you imagine by the term "option"? What does it
mean to you?--Option?

Yes?--In itself or in a context with other words - or
just "option" itself?

Just "option" itself?--It means to me it gives me an
opportunity - or if I wish - sort of clause.

40 Have you ever heard the words "first refusal"?--I have
heard of that, yes.

Have you heard of that only in the last five years or
had you heard of that expression prior to then?--I wouldn't
know. Just part of the English language to me.

Do you know what that means?--I would have to take a
guess.

50 Yes. I am open?--"First refusal". I would have the
first chance to be refused.

Did you ever hear Mr. Watson use that term?--No, I did
not.

You are quite sure of that?--Very sure.

Because I suggest to you that when any mention was made
about you wanting the 79 acres Mr. Watson used the terminology
of the "first refusal"?--He definitely did not.

60 On the second occasion - just recapitulating, there was

1
no mention of an option or a first refusal or any other
reference to buying the 79 acres on the second meeting?--
Could you repeat that, please.
10
20
30
40
50
60

1
There was no mention by any person, either Mr. Watson or yourself or your brother, regarding an option or first refusal over the 79 acres at the second meeting?--No, I believe there wouldn't have been.

On the first time that you told us that occurred, reference to that was when you and your brother visited the property?--That's correct.

10 And that, you suggest, is in the middle of December?--
Yes.

Had you seen your solicitors by that stage?--Yes, I had; the very same day.

The day that you went out-----?--To see Mr. Watson.

About three to four in the afternoon, you said?--Yes.

20 When you saw Mr. Watson, did you look at the property first - go for a walk first, or did you go for a walk after you spoke to him?--It was after we spoke to Mr. Watson.

30 Could you tell us the words that you recall you put to Mr. Watson regarding what you say was a discussion about an option?--Yes. I said to him, "Jim, would you give us an option to purchase the lease area during the lease?" I said, "Would you be interested?" And he said, "Yes, I would." Then he went on to say how good they were. He went on for quite a while how good they were, and I do recall very plainly at the end of - if I could say - a spiel or whatever it was, he said, "Seeing as the lease runs for 5 years", he said "I would have to ask a thousand dollars per acre."

I say what you said to him were words to the following effect, "I won't be able to do it.", in reference to the leased area?--"I won't be able to do it"?

Yes?--No.

40 You prefer your version?--I prefer mine.

I suggest in answer to that question, "I won't be able to do it" by you, Mr. Watson said to you, "My wife and I, if we desire to sell, you shall have the right of first refusal."?--He definitely did not.

You remember that quite clearly, do you?--Very clearly.

50 And then there was a discussion about price, you just told us that, did you?--Yes. He said he would have to ask a thousand dollars per acre.

Did you offer \$750 per acre?--I definitely did not. There was no haggling over that whatsoever.

I find that strange-----

MR. DAVIES: I object to this comment.

60 MR. McMILLAN: I am making a comment on-----

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60
Supreme Court
No. 4 Plaintiff's evidence
G.R. Phipps
Cross-examination

HIS HONOUR: The objection is valid. You ask questions, you don't make comments. "I find it strange" - I think you will have to rephrase it.

BY MR. McMILAN: It is unusual, isn't it, that there was no haggling at any time over prices, whether for the cost of the land you purchased or for the figure of \$1,000?-- I don't think so.

I am suggesting the meeting that was had at Mr. Zande's office was in December, and that it was in mid-December, and the purpose of the discussion was to talk about the terms of the contract for the sale of the property and for the exchange of your house property?--I don't recall that.

And that you then asked that the contract sale, when it was prepared, be sent to your solicitors Messrs. Dale and Fallu?--Could be possible, but I do not recall it.

So what you are saying now is that it is possible there were two meetings in Mr. Zande's office, one in December at which that was said - the contract was talked about and you suggested that the copy go to your solicitors Messrs. Dale and Fallu, and there was another meeting at the end of January to gain the milk quota?--That is possible, but I do not recall the meeting.

Did you ever see a draft lease some time in January?-- I saw several, but I couldn't say when I saw them. There were quite a few made.

Just keeping to January, can you recall seeing a draft lease in January?--It is possible, but I couldn't recall for sure, no.

So you did get it in January - the draft lease; did you read through it at all?-----

HIS HONOUR. Before you answer that question - it has been put to the witness he got the draft lease into his own possession. I think you should make that clear to the witness.

BY MR. McMILAN: You are not sure whether you received and were able to look at a draft lease in January?--Not totally. There were that many drawn up that I lost track, and being so long ago I can't remember exactly when it happened.

Can you remember how many different lease documents - whether they were draft or not - how many separate documents you looked at?--I could not say for sure, but I would believe at least three, if not four.

On each of the occasions that you looked at it did you read the lease document through?--No, mainly that was left to the solicitor because it was really double-Dutch to me; it was very technical and legal.

The question of having the right to buy the leased area, was that important to you?--Yes.

1
Would you say that it was as important as the amount
of rent that you were going to pay for the leased area?--
Yes.

When you looked at the lease documents on each occasion,
did you look at what the rent was going to be?--I could not
say for sure. That was left to the solicitors to handle;
I believe that was why I was paying them.

10
So when you got the document, did you get the document on
each occasion from your solicitors?--From my solicitor?
Do you mean did I view it?

Was it put into your hands physically, or sent by
post to you by your solicitors?--I believe on one occasion
it came to me, but I don't know which occasion that was.

On that occasion was it brought to you by Mr. Watson?--
I think it may have been, but I'm not totally sure.

20
Do you recall him coming to the dining room of your
house on the farmland in April 1978 while you were having
breakfast one morning?--It is possible. He used to call
in every few months, sometimes only just for a general discussion
about the weather or anything else.

Did he on one of those occasions bring with him the
lease document?--He may have, yes.

30
If he brought it to you, because it was him who was
bringing it to you, did you have a look through the document
before you did anything with it?--If anything ^{like that} was given to me
I gave it straight to my solicitor; it was up to him to go
through those sort of documents.

40
Would it be correct to say that you never read through
any of the lease documents that were given to you?--No, it
wouldn't be correct. I looked through several of them; but
like I say, it was very technical to me, so it was always
left to the solicitor to handle.

50
So the several you looked at, did you look in particular
for the clause or the part of it that dealt with this
option business?--I couldn't say for sure.

You couldn't say whether you looked for it?--No, not in
particular, no.

You have, no doubt, read many times in the last five
years clause 3 A?--Yes, I have seen it several times, yes.

When was the first occasion that you saw the clause in
the light of deciding - with a view to your rights under it?--
I don't understand that question.

When was the first occasion that you looked at the
lease document for the purpose of deciding or doing something
about purchasing the leased property?--Well, it was after this
discussion with Mr. Watson and me telling him that I was intending
selling my own property to purchase the other.

1
Was that in April 1981?--Yes, thereabouts, and I had been contacting my own solicitor several times in the past about registration of the document and what concerned me was the fact that Mr. Watson didn't seem at all like he was intending to sell me the property at all then.

10
That was after that conversation?--Yes. So in due time I had discussions with my own solicitor as to the registration, which was the only thing that concerned me at the time as to how legal the document was, because it hadn't been registered, and it was through that process that eventually I was told that the option clause wasn't as good or valid, whatever.

You got some information. At any of the meetings that you had in Mr. Zande's office did you bring up any aspect of the option?--No.

20
You are quite sure of that?--As far as I remember, I only had the one meeting, but it is possible there was another, and at that one what I recall was only the milk agreement.

Would you agree with the comment that Mr. Watson helped you get the transfer of the milk quota, either completely in respect of the land you bought, or the temporary transfer for the balance?--Yes, that is partially true because he did accompany me on the occasion and it was he who spoke to the Board on our behalf.

30
I suggest also he spoke to you in early December at one of the meetings and tried to influence you into taking up the milking side of things - if I can refer to it in that way?--I don't recall it, but it is possible. At that stage I was only interested in growing crops.

Did you ever inform your solicitor that a portion of the transaction in discussions with Mr. Watson involved an option?--Yes. That was part of the lease.

40
BY HIS HONOUR: No. You have been asked whether or not you ever informed your solicitor part of the discussions of the transaction with Mr. Watson involved an option - that is as I understand the question. It is what you told the solicitor that you have been asked about.

60
Supreme Court

No.4 Plaintiff's evidence
G.R. Phipps
Cross-examination

Do you understand the question?-- No, I'm sorry, Your Honour. Could I have it again?

HIS HONOUR: We will have it read out.

(Shorthand notes of relative passage read.)

WITNESS: This was right at the beginning when the lease was to be drawn up?

BY MR. McMILLAN: Yes?-- Yes, he was in full knowledge that there was an option in that lease.

Did you use the word "option" when you talked to him?-- Yes.

Is it possible that you told him that you had discussed the prospect of buying the leased lands at some time in the future? Is that the way you may have put it?-- I don't know how it came up but he was aware in that lease there was to be put in an option to purchase the land.

What I am seeking to obtain from you is did you use the word "option" when you spoke to him or did you generalise, or use a general expression, and say, "Look, I've had a talk with Mr. Watson and we've agreed that at some time in the future I'm going to buy the leased lands."?-- No, because it was through my solicitor's advice that I asked Mr. Watson for an option to purchase the land, and that is exactly what I asked for.

That was a discussion you had with them prior to going to this property?-- Exactly. Also the rates - he asked me who was going to pay them, and that was also why I went to see Mr. Watson.

Do you know whether Mr. Watson went up to Ken's house after you had been with him to the milk factory in late January?-- I believe not but I couldn't say for sure.

It is only if you knew, that's all?-- No, I believe not.

You mentioned going for a walk over the top, as you call it. That is the land you eventually bought?-- Yes.

Did you take your wife over the flats - the leased area that you were going to lease?-- No, I did not.

Was there any reason why you didn't do that?-- I suppose not - no particular reason.

Do you recall having to sign the lease document late in 1978 -----

HIS HONOUR: Mr. McMillan, which lease document are you talking about? We know there are two.

MR. McMILLAN: I am talking about exhibit - the one that was put in to the Titles Office.

HIS HONOUR: That is Exhibit 2.

BY MR. McMILLAN: Exhibit 2 - do you recall in late 1978 having to once again look at a lease document?-- That is very possible.

Perhaps if I might assist your memory; it was something to do with what Mr. Watson's bank wanted. They wanted a signature from you?-- That was possible, yes.

I would like you to have a look at this document, please?--
(Handed to witness.)

Do you see your name mentioned on the front page of that?--
Are you referring to my own handwriting there?

No, your own name, Glen Robert Phipps, about a third of the way down from the top?-- Yes, yes.

Do you also recognise the signature in the column on the left-hand side of the page?-- What, half way down?

Yes?-- Yes.

Is that your signature? Do you recognise it?-- That is my signature.

If you go to page 8, about two-thirds of the way down, or really at the bottom of the page - we will work our way up - do you see a signature there?-- Yes.

Do you recognise that signature, the last one on the page?-- Yes, that's my signature.

And the date beside it is 6 February 1978?-- Yes.

And as you go further up the page you see two signatures of Watson?-- Yes. There is one there - I'm not sure what the one is above it. Is it Watson, too?

One is a bit indecipherable?-- Yes.

And beside it is the date, 1 February?-- Yes.

If you would go to page 5, about a quarter of the way down you see a figure "3" and it is hereby mutually agreed" - do you see that in block type a quarter of the way down from the top of the page? Do you see a figure "3" on its own on the left-hand side?-- What page, please?

Five?-- Sorry, I'm on the wrong page. (Witness does as requested) A figure 3 - yes.

"And it is hereby mutually agreed by and between the parties hereto as follows...", and then a small "a" and the clause?-- Yes.

And that says, does it not, "At all times during the said term or at the expiration of the said term the lessee may offer to purchase the demised land from the lessor for the consideration equivalent to one thousand dollars (\$1,000).

2/9 kk/7

per acre." Is that what is written there?-- Yes, that's right.

Do you recall reading that clause before you signed that lease?-- No, -not in particular.

MR. McMILLAN: I tender that for identification, Your Honour.

HIS HONOUR: Lease dated 1 February 1978 is Exhibit A for identification.

(Marked "A" for identification.)

BY MR. McMILLAN: Would you have a look at Exhibit 2, please?-- (Handed to witness.)

Could you turn to the last few pages - perhaps the second last page. At the bottom of the page you will see a date, 6 December 1978. Do you see that?-- (Witness does as requested.) Yes

And the signature on the right-hand side of that page?--Yes.

Is that your signature?-- I believe so.

Do you remember signing this document?-- Not exactly because I'd seen quite a few of them.

If you go back into the document about two pages in you will find a page with your name up the very top, "I, Grant Robert Phipps...."; do you see that?-- Yes.

And a date there, "Dated 7th day of April 1978"?-- Yes.

Is that your signature against your name half way down?--Yes.

And if you turn the page back in again you will see another page also with your name up the top; do you see that?-- Yes.

It has got a number on this page, but also it has got "7 April 1978", has it?-- Yes.

And your signature is also on that page?-- Yes.

Could you turn further into the document - actually, it is three pages in from the front, and on that page there are two figures and paragraphs 2, on the left-hand side, and 3. Do you see that?-- Yes.

"And it is hereby mutually agreed as follows:- (a)...." - I won't read it out again -----

HIS HONOUR: Is that after 2 or 3?

MR. McMILLAN: Three (a), Your Honour.

BY MR. McMILLAN: You have read that clause?-- Yes.

You would agree that is the same wording that I read out in that other document?-----

1 BY HIS HONOUR: Do you want to look at that other document?--
No. I believe that is correct, Your Honour.

BY MR. McMILLAN: Do you recall reading that paragraph
in particular when you signed this document?-- No, not really -
not in particular.

If you had read it in particular what would you have done
about the wording of that paragraph?-- I'm not a solicitor ----

10 MR. DAVIES: I object to the question. 10

HIS HONOUR: On what grounds? The witness has answered.

MR. DAVIES: He has answered. It doesn't matter now.
It is just speculative, but it doesn't matter now.

HIS HONOUR: All right. Go on, Mr. McMillan.

20 BY MR. McMILLAN: You have told us about the meeting in
about April 1981?-- Yes. 20

You were aware, were you not, that Mr. and Mrs. Watson
had bought the block next door to your -----?-- I was aware of
that, yes.

HIS HONOUR: What's that again?

MR. McMILLAN: Next door to his property.

30 BY MR. McMILLAN: The property you had purchased?-- Yes. 30

HIS HONOUR: Mr. and Mrs. Watson?

MR. McMILLAN: Yes.

HIS HONOUR: They bought another property?

MR. McMILLAN: Yes.

40 HIS HONOUR: I wasn't aware of that before. 40

BY MR. McMILLAN: You were aware of that, weren't you?-- Yes,
I was aware of that.

Was this meeting on that particular block? Let's call it
now the Watson block?-- Yes, it was right at the gateway,
or his driveway - or whatever you want to call it.

50 Did you go onto the property?-- It was a chance meeting,
actually. He was driving out and I was driving up the road
on my bicycle - motor cycle, I should say. 50

BY HIS HONOUR: Did you go into the property; that is
what you are being asked?-- Yes. I would say - well, there is
no fence line there. It was at the edge of the road. I could
have been on his property.

It was somewhere near the boundary line ----

60 4/9 kk/7

1 BY MR. McMILLAN: Can you recall whether a bulldozer had been working on the Watson property?-- Yes, it had been because the driveway was cut in already.

Do you recall saying to Mr. Watson, "What are you doing?"-- Oh, I may have. It is possible.

10 And do you recall Mr. Watson saying, "We are building. We are getting ready to come back."?-- I couldn't recall if those were his exact words, but he may have said something like that.

He may have said something like that?-- Yes, he could have.

I suggest he did say something like that?-- He may have.

I suggest that you then raised with him that you, "can't afford the farm" - that is, the whole farm - "would you sell me sections."?-- I don't believe so.

20 You say you don't believe so. Could you have said that?-- No, I don't think so.

This is in 1981, isn't it?-- Yes.

You can't remember but you don't think you said it?-- No.

I suggest that in answer to that question which I just posed to you, Mr. Watson said, "No, it is not for sale at all."?--No.

You said, "We can force you into an agreement to sell. You will hear from my solicitor."?--No.

You did not say that?--No, I definitely did not say anything like that.

So, nothing was said about letting the solicitors find it out?--No.

I suggest that in one of the December meetings the question of the price per acre came up, that you did suggest a price of \$750 and that Mr. Watson said, "I wouldn't be satisfied with that, but if we do sell we'd sell for \$1,000."?--Definitely not.

You say there was no -----?--Never.

... conversation at all?--There was never any haggling over price, either on his prices or mine.

Did you know that Mr. Watson had not been well? You said, mentioned earlier that you discussed his health?--Yes. Well, I knew from what he had said at that discussion that he had not been well.

BY HIS HONOUR: This is the discussion in April 1981?--No.

MR. McMILLAN: December 1977.

HIS HONOUR: Yes, you have referred to one of the discussions relating to the price. That is what you are referring to, is it not, Mr. McMillan?

MR. McMILLAN: Yes. No further questions.

RE-EXAMINATION:

BY MR. DAVIES: At your first meeting with Mr. Watson and, indeed, at no time in December, did you ever offer to buy the whole property, that is, the house part that you purchased and the part that you eventually leased?--No.

Why did you not offer to buy the whole property? What was your reason for not asking to buy the whole property then?--Finance.

Could not afford it?--No.

You said in answer to a question by my friend that you were concerned with how legal the lease was because it wasn't registered and you said that you had been contacting your solicitor on a number of occasions about registration of that document?--Yes.

1
That is, a number of occasions prior to the meeting
in April 1981?--'es, quite often

On how many occasions prior to April 1981, say,
since mid-1978 did you contact Mr. Bloxsom?--At least six
times.

10 With a view to ascertaining whether it had been registered;
is that right?--That is correct.

Did you contact anyone else over that period besides
Mr. Bloxsom?--'es, at one stage.

Who?--I don't know if I spoke to Mr. Zande himself.
I believe it was, but it was Zande & Associates that I rang.

20 You rang Zande and Associates. Why did you ring
Zande & Associates? Why did you not just keep on -----?--
I'd been trying to see that I got my money's worth and I
paid to have a lease.

Why did you not go back -----

BY HIS HONOUR: "Why did you go to Mr. Zande? Why
did you not just keep on with Mr. Bloxsom? "--Well,
after several years I was getting nowhere with Mr. Bloxsom.

20 BY MR. DAVIES: You cannot say what he said, but the
reason was that you were not getting anywhere with Mr. Bloxsom
No.

After your meeting with Mr. Watson in about April 1981
you went back to Dale & Fallu; is that right?--Yes.

On this occasion did you talk to, speak to Mr. Bloxsom?--
No, I didn't. I felt I had not got good results from him
in the past. I went to Mr. Fallu himself, Mr. Fallu Senior.

40 MR. DAVIES: I have no further questions.

HIS HONOUR: Do you want the witness excused?

MR. DAVIES: Yes, just in case.

WARREN HAROLD PALFREY, sworn and examined:

BY MR. DAVIES: Is your full name Warren Harold Palfrey?--Yes.

You reside at 66 Arcoonah Street, Sunnybank?--Yes.

You are a solicitor of this court?--Yes.

You were a solicitor of this court in 1977 and 1978?--
Yes.

In those years, were you employed at Richard Zande & Associates?--
Yes.

In that capacity, as an employed solicitor of Richard Zande & Associates, did you act for Mr. and Mrs. Watson in a transaction with a Mr. Phipps?--Yes.

You have signed a statement which you have provided to my solicitor. Would you have a look at that document?--('Handed, to witness.)

Is that the statement that you have signed?--Yes.

Are the facts contained in that statement correct?--Yes.

The opinions expressed in that statement correct, to the best of your ability?--Yes.

MR. DAVIES: I tender that statement.

BY MR. DAVIES: Perhaps I should add that statement has annexed to it a photocopy of some notes in your handwriting?--
Yes.

And it has a photocopy letter which you wrote as an employee of Richard Zande & Associates?--Yes.

MR. DAVIES: That letter dated 19 December 1977 is Exhibit 3.

HIS HONOUR: Have you seen this, Mr. McMillan?

MR. McMILLAN: I have not seen the statement.

HIS HONOUR: That statement and attached documents is Exhibit 11.

Ex. 11 (Admitted and marked "Exhibit 11".)

HIS HONOUR: This exhibited photocopy or note appears to have some omission. I do not think the photocopy is complete. I think that the left-hand margin on this photocopy was -----

MR. DAVIES: On which page?

HIS HONOUR: The first page. For instance, it appears to me that immediately below the wavy line across the page it has got "ease".

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-45-

Supreme Court
No.4 Plaintiff's evidence
W.H. Palfrey
Exam.-in-chief

MR. DAVIES:

I call for the original of those notes. Yes, Your Honour is quite right. That appears to be the only copy we have.

HIS HONOUR: Probably it was an incorrect photocopy made initially and the mistake has been repeated, yes, I have read these.

MR. DAVIES: If I could hand up, first of all, the four pages which we thought were the only pages provided to us of Mr. Palfrey's evidence. That is, the original - I tender that they are the originals of the four photocopy pages which are annexed to his statement.

HIS HONOUR: Those four pages, I will have them stapled together and marked "Exhibit 12."

Ex. 12 (Admitted and marked "Exhibit 12".)

MR. DAVIES: We have been provided for the first time with a further page which appears to be relevant and important. I will ask Mr. Palfrey to translate it.

BY MR. DAVIES: Would you look at that document?--(Handed to witness.)

Is that also a note in your handwriting?--Yes.

Could you translate that for us?--At the top of the page "Mr. Watson", a clause underneath with the words "not furniture" Should be "fixture". I can't translate that as to what significance that -----

No, just translate what is there, if you would not mind?-- And the word "lease" underlined followed by "option to purchase to be at \$1000 per acre,"

1 And in that, "I am to pay rates; he will pay electricity
rental\$ 220." And further down there is "Advise Mr. Bloxsom
of R.P.O. description."

MR. DAVIES: I tender that document separately.

HIS HONOUR: That further single page is Exhibit 13.

(Admitted and marked "Exhibit 13.")

10 BY MR. DAVIES: Do you have any recollection of taking
that note?--No. I can't recall taking the note.

Can you answer this in accordance with what your practice
would be and with the person in which that is taken down,
"I am to pay rates..." and so on. Does that appear to you
to have been a statement or a note which you would have made
in Mr. Watson's presence?--Yes. It would appear to me to be
part of instructions received from Mr. Watson.

20 MR. DAVIES: I have no further questions.

CROSS-EXAMINATION:

MR. McMILLAN: Could I please have a look at Exhibits 12
and 13?

(Handed to Mr. McMILLAN.)

30 BY MR. McMILLAN: If you could have a look at these, please
?--(Handed to witness.)

MR. McMILLAN: The statement must be Exhibit 11, I take
it?

HIS HONOUR: That is the statement.

40 MR. McMILLAN: Could I have a look at that also?

(Handed to Mr. McMILLAN.)

(Handed to witness.)

BY MR. McMILLAN: In December 1977 you had been how long
with Mr. Zande as his employed solicitor?--a matter of weeks.

50 Prior to that you had been working as a solicitor elsewhere?--
I was admitted in April '76 and I - sorry - I began work with
Richard Zande in December '76. I had been with him about a year.

12 months?--12 months or so.

In that 12 months you were working with him did your work
involve conveyancing matters or litigation or was it a good
cross-section of all?-- My work was perhaps exclusively in
the common law field. I did very little conveyancing.

60 This particular transaction, was it perhaps even the first

1 such transaction you had done?--It was the first farming
lease item.

BY HIS HONOUR: The first farming lease you had done?--
Yes.

10 BY MR. McMILLAN: I merely ask this for background:
the contract of sale that was drawn, do you recall - there
was a contract of sale in which a portion of the farm of
Mr. Watson was sold to Mr. Phipps?--I didn't recall that
until I saw the notes.

Perhaps the witness could have a look at Exhibit 1?--(Handed
to witness.)

Do you recognise that? Does it refresh your memory that
you were involved in the drawing of that contract of sale?--It -
I recall that the contract - that it was associated with the
preparation of the lease.

20 Had you been involved in the drawing of many contracts
of sale-----

HIS HONOUR: He has not said he was involved in drawing
that contract of sale.

MR. McMILLAN: No. I realise that. With respect, I was
just putting this question to him.

30 WITNESS: May I have the question again?

BY MR. McMILLAN: Had you been involved prior to December
1977 in the drawing of many contracts of sale?--No, not many.

If you did draw that one - and I accept that you don't know
whether you were involved in drawing that - would that have been
the first one you have drawn?--No.

40 Could you turn over the contract to the final page?--
(Witness does as requested.)

You will see there at the top a set of subject clauses.
The clause which is the final clause typewritten - (c) - do
you recall having read that before today?--No. I can't recall
that clause.

The witness to the vendor's signature at the bottom of that,
is that your signature?--Yes, that's mine.

50 Would you agree that clause (c) is in a lighter type than
the typewritten portion above it?--Yes. I would agree with that.

Would you have any knowledge from your memory as to how that
occurred?--No.

You can't help at all?--No, I can't assist.

60 Can you recall in what circumstances Mr. Watson came to you
to give you instructions about acting for him in this matter?--
It would have been an interview in my office. I cannot recall.

Supreme Court

No. 4 Plaintiff's evidence
W.H. Palfrey
Cross-examination

any - whether there was a combination of interviews or whether there was just one meeting. What I can recall is Mr. Watson and Mr. Phipps being in my office together and discussing the lease of a farming property. That's the extent of what I can recall about the -----

Would that have been definitely in December 1977?--I can't recall just when that was, but my notes are not dated.

Attached to one set of notes there is a copy of a letter of 19 December 1977-----

MR. DAVIES: It is attached to the statement. My learned friend is mis-stating something. I am really just objecting to the way he is mis-stating.

HIS HONOUR: Attached to the statement. That is what Mr. McMillan intends.

BY MR. McMILLAN: My learned friend did put to you that that letter was attached to his statement. That letter, I take it, was written by you?--It wasn't signed by me, but it has my reference on it; I would have dictated it.

Does that in anyway assist you with fixing the time when you got instructions - what time of the month it was?--It would assist me to the extent that I feel the instructions would have been received shortly before 19 December 1977.

You have no doubt come across the expression "a right of first refusal"?--Yes.

Had you come across that expression prior to December 1977?--Yes.

You are aware - I am putting this to you for obvious reasons - you are aware of the difference between a right of first refusal and an option?--Yes.

Did Mr. Watson ever mention to you the expression "right of first refusal"?--I can't recall. The extent of my recollection regarding the transaction is related to the notes. That phrase doesn't appear in the notes.

Was there anyone else at the conference? You said that Mr. Phipps and Mr. Watson were present. Was there anyone else also at that meeting?--I seem to recall Mr. Phipps' mother may have been present - I seem to recall meeting her at some stage; whether she was present at the time these notes were taken I'm not sure.

Those notes, as you say, are not dated, are they?--No.

So those notes could have been drawn by you prior to 19 December or even after that date?--Yes. They could have been drawn before or after that date.

The word "option" is mentioned in those notes in a couple of places?--Yes.

1 "here is no indication, I suggest - correct me if I am wrong - that it was Mr. Watson who told you or used the expression "option"?--There is no indication whom that came from.

 So that expression could have been used by either of the other people who were present at the conference?--Yes. I don't think-----

10 At a conference?--I don't think I have said that they were - Mr. Phipps and Mr. Watson were both present at the time these particular notes were taken.

 HIS HONOUR: For the record, the witness is saying "these particular notes"; he is referring to exhibit 12 and he has pointed to them.

20 BY MR. McMILLAN: That is really the point, isn't it?-- Yes.

 (a) you cannot say if those notes were taken at a meeting solely with Mr. Watson or whether they were taken partly at a meeting with Mr. Watson and partly at a conference with Watson and Mr. Phipps - or Mr. Watson, Mr. Phipps and Mrs. Phipps?-- That s correct.

1 So there could have been a running account of notes?--
Yes, that's possible.

Perhaps to sum up on that point, they could have been taken on one day and then another page of notes could have been taken down at a later time?-- Yes. The last page is indifferent coloured pencil or coloured biro (indicating Exhibit 13).

10 You can't exclude the word "option" as used in those notes was expressed by Mr. Phipps or his mother to you at a meeting in your office?-- That's correct. 10

The statement which is Exhibit 11, that was prepared by you, was it?-- No.

It was prepared by whom?-- Mr. Myers of counsel.

You read it through before you signed it?-- Yes.

20 There were a number of drafts of the lease prepared, that is the lease that was the intention of the parties to enter into?-- I have no independent recollection of that. 20

I take it you can't recall when the lease was engrossed?-- That's correct.

You checked the engrossed lease against your notes?-- I can't recall if I did that or not.

30 You can't recall whether you did that?-- No. 30

The letter of 19 December 1977 which is exhibited to your statement, can you recall whether that was forwarded out to Mr. Watson or Mrs. Watson - a copy of that?-- No, I can't recall that.

MR. McMILLAN: Can I have another look at Exhibit 11, the statement?

40 (Exhibit 11 handed to Mr. McMillan.) 40

BY MR. McMILLAN: In that statement on page 2 of it appears the paragraph, "I have in recent times examined clause 3(a) of the lease, and I now acknowledge that the clause does not create a legally enforceable option. It was intended to do so." What do you mean by, "It was intended to do so.", in the sense, was it your intention, was it the intention of Mr. Watson, was it the intention of Mr. Phipps?-- I qualified that statement with Mr. Myers. It was to mean that it was my intention to do so, and bearing in mind the notes that I have made prior to preparation of the lease. 50

I want you to have a look at this document?-- (Handed to witness.)

Do you recall that document?-- Yes, I remember that document.

Do you recall the background to that document?-- Yes, it's a statement prepared by Mr. Mitchell, solicitor, on behalf of Mr. Watson. I signed that document on Monday morning.

Turn 12 pl/7

1

MR. McMILLAN: No, Your Honour.

RE-EXAMINATION:

10

BY MR. DAVIES: Whenever it was that Mr. Phipps came along to your office with Mr. Watson, it was only on one occasion?-- To my recollection, yes.

And you did tell us before that if you look at Exhibit 12, that is the four pages, and Exhibit 13 which is the one page, they were in different inks, you said?-- Yes.

I would indicate to you Exhibits 12 and 13 were taken on different occasions?-- Yes, that's right.

20

And both in Exhibit 12 and Exhibit 13 the word "option" appears?-- Yes.

MR. DAVIES: I have nothing further.

NEIL LESLIE ZABEL, sworn and examined:

BY MR. DAVIES: What is your full name, please?--Neil Leslie Zabel.

And your residential address?--Mt. Parampa.

In early 1978 were you a director of the Queensland Farmers' Co-operative Association Limited?--I was.

And did you attend a meeting of the board of directors of that association on Friday, 27 January 1978?--I did.

You had an opportunity to refresh your memory of that meeting from the minutes, or you saw the minutes?--That's right.

Do you have an independent recollection of that meeting?--Yes, I can remember that meeting clearly.

Can you remember Mr. Phipps and Mr. Watson attending that meeting?--Yes.

And they attended the meeting - what - in the morning or the afternoon, as best you can recall?--Initially in the morning.

Who did most of the talking out of Phipps and Watson?--Mr. Watson did.

Can you recall what he said?--Yes - well, I can't recall it word for word but I can remember the gist ----

The gist of what he said?--That's right; that he was selling part of his property to Mr. Phipps initially and that Mr. Phipps had an option to purchase - a lease with an option to purchase the remainder in five years time.

Was any price mentioned for the option by Mr. Watson?--Well, I can recall the figure of \$1,000 an acre being mentioned at the time.

Do you remember who mentioned that?--I think Mr. Watson did.

What did you think of \$1,000 an acre at the time?--Well, knowing the area and the market at that time, it was pretty high.

What would you say would have been the going rate? You knew Mr. Watson's river flat land?--Yes, I know it well.

You knew that was the land which was the subject of the lease and the option?--That's right. Yes. My own valuation would have been \$600/\$700 an acre at the time.

Would you have a look at the minutes please, of the directors' meeting of that date? I will hand you up also, for convenience, because I propose to tender it, a photocopy of the minutes of that meeting?--(Handed to witness.)

Supreme Court

No.4 Plaintiff's evidence

N.L. Zabel

Exam.-in-chief

1
Would you have a look at the book - the minutes of the meeting of that date, 27 January?--(Witness does as requested.)
Yes.

You see on the first page of those minutes where it starts at approximately 10.20 a.m.?--That's right.

10
Does that accord with your recollection of what took place?--Yes.

If you go to the last page of the minutes - perhaps if you could give me that photocopy back again; I think I've only given you three pages, is that right?--That's right.

(Witness does as requested.)

20
BY MR. DAVIES: I meant to give you a fourth page with the signature. If you turn four pages over in that book you will see a signature?--Yes.

Do you recognise that signature?--I do.

Whose signature is that?--That is my father's.

He was the chairman of directors at the time?--That's right, yes.

30
MR. DAVIES: I tender the minutes of the directors of 27 January 1978. I have a photocopy rather than putting in that whole book. I am quite happy to leave it there for Your Honour and my learned friend to check that I am not putting in anything other than the full minutes.

MR. McMILLAN: I would object to the tendering of these minutes.

HIS HONOUR: What is the basis?

40
MR. McMILLAN: They haven't been proven as to the signature of Mr. Zabel Senior.

WITNESS: I will swear to his signature.

HIS HONOUR: Just a moment, you keep quiet. When you say "not proven" you mean the person who signed is not called?

50
MR. McMILLAN: They are being put forward as a record of minutes of proceedings of a certain meeting on that day. The person who took the minutes has not been called; it hasn't even been suggested that he be called.

(Argument ensued.)

60
HIS HONOUR: Mr. McMillan, I propose to admit the minutes of 27 January 1978. They are tendered only insofar as they relate to the record of what the witness says Mr. Watson said at the time.

MR. McMILLAN: Yes.

HIS HONOUR: They will be Exhibit 15.

(Admitted and marked "Exhibit 15".)

HIS HONOUR: Might I see the exhibit?

(Handed to His Honour.)

MR. DAVIES: That part of it appears on the first page of that photocopy.

HIS HONOUR: There is something further, Mr. Davies, on the third page, isn't there?

MR. DAVIES: Yes. I don't mind their being limited to what I have asked this witness; that is, as to what Mr. Watson said.

HIS HONOUR: All right. You have tendered the whole lot anyway, so they are in there.

MR. DAVIES: I have for completeness, but I don't mind if Your Honour says the rest should not be admitted, or I don't mind the whole lot going in.

HIS HONOUR: The whole lot can go in so that it remains for both counsel. They may try to make something out of the second reference to this transaction. Have you a copy of that exhibit?

MR. DAVIES: I don't know that I have a complete one.

HIS HONOUR: Would you make it available to Mr. McMillan?

MR. DAVIES: Yes, certainly. I have no further questions.

CROSS-EXAMINATION:

BY MR. McMILLAN: You said in the first part of your testimony when you were answering my learned friend that you remembered the meeting of 27 January 1978 and you had no need to refresh your memory from the minutes?-- No, I can remember the meeting clearly.

What was there about the meeting over five years ago that enables you to say that?--The fact that Mr. Watson and Mr. Phipps attended the meeting. That stands out clearly in my mind, and possibly it was an unusual case at the time. It wasn't a straightforward case and it just stands out so clearly.

That has not happened before or since?--No. Normally it is a straight out sale - a straight out sale from one vendor to the other and there is no need for the vendors to attend the board meeting. This was unusual in the fact

Supreme Court

No.4 Plaintiff's evidence

N.L. Zabel

Cross-examination

1
that Mr. Phipps wasn't buying the whole of the property initially. That is why they had to attend the meeting and explain their situation.

Do you own any dairy country yourself?--Yes, I do.

10
And have you bought and sold at all in your lifetime dairy country?--I have only purchased my own property 17 years ago. That is my only transaction.

10
Have you ever been involved in assisting people to buy or sell dairy country?--Not in a sense like a real estate agent or anything like that. You know, sometimes people ask where there are dairy properties for sale and I just say such and such a property's for sale, or something like that.

20
How long had you been on the board of this co-operative?--Almost seven years.

20
Are you still a member?--I'm still a member, yes.

20
Leasing of dairy country - in your experience and knowledge do you know if you have heard of any others, other than this one?--Not so in our supply area - that is, our Booval supply group. It has happened in other areas but we didn't particularly permit it in our area at the time. We insisted on straight out sales.'

30
That is when it is concerning quota?--That's right, yes.

30
Before that meeting of 27 January were you aware of the proposed sale and the purchase by Mr. Phipps of some land at Fernvale?--Yes, I had heard it. I'm not sure where I heard it - I think perhaps at the cattle sale or something like that - I heard the dealers in there, so to speak.

You know the Phipps family, do you?--Yes, I do.

Would it be fair to say that you know them and are friends with them?--I know them on a friendly basis, and not personally, because I don't live near them, so - but I know the family well.

Have any of the Phipps people - there is a son called Kent, is there not?--That's right.

He is a dairy farmer?--Yes.

Has he got a quota with this particular property?--He has.

Have any others in the Phipps family got quotas with your company?--No, it is only just the two brothers that have quotas - there's other relatives, cousins or uncles and things like that, but not particularly Phipps.

Have they ever approached you, when they purchased property before a board meeting just for unofficial advice from you?---

MR. DAVIES: I object to this - did they ever approach you - I just want to know who my learned friend means by "they"?

HIS HONOUR: I do not think you can -----

BY MR. McMILLAN: Did any of the Phipps family and related cousins - when those people are intending to purchase for increased quotas, have they ever approached you prior to a meeting?-----

MR. DAVIES: I object.

HIS HONOUR: What is the basis?

MR. DAVIES: It is not admissible.

HIS HONOUR: It seems to me irrelevant as to whether any of the others approached him. It cannot possibly be relevant to this question as to what was the agreement between the parties, and also to the question of the credibility of-----

MR. McMILLAN: Very well.

BY MR. McMILLAN: Did Mr. Phipps or anyone on his behalf, that is, Mr. Glen Phipps, the plaintiff in these actions, anyone on his behalf speak to you before this meeting about the proposed purchase of this country?--It was just mentioned, but as to reasons for advice, or anything like that, I'd just known about it coming to the board, but not for advice, or anything like that.

What did you know was going to come before the Board? What were the facts as you knew them?--I'd heard that Mr. Phipps was buying Mr. Watson's property, but I didn't know to what extent.

Were you aware that there was a lease of further area?-- As soon as they come to the Board I was made fully aware of the whole situation.

Supreme Court

No. 4 Plaintiff's evidence
N.L. Zabel
Cross-examination

1 But before that meeting, were you aware that there was a lease in the wind, also?--No, I just thought it was a straight out purchase, you know, the whole property.

Did you ever hear anything about an option before the meeting?--No, I heard - not before the Board meeting.

These minutes, how are they taken down?--Secretary of the company.

10 That is, taken down in shorthand, is it? At that time in 1977 or 1978, I should say?--"Taken down in long hand. 10

BY HIS HONOUR: By whom?--By Mr. White, the Company's secretary, or Cooperative's secretary.

20 BY MR. McMILLAN: They are then processed after he takes them down in longhand?--Yes, he prepares them. He writes them out and they are given to his secretary to type and then they are distributed to board members for perusal to prove whether they are a correct record of the meeting. 20

So, all the members of the board get copies before the next meeting?--Yes.

If, for example, a member were to say that points taken down were not correct, are they ----?--"They are corrected.

30 And discussed with Mr. White?--They are corrected at the Board meeting with all members agreeing if there was a misprint or some word not correctly - they correct it at the next meeting. 30

You say that Mr. Watson did most of the talking at the meeting?-- "That's right.

Did he initiate the discussion, can you recall?--Yes, I would say he initiated the discussion.

40 Did the Board have any papers before them before discussion started?--Yes. 40

HIS HONOUR: What do you mean by before discussion? Before the meeting commenced?

BY MR. McMILLAN: Mr. Watson and Mr. Phipps?--No, we didn't.

You saw them "cold", as it were?--That's right, yes.

50 The note of minutes indicates that - you have it there in front of you, do you?--Yes. 50

Mr. Watson stated that the reason he sold 30 acres, his dairy and house to Mr. Phipps and leased the other 90 acres to Mr. Phipps with an option to purchase----?--That's right.

60 Can you recall positively that Mr. Watson used the expression "Lease a further 90 acres to Mr. Phipps with an option to purchase" ?--I can remember that distinctly, and if I may say that - sorry, I won't say that unless----- 60

1 Please go on?--The Board would not have issued the quota to Mr.Phipps if there was no option or a straight out purchase, and that is why we insisted on that being in the deal.

Do you know whether he actually used the word "option" or was there an expression of "a right of first refusal" ?-- Yes, I can clearly recall "option" being used.

That was the term that was used?--Yes.

10 Did Mr.Phipps say anything to add to what Mr.Watson said about the transaction itself?--Yes. Phipps also spoke, and I sort of explained the situation to help clarify that anything that may - he did address the Board as well. 10

Do you recall what he said?--He went on to say he was a young farmer and that he didn't have all the money to buy the whole property initially and he was going to work the property and by the time the five - at the end of the time, the five years, he would hope to have sufficient deposit to buy the property. 20 20

BY HIS HONOUR: In five years time he hoped to have sufficient to buy the whole lot? That is what Phipps has said?-- Something along those lines, yes.

BY MR. McMILLAN: Do you recall how long that discussion took? It is noted it would have been at 10.20, anyway, received by the Board. Do you know if it was a lengthy discussion or a short one while they were in the room?-- It was somewhere around about half an hour. I can't be sure if it was 20 or 40 minutes, but it was approximately half an hour. 30 30

BY HIS HONOUR: These minutes, I take it, are really just a precis of the day's events. I am saying that noting that the meeting went right through to 6.32 p.m.?--That's right, yes.

I see at the top of the third page you resumed. You went for lunch at 12.50 and resumed at 1.25?--That's right, yes. 40 40

BY MR. McMILLAN: Then there is a further note in the minutes regarding an afternoon session, at page 554-----?-- 5548.

BY HIS HONOUR: 5548, is it?--Yes.

HIS HONOUR: The "8" does not appear on the photocopy.

BY MR. McMILLAN: The first item in small type - this discussion - the meeting went for lunch at 12.50 p.m., resuming at 1.25 p.m.?--Yes. I can see that, yes. 50 50

1
Then you see the business "J.J. Watson sale to Phipps"?--
That's right, yes.

10
It doesn't say there that Mr. Watson and Mr. Phipps
came back into the meeting. Do you recall whether they did
or not?-- No. I can recall Mr. Watson coming into the office,
but I don't think he came into the meeting. I know he called
into the office to see Mr. Watson, but I'm doubtful - I couldn't
swear to the fact that he came back to the meeting, but I
recall him coming to the office to see Mr. White, and that
was mentioned in the meeting. 10

You said that in the discussion that Mr. Watson had
with the board in the morning that the option to purchase -
there was a price of \$1,000 an acre?-- That was mentioned, yes.

20
Was it Mr. Watson who said that or Mr. Phipps?-- Well,
I can't say 100 per cent but I think it was Mr. Watson,
I think.

20
Could it perhaps have been mentioned and you heard it
generally before the meeting?-- No. I hadn't heard it
before the meeting.

MR. McMILLAN: I have no further questions.

30
BY HIS HONOUR: I have just one or two questions to
ask you. In the minutes it appears that you resolved that
you wanted to see accompanying documentation to establish,
among other things, proof of the lease arrangements?--
That's right, yes. 30

You can check it ----?-- Whether it's a sale or whatever,
we always request that of any vendors.

40
It does appear that later on you did see what was
described as copies of the contract of sale and
lease agreement?-- That's right, yes.

40
Do you recall whether that was a signed lease agreement
that you saw?-- I'm sorry, I can't recall if it was signed -
by either Mr. Watson or Mr. Phipps? 40

Yes?-- I don't - I can't recall it, but I don't think
Mr. White would have presented it to the board if it wasn't
signed; he's very particular on that - that it must be properly
fixed up.

50
The other thing is this: that in the result you agreed
to transfer part of the quota in proportion to the 30 acres
you were satisfied as being bought. But in respect of the
balance of the land was anything later done regarding the
quota?-- The balance of the quota was transferred to Mr. Phipps
when we were absolutely certain that there was an option to
purchase the property. 50

60
Can you tell me this: does that quota apply to the
whole of the land that includes what we call the river flats?--
That's right, yes. When a property is sold in whole or part

the whole of the quota goes with the whole of the property. If part of the property is sold it is divided by how many acres and how much quota. Only part of the quota goes normally.

In your experience does the fact that a block of land has attached to it a quota for milk supply have any bearing on the value of the property - the value of the land?-- It does if the property is capable of producing milk. Yes, the - would have a value on the land. There is a quota with it.

It increases the value of the land?-- Marginally.

HIS HONOUR: Any questions arising out of that?

MR. DAVIES: No, Your Honour.

HIS HONOUR: It is a suitable time to adjourn.

The Court adjourned at 4.31 p.m. till 10 a.m. the following day.

IN THE SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

No. 4554 of 1981

BEFORE MR. JUSTICE SHEPHERDSON

BRISBANE, 27 JULY 1983

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BETWEEN:

GLEN ROBERT PHIPPS Plaintiff

- and -

JAMES JOSEPH WATSON and
PAULINE ELAINE WATSON Defendants

SECOND DAY

The Court resumed at 10.01 a.m.

KAREN JOYE PHIPPS, sworn and examined:

BY MR. DAVIES: Is your full name Karen Joye Phipps?--Yes.

You are the wife of the plaintiff, Glen Robert Phipps?--
Yes.

You were married on 18 December 1976?--That is correct.

Do you remember on an occasion before you purchased the farm where you now reside visiting it with your husband?--Yes.

Can you recall when that occasion was?--It was approximately in the middle of December 1977. It could be a fair while before Christmas, and it was on a Wednesday or a Thursday afternoon.

How do you know it was on a Wednesday or a Thursday afternoon?--At that time I was working for the T.A.B. at East Street in Ipswich and we used to go out after work.

Do you remember being picked up and going out after work?--
Yes.

What time in the afternoon was it that you went out there?--It would be approximately 4 or 5 o'clock.

RT

When you arrived at the farm where was Mr. Watson?--
He was up the dairy milking cows.

Did you go up there?--Yes.

Did he come out of the dairy and speak to you?--Yes,
he did.

Did you see Mrs. Watson at any time that day?--No,
not at all.

Can you recall the conversation which took place
between your husband and Mr. Watson?--Yes, I can.

What was said?--After a general discussion Glen had
asked Mr. Watson about who was going to pay the rates on
the leased property and Mr. Watson said that he thought
it would be up to us. Glen said, "How about if we pay
you extra for the lease, would you then do the rates?"
and Mr. Watson agreed to it.

Was any figure mentioned?--I think it was an extra
\$20 a month.

That was from \$200 to \$220?--Yes.

BY HIS HONOUR: Was that the figure that was mentioned?--
Yes.

BY MR. DAVIES: After that discussion what else was
said?--Glen asked him would he consider an option to
purchase within the lease period.

And what did Mr. Watson say?--He said - well, he said
he would have to consider how well the flats were and
what the price rise would be within five years and he asked
for \$1000 an acre.

Was it all said as quickly as that?--No, there was
other general discussion between -----

Was this discussion about the flats area as short as
that?--No. He went on to say how well they were, and that's
about it - just how well they were.

He said he would have to ask \$1000 an acre?--Yes.

What did your husband say to that?--Glen agreed to it.

Was anything else said?--We then asked him if we could
go up the back and look over the property that we now own.

And he agreed to that?--Yes.

And you went and had a look?--Yes.

You hadn't been up there before?--No.

Can you remember Mr. Watson coming to your home in
Ipswich?--Yes.

Can you remember any discussion on that day? Was that before or after this occasion?--After

How long after?--I couldn't be exactly sure.

Days or weeks, or what?--Could be a couple of weeks.

Can you recall anything said on that day?--Nothing to do with the option to purchase.

No. Was anything said about the house or the price or the purchase?--Glen went with Mr. Watson and showed him through the house. The deal had to do with Glen and Mr. and Mrs. Watson so I didn't go with them at all.

You didn't go around the house?--No.

MR. DAVIES: I have nothing further.

CROSS-EXAMINATION:

BY MR. McMILLAN: You told us about an occasion that occurred in the middle of December 1977, and it was a Wednesday or Thursday and Mr. Watson was milking at the time?--Yes.

Was this conversation that was held just with Mr. Watson?--Just himself with Glen and myself.

Was it in the dairy?--No, it was outside by the side gate.

Who started off the talk?--Well, we walked up and we said, "Hello" first, and then we talked to Jim from then on.

And the first subject spoken about was the rates; is that correct?--That's correct.

And you recall the figure of \$220 being mentioned, do you?--Yes.

You can remember that?--Yes.

You said Glen asked him whether he would give an option to purchase the flats. Are you able to remember the words that were actually used?--What Glen used?

Yes?--Glen said would he consider an option to purchase within five years - or within the lease.

That is still more or less indirect. Can you recall the actual words that were used?--No, I cannot.

You can't? You don't know whether the word "consider" was used, do you?--No.

Supreme Court

No.4 Plaintiff's evidence

K.J. Phipps

Cross-examination

And the word "purchase" - it could have been "buy"?--No, "purchase" was definitely used.

You can recall that?--Yes.

And the word "flats" - was it the use of the word "flats" that you can remember?--River flats, yes.

He didn't mention the leased property or the leased land?--Not that I can recall.

And the word "option", was that used?--Yes, it was.

It was definitely the word "option"?--Definitely.

I suggest that it wasn't used, but words to the effect that your husband was interested in buying - words to that effect were used?--No.

Definitely not?--Definitely not.

This is over five years ago?--Yes.

And you can remember quite well?--Yes.

You and your husband have spoken about what happened that day since then?--Since then we have been together -----

But have you and your husband spoken about it since then?--Yes.

Did you speak about that conversation in the first 12 months?--The first 12 months of being there, yes.

You did talk about it?--Yes.

Obviously you have spoken about it since the position became strained in late 1981?--Yes.

In fact, you have probably spoken about it in the last week or so before coming to court?--We have always spoken about it in the last five years.

And no doubt Glen has spoken about the word "option". He has related to you his account?--Yes. I have even read the lease.

You have read the lease?--Yes, because I handle all of Glen's paperwork.

When did you first read the lease, can you recall?--No, I don't.

Was it in the first 12 months?--No, because we didn't have a copy of it then.

Do you recall your husband receiving a copy of the lease in the first 12 months?--I can remember him going into Dale & Fallu and reading through the lease with Mr. Bloxsom.

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Did you go with him?--No, I don't think so.

Do you recall Mr. Watson coming to your house at Coalfalls and bringing the lease document with him?--He brought something but I couldn't say exactly what it was.

He brought a written document?--Yes.

Do you recall your husband sitting down and looking at it in the lounge?--No, he was in the dining room.

And he looked at it when Mr. Watson was there?--Yes.

And that was when you were living at Coalfalls?--Yes.

Before you moved out to the farm property?--Yes.

You can't recall what that document was?--No, I cannot, because that had to do with Glen and Mr. and Mrs. Watson.

You have given the words that you think were actually used by your husband and you said in answer to my learned friend that Mr. Watson said he would have to ask \$1000 per acre?--Yes.

Can you remember whether those words were the words actually used?--Yes.

He wouldn't have said, "I would have to ask", I'd suggest?--He started off by saying about how good the river flats were and he said he would have to ask for \$1000 per acre.

You can remember those being the actual words used?--Yes.

Did you go in at any stage with your husband to Mr. Zande's office?--No, I did not.

Not at any stage?--No.

In the conversation at the side gate in mid-December 1977 do you recall whether the words "right of first refusal" were used by anyone?--No, not at all.

Do you recall whether a figure of \$750 was mentioned at that meeting?--No, not at all.

Not at all?--No.

I suggest that your husband said to Mr. Watson, "I'll offer \$750," or words to that effect?--No, he did not, no.

I suggest that Mr. Watson said to both you and your husband, "My wife and I - if we desire to sell you shall have the right of first refusal."?--That afternoon?

That afternoon at the side gate?--No, he didn't.

Who used the word "option" first in that conversation, can you recall?--Glen did.

Glen did?--Yes.

MR. McMILLAN: I have no further questions.

MR. DAVIES: No re-examination. I have only one other witness whom I have not opened. He is a valuer. The only basis upon which I can put the relevance of his evidence is regarding the stated value of the property, and although that may only be relevant to what the parties thought we would submit that the evidence of a valuer is of at least some marginal value on the question.

HIS HONOUR: I don't know what Mr. McMillan's attitude to it is. What is your attitude, Mr. McMillan?

MR. McMILLAN: I agree with my learned friend that the valuation by an expert valuer is of marginal relevance.

HIS HONOUR: I would have thought it might have been of more than marginal relevance and the reason I am saying that is this: we have evidence of milk quotas. I know that Mr. Zabel marginally increased it, but where you have got a situation like this where your client has to provide clear convincing proof of this prior agreement, if in fact the land has a very high value it may be that where areas of credibility exist that is an incentive for your client to be dead keen to get the property, so that it may not be quite so marginal as you think.

MR. DAVIES: No, perhaps not. Well, if Your Honour thinks so and my learned friend does not object to it, I propose to call Mr. Pearson, who is a valuer.

MR. DAVIES further opened the case for the plaintiff.

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ROLAND HARVEY VALL PEARSON, sworn and examined:

BY MR. MYERS: What is your full name?--Roland Harvey Vall Pearson.

And your residential address?--53 Alice Street, Silkstone, Ipswich.

10 And your occupation?--I am a registered valuer.

Could you give His Honour details of your qualifications as a valuer and your experience in that field?--I have been valuing since 1960. I was registered by the Valuers' Registration Board in July 1967.

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Supreme Court
No.4 Plaintiff's evidence
R.H.V. Pearson
Exam.-in-chief

I have been valuing as a registered valuer since 1967.
Prior to that I was only an approved valuer.

What experience have you had as a valuer?--In ^{what} respect
sir?

HIS HONOUR: What sort of land?

BY MR. MYERS: Have you been involved with both rural
and residential?--I am registered as both a rural and urban
valuer.

What areas have you valued in your capacity as a rural
valuer?--Practically all areas in the West Moreton District,
the Fassifern Valley, Lockyer, around Lowood, Fernvale,
up as far as Mt. Beppo and Toogookwah.

Does the subject land come within that particular sphere?--
It does.

Did you have occasion to prepare a valuation of the subject
land on 21 July 1983?--I did.

Did you value that land as at 17 February 1978?--I did.

Would you have a look at this document?--(handed to witness.)
That is the original of the valuation that I prepared.

Are the facts set out in that true and correct, to the
best of your own knowledge and belief?--They are.

And are the opinions expressed in that valuation your
own opinions?--That is correct.

MR. MYERS: I tender that document.

(Admitted and marked "Exhibit 16.")

MR. DAVIES: Whilst you are looking at that, Your Honour,
because you mentioned the milk quota, I should really tender
the milk agreement. I call for the original of the agreement
between the parties dated 3 February 1978. The effect of that
agreement is - and it may have some effect on your Honour's
concern - the valuation, is that when the milk quota is
eventually sold, the proceeds were to go to the defendant,
although we had the use of the milk quota during the term they
had the quota on the farm.

HIS HONOUR: It looks as if Mr. Pearson, I think, has not
got the description of the property right, paragraph 1A.

MR. DAVIES: Is it wrong?

HIS HONOUR: Yes. It has got an omission in it.

MR. DAVIES: Has it? Once again, my learned friend hands me
two in identical terms on different dates.

HIS HONOUR: Take your pick, Mr. Davies.

MR. DAVIES: I am taking the second one.

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HIS HONOUR: What date is it; 3 February?

MR. DAVIES: I cannot understand it.

HIS HONOUR: You might like to have a discussion while I read this.

MR. DAVIES: I tender that now. It is dated 3 February 1978.

HIS HONOUR: Milk agreement dated 3 February 1978 made between the plaintiff and the male defendant is Exhibit 17.

(Admitted and marked "Exhibit 17.")

BY MR. MYERS: Could I ask you to look at Exhibit number 17, the agreement that has been made between the parties in relation to the milk quota attached to this land?--(Witness does as requested.)

Do you understand the effect of that agreement to be that Mr. Phipps would have the use of the quota, but that in the event of the property being sold - I am sorry - in the event of the milk quota being sold, Mr. and Mrs. Watson would have the proceeds of sale?--I do. That is my understanding of it, yes.

Does that agreement affect the valuation of the property in any way?--Well, in the sense that the land - I think this is what you are asking me - I hope I am right - but the land in question, the cultivation land, the loss of that - or perhaps I should put it this way - were it not for that cultivation land, the property that Mr. Phipps already owns would be economically unviable. You see, he has got no agricultural land on the hillsides at all and this land down on the river where he can grow his cultivation, that land is essential to a milk quota, if you understand what I mean?

Yes-----

BY HIS HONOUR: I don't, because you say there is no agricultural land on the hillsides?--No.

Why is the lower land essential for a milk quota?--With the land-----

What would he use the land for?--On the flats?

Yes?--For cultivation, for growing crops.

What would he do with the crops?--He would feed them to the cattle. It is all green feed.

That is what you did not make clear?--My apologies.

BY MR. MYERS: Could we put it on this basis, on the basis that the milk quota in effect remains the property of Mr. Watson. In the event of it being sold, what effect would that have upon the price, if any, that you have reached here, of \$782 per acre? would it increase, decrease the price, or would it have any effect at all?--I don't think it would have any effect, really, because I put on that property at the relevant time in 1978 what

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No.4 Plaintiff's evidence
R.H.V. Pearson
Exam.-in-chief

1 it would have sold for on the open market. I didn't take a milk quota into consideration. I wasn't aware there was a milk quota attached to it.

10 And the comparable sales to which you have referred in the course of your valuation; are you aware of whether or not there were milk quotas attaching to any of those properties?--No, there were no milk quotas whatsoever attached to any of them. To the best of my knowledge, the one sale of Peters to Bean, and the other two - they were relatively small blocks adjoining this subject land. They were only 5 acre blocks. That was land that had been bought in Globo and developed for resale into 5 acre blocks.

20 You have taken into consideration the sales of smaller blocks of land. Could you tell His Honour just in what way the sales of smaller blocks of land are relative to sales of a larger parcel, as suggested, the one in question here?--Yes. A smaller block of ground, once it is developed, will attract a higher price per acre or per hectare than, say a block of ground of 70, 80 or 100 acres. It is a matter of the purchaser's ability to pay. If, say, 5 acre blocks are selling for \$1,000 an acre, it does not necessarily mean that a 100 acre block will sell for \$100,000, because the larger the block, the lower the price that is normally realised.

30 Of the sales that you analysed, are you able to say that any one or two of them is more comparable, when valuing the present land, than any other that you looked at?--Well, they'd be more comparable in the respect that they are very, very close to the subject land as far as locality is concerned, but there were no sales along there in that immediate area for some years prior to 1978.

40 BY HIS HONOUR: That is, sales of unimproved land?--Sales of unimproved land, and the Valuer General informs me, or from my searches that I have made down there, there have been none since 1978 of comparable land along the river.

40 BY MR. MYER: How did the land involve with the Peters/Bean sale compare to the subject land?--Quite favourably. It was a 90 acre block with an old home on it. It had been neglected, it wanted a few minor repairs and paint. There was no stock on the land, but a large area of it was arable - all high, sweet country.

50 BY HIS HONOUR: But not on the river?--Not on the river. There is a well there which has been tested as 10,000 gallons per hour. You could irrigate from that, but it is not on the river.

50 You have referred to three large storage dams and a pump over a well?--Yes, a pump over a well. The large storage dam is there merely for stock water. They are not big enough for irrigation.

60 BY MR. MYERS: Was the home to which you have referred taken into consideration as part of the purchase price?--No, I didn't.

You ignored that?--I ignored that.

HIS HONOUR: He said he discounted it all. It came to \$500 an acre.

MR. MYERS: Thank you.

CROSS-EXAMINATION:

BY MR. McMILLAN: What would you say the market in this type of land, river flat land generally in the Fernvale area was like at the end of 1977?--It would have been in fair demand, yes. There's always fair demand for good agricultural land.

Were you aware that there were instances of dairy farmers selling land in 1977?--There would have been dairy farmers selling out in 1977, yes.

Away from dairy flats?--Pardon?

Away from dairy flats?--You mean Hill-----

Yes?--Hill country?

Yes?--Yes.

In fact, the industry was going through some travail was it not?--I believe they were trying to stabilise the industry, yes.

Are you aware in your practice as to whether the market picked up again after the end of 1977?--Yes, the market did pick up after 1977, slowly, then it slumped again. I think it is gradually on the rise again now.

So, from 1977 it rose slowly. There was no leap at any stage?--I wouldn't say there was any great leap, but it progressively rose from 1977 onwards, yes.

Would you agree, however, that between early 1981 and early 1982 there were good increases generally in dairy country in that general Fernvale area and around it?--How do you mean? Increases in values of land?

Values of land?--Yes.

And the figure that you arrived at here, \$782 per acre, if you had to look at it in 1981/1982, would you be valuing that at a higher figure?--I would.

Would that figure be perhaps double that-----

MR. MYERS: I object.

HIS HONOUR: On what basis?

MR. MYERS: With hindsight the value in 1981 and 1982 is completely irrelevant to Your Honour's eventual determination as to what these parties might have agreed to in 1977.

HIS HONOUR: I have to assess the credibility of the witness. I cannot see that it is irrelevant. Your client's case is that there was an agreement whereby he got an option to purchase. The defendant's case is, as I understand it, that he was to give them first refusal. There is an obvious difference between the two. The document as drawn, as I read it, supports the defendant's case, and if in fact there has been a substantial increase^{and} your client can sustain his claim or wishes to sustain his claim that there was an option to purchase, that increase will be relevant on the issue of credibility. I will allow the question. This man is an expert.

BY MR. McMILLAN: Perhaps I will repeat it again?--If you would, please.

In early 1981 going through to 1982 - perhaps I will fix on a date; that is probably fairer to you - February 1982 - would you be able to put a figure on your estimate of the price per acre that you would value that river flat land at?--well, I wouldn't. I am not given to guessing. I like to do my investigations and go and seek comparison sales. My instructions were to value this as at 1978 values, but from other sales that I have looked at I would estimate - I could be \$100, \$200, \$300 per acre out - but I would estimate in about 1983 that land would have had a value - that is, the river land - would have had a value of approximately \$1500 per acre.

BY HIS HONOUR: You make it clear that is just an estimate?--That is only an estimate.

And not made with the advantage of having looked at comparable sites?--I haven't had that advantage.

BY MR. McMILLAN: Would it be fair to say that at February 1983 that river flat land would be worth more per acre than in February 1982?--It could be worth marginally more, but, as I said, I hadn't searched any areas there. But possibly it could be worth marginally more, yes.

It is indicating what you said earlier?--There is a gradual trend upwards, yes.

In December 1977 would you be able to estimate what the value was in five years time?--In December 1977?

Yes?--No way. You wouldn't know how the trend was going to go.

If we could turn to the milk quota aspect, you have valued other land, not just this particular block that that milk quota was attached to?--I wasn't aware there was a milk quota attached to this when I valued it.

1 Have you valued properties with milk quotas attached to them?--No.

You haven't?--No. Normally the milk quota is sold with the property and the valuer doesn't come into it. The farmer puts his price on, and we rarely see - or I - valuers rarely have to value farms with a milk quota attached unless it is compulsory acquisition. Up to date I haven't had one of compulsory acquisition where there has been a milk quota attached.

10 The situation though really is this: a dairy farm could either be a dairy farm being operated with cows being milked daily and milk being supplied to the factory-----?--Correct.

Or it could be land still with cows on it but not being milked - there are cows on the property but they are not being milked and there is no milk being supplied off the property?--True.

20 If you were valuing those two properties side-by-side, everything else being equal, would you give the one that is actually supplying milk to a factory a higher value per acre than the other one?--No. I don't think I would because if the farmer turns in his milk quota the factory buys him out. They pay him for the quota. If a farmer gives up dairying, his quota goes back to the factory and they buy him out.

30 Is it the major objective of working in different dairy farm country to get a return off the land?--I beg your pardon?

Is it the object of operating a dairy farm to get a return off it?--Yes.

40 If it is a dairy farm and it has all the facilities for milking, you would expect that the farmer - operator - is going to turn it to milking cows and supplying milk?--If he can get a quota. But it's a closed shop.

Doesn't that make that land, if you were vying to buy it - if it had a quota attached to it, wouldn't it make it more valuable if you were in the business of -----?--If I already had a quota or I could get it transferred to me, but I couldn't just go and buy rural land and say, "I want a milk quota." They'd laugh at me.

50 I am assuming you have a farmer who has a milk quota and is supplying milk to a local factory?--Yes.

You would be very interested in buying it?--Yes.

But what if the farmer had cows on the property but he was not and did not have a milk quota? You would look at this price in a different way, I would suggest?--It depends on what he wanted the property for.

60 If you were going to milk off that property?--If I was going to milk off it, yes, I would be interested.

Supreme Court

No.4 Plaintiff's evidence
R.H.V. Pearson
Cross-examination

Because you would realise you would have problems, wouldn't you, after you took over the property approaching the local milk factory to try to get an allocation or buy somebody else's quota?--To get an allocation to day you have to buy somebody else's quota.

So really dollar for dollar-----?--Or buy their farm with a quota.

So a farm with a quota is more valuable, I am suggesting, than a farm without a quota?--quite so. quite so. Because a farm without a quota can only be used for, say, agriculture - like the growing of crops and grain - but there again, what you can grow on land depends on what the land is suitable for.

You have never been in the position, though, of having to value a farm property with a quota?--I have never had the occasion to value a farm property with a quota, no.

In theory if you had to do the job you would have to put some figure on what that quota is worth?--You would get that figure from the factory - what they put on the quota - because if it is returned to the factory they pay the farmer out.

Isn't it worth something more than that because it is not just the figure that the factory and the farmer are dealing with: it is because it adds a glow to that land - it's -----?--That would be up to the parties concerned. I can't say how a prospective purchaser would feel - whether he would feel that it would be worth anymore to him. If he's already got a quota and he's oversupplying, that will have a big bearing on the quota that he will receive next year. In other words, if he is over supplying this year and they are looking for extra milk, his quota will be extended next year, whereas if he is undersupplying his quota could be dropped.

MR. McMILLAN: I have no further questions.

RE-EXAMINATION:

BY MR. MYERS: If a property does have a quota, is that sold separately or is it reflected in the price of the property itself?--It would reflect, I think, in the price of the property itself. If I have a farm and I am selling it - well, I know what I am earning off it and I know what I want for it - so I sell the quota with the farm.

As far as the Valuer-General's Department is concerned, does the quota appear as a separate item of the consideration?--No.

BY HIS HONOUR: There is special legislation, is there not?--Yes. For primary producers.

Special legislation - for instance, for cane farmers?--

Cane farms and primary producers.

What the Valuer-General does under his Act is of no concern to you in giving your opinion?--No. None at all.

MR. MYERS: Thank you.

MR. DAVIES: That is our case except for two minor matters of amendments. One was discussed yesterday and was really not finally completed. That is paragraph 2 of the statement of claim. where it reads "First of February" we ask leave to amend that to "7 April 1978".

HIS HONOUR: You don't have any objection to that, I take it?

MR. McMILLAN: No objection.

HIS HONOUR: I give you leave to do that.

MR. DAVIES: The other is the area you picked up this morning in the description of the land in paragraph 1(a). Instead of "Re Sub-Division 1 of ..." I ask leave to insert "Re Sub-Division 6A of Sub-Division 1 of..."

HIS HONOUR: I will give you leave - you don't object to that?

MR. McMILLAN: No, Your Honour.

MR. DAVIES: That is our case.

MR. McMILLAN: I did hand to my learned friends this morning a photocopy of a map which is a photocopy of the Government series of the area. It has coloured in portions of land which has already been referred to by the plaintiff's witnesses and will be referred to by the defendant's witnesses. It is not proposed to put it in as evidence but merely as a guide to yourself. I don't know whether my learned friend has any objection to that.

MR. DAVIES: No. I cannot see it as being relevant to any issue in the action. I don't mind Your Honour looking at it.

HIS HONOUR: I will use it for my assistance in understanding the evidence.

MR. McMILLAN opened the case for the defendants.

During the opening -

MR. DAVIES: I will be objecting to that evidence.

HIS HONOUR: We might as well deal with that now. First of all, Mr. McMillan is entitled to know the basis of it.

MR. DAVIES: Yes. In our submission a party cannot give evidence of what his intention is by giving evidence of what he told other people his intention was.

HIS HONOUR: Self-serving statements?

MR. DAVIES: Self-serving statements, and if my learned friend says it is not from a statement but from what the person believed, rather than from a statement, then it is even further from something that is properly admissible evidence. In other words, if the son is simply saying what he believes the father believes without even having been told by his father then it is evidence of an opinion and is not admissible.

HIS HONOUR: What do you say about it, Mr. McMillan?

MR. McMILLAN: His evidence -----

HIS HONOUR: Perhaps you had better open it fully. So far, from what I have heard, I would be ruling against you.

MR. McMILLAN continued opening the case for the defendants.

During the opening -

HIS HONOUR: Presumably Mr. Watson will be saying that himself?

MR. McMILLAN: Yes.

HIS HONOUR: And all you want is for the son to reinforce the veracity of that?

MR. McMILLAN: Yes.

HIS HONOUR: Isn't that objectionable? We have come a long way since the 16th Century -----

MR. McMILLAN: I take Your Honour's point but in a rectification suit it has certainly been held that any fact is relevant to the issue where it proves that the parties' testimony in court is correct, because it is a matter of intention at the time that he is alleged to have made statement which has been sworn to by Mr. Phipps. That is the only basis I can put it on.

HIS HONOUR: Unless you can show me some case I am against you. I cannot see how this evidence can possibly be admissible. It is self-serving and it is hearsay evidence and, if I may say, secondary evidence.

MR. McMILLAN: I take all of that -----

HIS HONOUR: They are not statements against interest, really.

MR. McMILLAN: No, they are not. They are certainly for interest.

HIS HONOUR: So unless you can do better than that I won't allow the son to give ^{that} evidence.

MR. McMILLAN: I won't call the son in those circumstances.

MR. McMILLAN continued opening the case for the defendants.

JAMES JOSEPH WATSON, sworn and examined:

BY MR. McMILLAN: Your full name is James Joseph Watson, you reside at 11 Globe Street, Gailes, you are a property owner by occupation, and you are one of the defendants in this action?--That's correct.

Could you tell the court your ambition in short terms relating to farming on the property -----

MR. DAVIES: I object to that evidence in such general terms. What his ambitions might now be in respect to farming is really irrelevant.

HIS HONOUR: It isn't really what was opened, Mr. McMillan. I understood you to say that from the very early stage he has always been keen to go on the land and when he bought the property in 1974 he realised his life-long ambitions.

BY MR. McMILLAN: From an early stage was it your intention to go on the land?--Yes, from a very small boy.

And was that intention realised sometime in 1970?--Yes, after 20 years of very hard work.

And when was that?--I'm sorry?

When were you able to realise that ambition?--When I actually accumulated enough property to be able to sell it and buy the farm.

BY HIS HONOUR: I think Mr. McMillan wants to know the date and year?--Yes. That was 1974.

BY MR. McMILLAN: You purchased the property from whom?--A Mr. Fryberg.

And, very briefly, the details of that purchase were that there was still something owing to Fryberg; is that right?--Yes, there was a second mortgage.

Supreme Court

No.4 Defendant's evidence

J.J. Watson

Exam.-in-chief

1
If we could come to 1977, what was life like for you and your wife on the property?--As the court has probably realised, the downturn in the dairying industry was tremendous and, of course, our debt was very huge and I suffered ill health as well and financial difficulties. It was a new business to me as well and it was getting to an end - the pressure of keeping the debt paid and running a very large farm on my own.

10
I would like you to have a look at this sketch plan?--
(Handed to witness.)

Who prepared that plan?--My wife.

20
What does it represent?--It represents almost the complete outline of the farm. There is one paddock missing there, but that is the farm in question and the new portion that I have almost finished a home on.

20
And that accords with your understanding of the layout of the property?--Yes, it is not to scale but, yes, that is virtually it.

MR. McMILLAN: I tender that plan, Your Honour.

Ex.18 (Admitted and marked "Exhibit 18".)

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BY MR. McMILLAN: Would you have a look at Exhibit 18?--
(Handed to witness.)

30
40
How did you work your farm whilst you were operating the farm at Fernvale; if you could indicate to the court what the various blocks were used for?--Well, yes. Lots 2,3, 4,5,6,7 and so on were literally the backbone of the country. That is the fertile farm flats that are strip grazed and cultivated. Without that a dairy farm is completely useless. There was a walkway paddock, number 1, just a holding paddock; then up here, back towards the two together, there was the old dairy and the house and sheds and yards, and what have you - a very infertile area. We have never liked it, actually - a very old home. Next door is a closer block to the farm; it isn't illustrated properly, and a better position altogether.

50
BY HIS HONOUR: That is the battle-axe block where you have a new house?--Yes.

50
That is the property you have bought since?--Yes.

One thing you might clarify for me is, you said paddocks numbers 2, 3, 4, 5, 6, 7, and so on - how many of those paddocks that you have numbered there up to 10 were on your property?--At that time?

Yes, December 1977?--Yes, they were all on the property.

That is, two up to 10 inclusive were all on the property?--Yes, and the one with 12 acres written on it and, plus, over on the right-hand corner there was another 40 acre block there. It was a dry paddock or a back paddock, It is not shown.

It is not shown?--No.

BY MR. McMILLAN: It was one that was sold to who?--Mr. Doug Phipps.

The working of this property would be carried out in what way?--The 30 acre paddock that Mr. Phipps has that I sold to him was just a night paddock for holding the cattle for morning milking. It was just a means of milking. They'd only be there overnight, and they were then taken down to the river flats, the irrigated river flats and strip-grazed through the day. That was the whole use of that particular property.

When they would come back at night?--Yes, every evening, yes. Every rain they'd be held.

BY HIS HONOUR: Do you have improved pastures?--Yes, they are more temperate pastures, we call them. They are lucerne and oats. It is like force-feeding dairy cattle. You need a lot of green feed.

When you strip-feed, did you have an electric fence?--Yes, an electric fence.

BY MR. McMILLAN: That river flat country, would you have compared that to other country in the area, Fernvale area?--Yes, I could, but we are very proud that the fact - according to the D.P.I. they were the best flats in the valley. That was a broad statement, of course, but they are excellent flats, and some parts there the soil is 20 feet deep in the gulleys. They are top flats. I am sure the valuation is way down.

The property at the top of the page, with the dairy house, the residence is there also?--Yes.

In 1977, what was the state of the running of the farm?--I am sorry, I don't understand that question.

What? Were you encountering any problems?-- In 1977?

Yes?--Absolutely, yes.

What were they?--Drought. We'd had a very heavy drought. We were irrigating continually which meant that the irrigation had to go at night. As a result of handling that farm

1 that size and irrigating continually and milking up to 100
cows was a very big job for one man. I couldn't afford labour;
the milk prices were absolutely rock bottom. There was nothing
else the farm was good for at that stage, because I couldn't
lose the quota - financial difficulties, and the fact that I was
losing the thing that I'd worked for all my life was a threat.
This was worrying me sick, and so I had an economist come
out and he was really wonderful in advising me, and this was
when I started to sell an odd paddock that was useless. I
10 mean, that back paddock that Mr. Doug Phipps bought, it's
a good paddock, but during a period of time it will only
carry a dozen head of cattle but it may carry 50 for a month
or two, so I culled away the unnecessary, keeping the valuable,
and, that is, the river flats.

20 Towards the end of 1977 you have spoken about financial
matters. What was the state of the finances then?--I was - I
can't quite remember the exact amount, or the time, but I remember
the New South Wales Bank were wonderful. They assisted me.
I was only paying the interest at that time. Also, Mr. Fryberg,
with all respects to the old gentleman, would not carry me one
bit. He was foreclosing and giving me a very difficult and
hard time.

HIS HONOUR: Mr. McMillan, to complete the picture, we have not
heard who Mr. Fryberg is other than a statement made from the
Bar Table, but that is not evidence.

30 BY MR. McMILLAN: From whom did you buy this property?--From
Mr. Fryberg. He is a dairy farmer there.

In 1974, was it?--Yes.

HIS HONOUR: Mr. McMillian, I think we are going on to a
new matter. We will adjourn now for a short break.

The Court adjourned at 11.29 a.m.

The Court resumed at 11.51 a.m.

MR. McMILLAN: By an oversight I did not raise in my opening matters which are material to one of the paragraphs of the defence, and that is the question of delay. If I could perhaps continue opening on that point?

HIS HONOUR: Mr. Davies, have you any objection to this?

MR. DAVIES: No, Your Honour.

MR. McMILLAN further opened the case for the defendants.

JAMES JOSEPH WATSON, further examined:

HIS HONOUR: I think you had got to the stage where you told us he bought the farm from Freiberg in 1974. There was a second mortgage and-----

BY MR. McMILLAN: we are talking about the farm. You conducted a dairy business from that farm and you supplied dairy products to what organisation?--Yes. To the Jacaranda Dairy Factory or - what is the title? I just can't think at the moment what it is.

Mr. Zabel, who gave evidence yesterday - do you know him?--Not personally, no. No.

Do you know his connection with that factory?--I believe he is a Board member.

Up until December 1977 you continued to supply-----?--Milk to the Jacaranda - yes, yes.

HIS HONOUR: Just to get one thing clear, Mr. McMillan: you put the phrase "dairy products" to the witness. He used the term "milk".

BY HIS HONOUR: Is it milk or something other than milk?--Just milk.

BY MR. McMILLAN: Mr. Freiberg was pressing you for payment?--Very heavily.

What decision did you come to?--It was either being foreclosed on or selling a portion of the country that wasn't so valuable and cutting the farm down.

What did you do about it?--This is when we sold the first property to Mr. Doug Phipps - the 40 acre paddock. I just don't know how you've numbered it here, but that was the first one to go. I certainly didn't want to sell it or - actually, I had to sell it - certainly used to enjoy, but it wasn't a terribly good paddock - it was called our back paddock or our dry cow paddock.

1
10
What else did you do?--That saved the day for a short time, but later on it - the drought continued and more debt and what have you, and, of course, a lot of replacement machinery was necessary on the farm - and all sorts of costs. My wife had to get a job as an assistant nurse at the Wolston Park - I should say the Challinor - to try and keep us alive, so all her money went into the farm as well. She worked massive hours trying to keep it going, and in the end we both almost cracked up - well, I did, and I had a time in hospital - so that's when we decided that we must sell more.

10
What did you do about that?--I let it be known around the district and also a couple of agents that I was interested in selling - well, at that stage I had thought of selling the whole farm. Now I admit to that.

20
When was that?--That was earlier in 1977 - I'm not sure of the date, but it was before I got ill and went to hospital. But it was on my mind to sell the whole farm. This didn't eventuate; I never pushed the matter. I don't think I even - can't remember even giving it to an agent.

20
You came out of hospital about when?--around the end of '77 - some time in December. Fortunately my son was on holidays and he was able to keep the dairy going. My brothers stepped in to help. And that's when I realised that-the struggle my wife was putting up and everything - it was just too great.

30
In December 1977 were you approached by the plaintiff?-- Yes. And his brother.

You have heard that it took place - it has been suggested - in the middle of December 1977?--It could be true, yes. I can't remember the exact date.

You say Mr. Phipps and his brother who was -----?-- Our good neighbour, Mr. Ken Phipps.

40
Can you tell us about the incident?--I was sitting in front of the garages; there's a bit of a lawn there. I think I was just relaxing - I'd finished some work - and I was playing with the dogs, and I was quite surprised they approached me and I just don't remember the exact conversation to start with, but I soon gathered that they had come to try and purchase the farm.

50
Can you remember any direct speech - exact words that were used?--Yes. I can remember quite a bit of it, actually, because it was very interesting at the time, naturally, for my future. They wanted to know would it be possible to purchase the 30 acres with the farm on, and on condition that they could lease the balance of the flats. And they wanted to know did I have a price. I did. It was - I quoted them 39 and a half thousand. That was on the first meeting.

60
I asked you about direct speech. Could you tell the Court who said what, if you can remember?--I can remember them -----

1
Which of the Phipps asked you what in particular?--
There was a few things discussed at first about the - mainly
the purchase of the 30 acres as the - what machinery would
go with it, whether it would be bare or whether the machinery
would be granted in the lease. They asked for a five years.
I said no, I'd prefer it over three years - words similar.

10
When you say "they" are you able to pin it down to
which of the brothers raised various matters?--No. Not
really, no. Both brothers were talking. I think Ken knew
more about farming land and more about the farm.

So they asked for five years?--Yes.

Someone asked for five?--Yes. I couldn't give them an
answer on that day without talking to my wife. She's a full
partner.

20
So was that the extent of the conversation - what you
have told the Court?--More or less, I don't think there
was much more discussed that first time - just that we
were all interested.

Anything more said about the terms of the lease?--No.
Not really, no. Just that it would be a lease - either three
or five years.

30
Then was anything said about milking?--Not at that
stage. That's why he - that's-one point that Glen Phipps
brought up was that he wanted to grow lucem, and this
concerned me because I didn't know whether he'd ever grown
it before. Apparently he has, but I didn't know at that
stage, and of course I couldn't see - I knew he wasn't the
richest man on earth; I thought would he keep the payments
up? These were the things that went through my mind.

1 That meeting then concluded, did it?--Yes, it wasn't
that long.

What arrangements were made to continue the negotiations?--
Well, the arrangements were that I would see my wife, of
course. It all stemmed on her approval as well as mine,
and, of course, then to get back together as soon as possible
and I would let the older brother Ken know at that time.

10 Did that happen?--Yes. It was a day or two later -
I just can't remember - but we did get back together and
it was discussed further.

Where did that meeting take place?--On my property
again.

And who was there?--Both brothers and myself.

They were the only people there?--Yes.

20 Can you recall how the discussion started?--No.

Can you recall what was discussed?--Yes, a lot about
the milk quota.

30 Who brought that up?--I can't remember, but certainly
Ken and I were out to encourage Glen to take the quota
because we, as dairymen, realised, just how vital a quota
is, and that farm is only good for dairying unless you
are a qualified agricultural farmer.

What was the reaction of the plaintiff to this discussion
about the quota?--It wasn't too enthusiastic, if I remember
rightly, although it was possibly said in jest - I can
remember the words - it seems strange after all these years,
but there are a few things you can remember - but it stuck
in my mind that he didn't want to milk "stinking cows", and
I suddenly thought that he didn't appeal to me like that.

40 How did that conversation about the quota end up?--
End up?

Yes, how did it conclude? Did it come to any point?--
I think we decided that we should first then approach the
board itself because they had control of the quota, to see
then if it could be transferred because I realised the
business of the quotas in that day to a certain extent,
so we realised we had to go to the board.

50 And so it was left on that basis, or what else transpired?--
I think there may have been a little bit of talk about rent -
who was going to pay what - rates, electricity, etc. It
wasn't settled that day - not the second meeting.

Did anything else come up at that meeting?--Not really,
no, just that they were - well, the fact that I had granted
them - this is the second meeting - that we would go the
five years lease; that was it.

Was there any more detail about the lease?--No, oh, just the machinery - the necessary implements and tractors, and what have you to work the balance of the farm.

What about the machinery in relation to the lease? What was discussed?--Just that it would always remain in good care and attention, and what have you.

Are you suggesting that was to be incorporated into the lease?--Yes.

How did that meeting end up? Who was to do what; do you have any recollection?--I think I was to approach Mr. White, the secretary, to see if we could attend a meeting - the next board meeting. I know I had a fair bit of conversation with Richard Zande after that time.

You are talking about the board meeting. That is the board meeting of which organisation?--Of the Jacaranda Butter Factory.

That meeting eventually took place when?--On a Friday. The date escapes me, but it was the very next meeting.

Which month, can you recall?--No, I'd be guessing now.

You said you had a discussion with Mr. Zande. He was your solicitor, was he?--Yes.

And what did that result in?--It was just explaining to him the situation that I wanted to sell and lease.

Did that conversation lead to anything happening?--I think he was prepared for us all to come in to sign a contract.

Between that - we will call it the second meeting - with the two brothers Phipps and yourselves. Did you see Mr. Phipps again?--In between times?

In between that second day and a proposed meeting at Zande's office?--We saw each other almost every second day. We were very good friends.

HIS HONOUR: Which Mr. Phipps are you talking about?

MR. McMILLAN: Mr. Glen Phipps.

WITNESS: No, I'm sorry. I thought you meant Ken Phipps.

BY MR. McMILLAN: Did you see him after the second day in relation to anything?--I think it would have been to look through his house - yes, that would be all.

Did you go?--Just myself, yes, the first time.

And that house was situated where?--Coalfalls in Ipswich.

Who was there at that house?--Mr. and Mrs. Phipps and myself, no-one else.

1
Did you discuss anything there about the proposal with Mr. Phipps and Mrs. Phipps?--About -----

The proposal - the sale and the lease?--No, I didn't have a lot of time. I wouldn't have discussed - if I did it wouldn't have been in detail. I spent very little time there. I was running late.

10
Can we come to what was the next development in the negotiations?--Well, I had agreed to the house, that it was worth the money and what have you, and it was just a matter of us all getting together at Zande's office, the solicitor- my solicitor - and signing the necessary contract of sale. That was about it.

And that meeting did take place when - what month, can you recall?--I think it was around about early January we signed a contract.

20
BY HIS HONOUR: No, that is not what you are being asked -----

BY MR. McMILLAN: No. Can you recall when the meeting took place?--Oh, the meeting - no.

Who was present at that meeting?--Mr. Phipps, his mother - that was all - myself and Palfrey, my solicitor.

30
Can you recall what was discussed at that meeting?--A little about the lease - I think a clause may have been mentioned to be inserted in the contract that it would be a five-year lease subject to this sale; nothing extra special about it.

Do you recall whether the contract was typed while you were there?--Yes, we waited for it.

40
Would you look at Exhibit 1, please?--(Handed to witness.)

Do you recognise the signatures on that document?--Yes.

On the front of the document you will see a date 6 January 1978?--Yes.

And on the last page of the document the vendors' signatures?--Yes.

50
Do you recognise those signatures?--Yes, my wife and myself.

That is the contract that was signed, is it?--Apparently, yes.

The date on the front, 6 January 1978, does that give you any indication of when the meeting took place?--I'm sorry?

60
Does that give you any indication of when the meeting in Zande's office took place?--Yes. It must have been earlier in January.

Supreme Court

No.4 Defendant's evidence

J.J. Watson

Exam.-in-chief

Did you see Mr. Phipps sign the contract?--Yes, we both signed together.

Whereabouts?--In Zande's office.

The back of the contract has Clause (c) typed in. Do you know how that came to be typed in? Was there anything that differentiated it from the other clauses?--This was the extra clause that I was speaking about that made this a conditional contract of sale of the 30-acre block. This apparently was put in .

MR. DAVIES: I object to that.

BY HIS HONOUR: You can't speculate. Did you see it put in?--No.

No - well, you can't speculate -----

By MR. McMILLAN: The details of the lease - were they discussed at that meeting in Zande's office with Mr. Palfrey?-- I believe so, yes, they were.

Can you recall what terms were discussed?--The terms of five years and the machinery, and one bit of machinery was missing, apparently, which was down at my brother's place, which I retrieved.

And anything else apart from those matters in the lease?--No.

Do you recall an incident when Mr. Phipps and his wife came out to the property?--Yes.

Can you throw any light on when that happened?--It was one evening. It is quite clear in my mind. It was -----

When you say "evening", can you be a bit more definite?-- Yes. It was milking time and I was a little bit embarrassed - I was in a mess. I do remember that. We were almost finished and my second oldest son said that I could go and talk to them - "Dad, I'll carry on. You go and talk to them."

And was it in December or January, to your knowledge?-- It was in January, I think.

Was it before the meeting in Zande's office or after?-- It was before.

Can you tell the court what happened at that meeting?-- We were mainly concerned about the figure -----

Who was there, I should ask first?--Mr. and Mrs. Phipps, purchasers of the property, were there.

And it took place on your property?--Yes, near the cow balls.

Near a side gate?--Yes, if that is the one they meant.

There are three side gates but that would be the one they are talking about.

Near the bails?--Near the front of the dairy.

Who mentioned what?--Well, it was mentioned about the price. We hadn't really settled the figure. There was a figure of \$200 -----

This is for the lease?--Yes. The rates were brought up. I think I would have brought them up, and also the electricity. We were ironing out these items. We then agreed that the Phipps would pay the electricity and I would pay the rates and the figure would then go up \$20 per month.

To what figure?--\$220.

That was what occurred?--Yes, absolutely.

Did anything else come up?--Yes. He said that they would like to purchase the flats and, well -----

Can you recall the exact words that were used, if it is possible?--Not exact words but similar words to the extent that if there is an agreement between my wife and myself that the property become available for sale, sure - but at that time, no way.

Was there anything else mentioned about price?--Yes, and this surprised me. Clearly I remember that Mr. Phipps said to me that the price - would I accept \$750 an acre if we ever sold, and I said, no, it would be more like \$1000, and it would have to be \$1000. I was very determined on that matter.

How did you come to that figure? Was there anything that made up that figure in your mind?--I think Mrs. Dorman at Lowood -

1 Mrs. Dorman was a good friend of mine. She wasn't a valuator, but she was in charge of Peter's Realty in Lowood, a good friend of the family. I am very sure that this information would have come from her as I spoke to her about the sale. This is where I got the thousand dollars from.

Was anything else mentioned about that aspect of negotiations?--No.

10 Then, what happened on that day?--I do believe we spoke more about going to the Milk Board and then there was something about they wanted to look over the property, just the 30 acres which they were buying. That is natural, and I agreed, of course.

You say that that conversation took place before the meeting in Mr.Zande's office with Mr. Palfrey. Did any part of that conversation come up in discussion?--I don't think so. I beg your pardon - just the amount of the lease that we'd agreed on.

20 That is, the rental?--Yes, the rental, and the conditions of the rental and of the lease as far as all the machinery, and that.

In evidence, Mr.Palfrey has indicated in his notes-the word "option" appears ?--Yes, I am hearing that a lot lately.

Can you throw any light----?--None whatsoever. This is amazing me.

30 Who brought that up, if it came up in the course of discussions?--Not to my knowledge. He wouldn't - I was terrified of options. My Dad went through too much trouble with options, and there is no way in the world I would have let Palfrey bring that up or put it in the lease.

After the meeting and the signing of the contract, what had matters progressed to then?--Well, I think the next thing was to - was the lease, the preparation of the lease which took quite some time going back ^{wards} and forwards to solicitors.

40 What? Did you go backwards and forwards?--Yes, I was running around. That is why I am no longer with Zande. I had to pick the lease up and take it to Mr.Phipps at his home.

Do you recall when that happened?--Yes. Not the exact day - I am sorry.

50 What month; can you recall?--No, sorry. It wouldn't be much longer after the contract was signed, I suppose, but he - we did have communication. Whether I rang Phipps or what, I can't remember, but I know that he wanted to read it and he told me that he wanted to read it before he talked to his solicitor, and that is why I went to his house. I think he wouldn't sign it.

His house being where? Which house?--This is the one at Coal Falls.

60 Can you recall when Mr.and Mrs. Phipps moved out of that property?-- Yes, it was before settlement, which surprised me, but they wanted to get on to the farm as quickly as possible.

1 I allowed them to work, start working the flats before settlement.
This would be before 17 February.

To your knowledge settlement took place on that day, 17
February?--Approximately. I couldn't be dead set sure. I
just couldn't quite remember that.

How far out would that date be, a matter of days or weeks?--
10 A matter of only a day or two, because, I, you know, I was
quite - everything was ready to go.

10 You took a document to Mr.Phipps at his house and that
document was - would you tell the court again?--The document
was the lease to Coal Falls.

The lease?--The lease of the bottom flats.

20 If you were shown a document, can you identify whether
a particular document was taken, which document was taken?--
There was quite a few, but no doubt I've seen the lease many
times, yes.

20 But of one of two or three you could not identify which
one you took to Mr.Phipps' house?--Only by the extra clauses
that were put in. There was a bank clause that had to be
entered. This was the hold-up.

Did you leave the lease with him?--Yes.

30 Had you signed it before you left it with him?--I believe
so. I believe I signed it in front of Palfrey.

You then left Mr.Phipps' house with him in possession
of this lease document?--Yes.

What happened after that?--Well, things progressed and
slowly we changed houses. He come out to the farm house.
We actually used the same vehicle, same removal truck. I was
trying to be as helpful as possible and-----

40 Was there a clearance sale at all?--Yes, I had a clearance
sale of my cows. It is sort of not heard of, someone taking
over your cows unless - you usually have a clearance sale.

Can you tell the court when that took place?--Not the exact
date. It was some time in January. I can't really remember.

Are you able to tell the court whether it was before or
after your visit to the milk factory?--It was before.

50 A matter of days or weeks?--Weeks, I'd say.

That sale-----

BY HIS HONOUR: Was it conducted by an auctioneer?--Yes.

Did you bother checking up with him?--No, I have not.

At that sale, were you able to sell all your cattle?--Yes,
they were all sold.

1 And equipment?--A small amount of equipment, unnecessary
equipment - just small items.

10 You have heard about a milk vat yesterday. What transpired
about that?--I sold the stuff that would never be of use to
me again. I wouldn't have used that vat again. It was old,
regardless. It still had the measure in gallons ^{on it} and it was
outdated. It was a square vat, was difficult to clean. It
had had a lot of use, and also the milking machines were a lot
they weren't the best brand ever made, so if and when I did
start a dairy again I certainly wouldn't use that equipment.

10 Was the milk vat actually sold at the auction?--No, I
couldn't get a bid on it.

You discussed something about it with Mr. Phipps?--Yes.
It certainly would have been helpful to him, and the price
was reached.

20 Did Mr. Phipps buy any of your cattle, Mr. Glen Phipps?--
No, not that I know of. All dealings went through the agent,
of course, but not that I know of.

You were at Coal Falls, he was on the property, and you have
mentioned a number of leases. Did you have anything to do with
other lease documents?--Yes, I had another lease to deliver to
him, and this was one morning after milking I arrived at his
farm, //

30 //and he was still having his breakfast. He finished the
milking. Once again, that was left with him.

Perhaps if you would look at Exhibit 2 with Exhibit A
for Identification?--(Handed to witness.)

The document that ^{is} the smaller of the two, the one in the
right-hand, that has your name and your wife's name up the
top of the document?--Yes.

40 Initials in the left-hand column - you recognise them?--
Yes, they are mine and my wife's.

If you turn to the second-last page, you see signatures
at the foot of page 8?--Yes.

Do you recognise the first set of signatures?--Certainly.
They are ours.

"Ours", being yourself and-----?--My wife and myself.

50 Do you see a date there, 1 February?--Yes.

And underneath there is another date, 6 February?--Yes.

Looking at that document and going to the next one, your
name and your wife's name appear at the top of the document-----

H.L. HONOUR: The next one is Exhibit 2.

60 BY MR. McMILLAN: Exhibit 2, I should say?--Yes.

1
If you could turn to the third-last page, do you see a date there?--7 April, yes.

And names?--My wife and myself.

And underneath it, another signature?--Mr.Palfrey.

And another signature against Glen Robert Phipps; is that right?--Yes.

10
And ^{of} the two documents you have before you, can you tell the Court which is the one that you say appears to be the document you took to Mr.Phipps at his house at Coal Falls?--At Coal Falls?

Yes?--It would be the one without the bank clause in it.

BY HIS HONOUR: The smaller of the two? Is it the smaller in size of the two?--I will have to glance through it. (Witness looks.) Yes, it is definitely the first small one.

HIS HONOUR: It is Exhibit A.

BY MR. McMILLAN: So that is the document that you took to Mr. Phipps at his Coal Falls house?--That's correct.

You saw him doing something with it when you took it there?--He had it in his hands; I didn't see him write it, but that was his intention.

MR. DAVIES: I object to that.

BY MR. McMILLAN: You don't know that, do you?-----

HIS HONOUR: The objection is valid unless there is a statement to that effect by the plaintiff.

MR. McMILLAN: Yes, it is quite a valid objection, Your Honour.

BY MR. McMILLAN: The other document - can you recall if he had something to do with that?--Yes, that would be - it is the definite one that I took - unless there is another one similar floating around - this has got the bank clause in it. It is the one that would have went to the house at Lowood to the farm house.

MR. McMILLAN: For the record, that is Exhibit 2. I tender as an exhibit the document marked A for identification.

HIS HONOUR: You have seen that, Mr. Davies, haven't you?

MR. DAVIES: Yes.

HIS HONOUR: The lease dated 3 February 1978, Exhibit A, is now Exhibit 19.

Ex.19 (Admitted and marked "Exhibit 19".)

BY MR. McMILLAN: Prior to the conversation at the side gate between you and Mr. and Mrs. Phipps, what was your intention in relation to the disposal of the property that was sold to Mr. Phipps, and the leased areas?--Clearly to fulfil the second mortgage - to finish with Mr. Freiberg.

Was that able to be done?--Yes.

So after the settlement of that matter, what was the situation between you and Freiberg?--Well, there was no longer a second mortgage; is that what you mean?

He was paid out, you mean?--He was completely paid out.

1
What was your intention in relation to the leased areas?--
The leased areas, of course, then we breathed a sigh of relief.
We still had our farm, and the intentions were to farm on the
land, but we knew we couldn't do it straight away.

Why was that?--We had to commit ourselves to a lease for
five years and, of course, we had to take jobs, to continue in
employment - my wife working, and I went to get a job at the
local real estate.

10
What were your intentions after the end of the lease?--
Our intentions have always been to farm that land and to keep
it. That's why I have always had in mind to build a home
there. I have had plans for years for that particular farm.

20
Did you do anything about a house?--Well, from there it
was a year or two before I decided I would start building slowly -
very slowly. I didn't know where the money was coming from,
but I decided I would have a go. But then, of course, I was
successful in real estate and I was able to pay out my farm -
pay for it after a long struggle of years and start building a
new home on a block of ground.

When did you acquire another block of land in the area?--
It would have been - it is a date that always escapes me.
It would have been '79 - sometime late in '79; I will have to
stand corrected there. I am fairly sure it was around that
time of the year.

30
Have you tried to check? Have you made any inquiries?--
No, not really.

What did you do after you purchased the land? Would you
tel' the Court how close it was to the land that is being
discussed in Court today?--Really I had had my eye on that block
for years. I couldn't afford it.

40
Which block is that?--It is right in view, the 30 acre
block. I had had my eye on this for a couple of years.
A couple of times it had come up for sale and my wife was always
pressing me and, of course, I realised it was even closer to
our dairy - to the flats, I should say - which makes it valuable
and more practicible and, of course, being - adjoining the
farm, adjacent to the farm, also it was perfect for what we had
in mind. Now I could have bought the block anyway because there
were a few blocks, and I was in real estate - probably better
bys, but this one was perfect.

50
You bought it, you say you believed, in 1979?--Yes, I'm
pretty sure.

Would that have been early?--Late '79.

The next time you had a discussion with Mr. Phipps after
he had signed the lease - do you have in front of you Exhibit 2?
When was that discussion?--The next discussion?

60
Yes?--There were two. There was one when I come to the
dairy to say hullo. They were busy milking; actually, I was
hoping to give them a hand, but the welcome wasn't there.

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That is the first occasion; when was the second?--The second time would have been on my property next door that I had purchased.

Can you -----?--I had pulled up for some reason-----

Can you fix a date?--It would be around April, middle of the year sometime.

April what year?--1980. I can't remember now; it would have been around about that time, I would say.

You said you were working on your property?--Yes, I was up - the bulldozer had put a road up for me and had levelled a site for a house, and also had put a dam in. That's the time Mr. Glen Phipps rode into the property on his motorbike. I was stopped about 50 or 70 yards in; I don't know now. I had stopped there for some reason. I remember it well. I was in a blue car that I owned, and I remember quite a bit about that; not the date so much, but I remember stopping there. Whether it was for fence posts or what, I don't know, but I was working all over the property at that stage.

Who spoke first; can you recall?--No, I can't recall, but I recall most - some of the conversation.

Could you tell the Court?--After the preliminaries of - no, "What are you doing?", were the words. It sort of struck me as, "Why would you want to know?" But, "What are you doing?" I said, "I am preparing to build for when we come back." I could see that this upset Mr. Phipps and he said words similar to - oh dear - "You know, I can't afford the flats. Would you consider selling me a portion at a time?", and I said, "No, they are not for sale." He then said - yes, I remember it very well, although he denies it - he said, "We will let our solicitors fight about it," and then I said, "What a shame. I don't want to fall out with you." They are almost the exact words I said, and he departed, and we certainly were very angry.

Did you hear anything more from Mr. Phipps or anyone on his behalf about wanting to buy or purchase the property?--Not for a while. There was nothing done. The next thing I knew, my own solicitors informed me that he had put a caveat or something over it. I don't understand that. I was quite amazed.

Nothing happened after that?--No, we went on building. We kept our plans going and we approached the factory for getting the quota back and travelling back onto the property and all sorts of things. We then went ahead with our business.

Here you aware that Mr. Phipps wrote a letter to you, or his solicitors, regarding the exercise of the option?--Yes, I think I gave that to Mr. Mitchell. Possibly the correspondence would have been given to him.

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1
You mentioned the milk factory and the quota. Do you recall going along to the meeting with anyone?--Oh, yes. I remember it well. I went along with Mr. Phipps. I arranged it with Mr. White.

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10
Who is ----?--The secretary of the Jacaranda Milk Factory. I went along on his invitation and we waited outside for some time and then we were ushered into the meeting. Mr. Phipps asked me would I speak, and so I did, and I just simply told them what we wanted.

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20
What was that? Can you remember what you said?--I told them that we'd had a lease drawn up - that is not the exact words, of course - but we had a lease drawn up, that Mr. Phipps had purchased the 30 acres with the dairy on it, that I was prepared to transfer the registration into his name - the registration of the dairy, that is - and we were now appealing to them for the quota to be put into his name so he could - so that he could continue on.

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30
Did you say anything further to the board other than words to the effect of what you have just said?--I think they wanted to see a copy of this lease and - yes, they did, because I had to deliver it back. I was still running around with leases. We weren't there long - five or ten minutes. We hardly got to sit down. They fired a few questions at me - or at us - and they were answered.

40
40
Do you recall whether the word "option" was used?-- Certainly not. This option business seems to be getting used a lot lately, but ----

Do you recall whether you used it?--Certainly not.

Did Mr. Phipps use it?--Not that I remember. I wouldn't have had a bar of it. I was terrified of options.

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50
You mentioned in evidence that the proposed purchase price of \$1000 an acre came up with the board meeting?--I don't see why it would, and I don't remember saying it. They've got it in their minutes. It's news to me, and I don't know how they got hold of it, and I am sure the cattle sale would have taken care of all that.

MR. DAVIES: I object to this witness speculating.

BY HIS HONOUR: You cannot speculate. If reference to the cattle sale was not made there it just cannot be made here.

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BY MR. McMILLAN: When Mr. Phipps approached you in April - and you believe it was 1980 - that is the best estimate you can give?--Yes.

If you had been informed then that he had the right to buy the lease leased land, what would you have done?--I certainly wouldn't have built a beautiful home on a hill that we'd waited all our lives for.

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~~Could you tell the court how much money has been spent on~~
Supreme Court

1 that house from the time you had this discussion with him until you got that letter from his solicitor?--You are saying that - when he actually came on the property?

Yes?--I don't believe there was anything done to the house at that stage. There was just the pad - the building pad.

10 When you got the letter-----?--I beg your pardon?

When you got the letter from his solicitor what had been done to the house then?--We had - I think we had - we could have - I think there would have been only trees planted and small buildings erected, just for convenience and what have you.

20 When you got the letter in which he said he wished to exercise the option that is all that had been done to that property?--Yes.

That is the point regarding the house - that he indicated to you that he was interested in purchasing some of the farm, said he couldn't afford the farm?--Yes.

30 What would you have done if you had been told he had the right to - been advised that he had the right to buy the river flats?--Well, I would have - I just couldn't have carried on because that's the whole exercise of my life out there. I wouldn't have carried on with the building of the house. I would have stopped.

Were you still interested in dairying at that point?-- At that point, yes.

Were you aware of the cost of dairying country at the time that you got that letter exercising the option?--Yes.

40 In relation to how much an acre for equivalent country - could you tell the court - are you able to tell the court?-- We are talking about the flats themselves?

Yes?--Not looking from a real estate point of view - because it's a crime to cut flats like that up - but looking at a farmer's point of view - to a dairy farmer, with a quota attached to those flats, they would definitely be worth, on today's market, according to the newspapers that come out -----

50 I want you to go back to the day that you got that letter exercising the option -----

MR. DAVIES: Ordinarily I would object to this because it is speculating and he is talking about the newspaper. I am only not objecting because everyone else seems to have had a go at saying what it is - with the qualification that when he is talking about the newspapers it cannot be given much weight. I am not going to object to it going in.

HIS HONOUR: Also he is one of the parties, of course.

BY MR. McMILLAN: Are you aware from your general knowledge in the area -----

HIS HONOUR: He hasn't answered the question. Mr. Davies has made it clear he does not object to the question, but he is pointing out that the question of weight is a matter for me, based on the qualification that reference to the newspapers which the witness has made -----

WITNESS: \$3,000 an acre.

BY MR. McMILLAN: The difference between \$1,000 an acre and \$3,000 an acre -----

HIS HONOUR: \$2,000.

BY MR. McMILLAN: If you were to replace the 79 acres could you have afforded being in a position to buy 79 acres at \$2,000 an acre when you got that letter?--Never.

You have told us about plans for building a house - a new house, I think you said?--Yes.

You were building one on the block which you bought next to the block you sold to Mr. Phipps ?--Yes.

Are they the plans you were talking about earlier in your evidence - that house?--No. I had plans to build another one earlier, before I purchased that land, on a 12-acre block.

Can you identify that from the sketch plan?--Yes. It's got "12 acc." written on it.

BY HIS HONOUR: Marked on Exhibit 18?--That was never leased.

BY MR. McMILLAN: That 12-acre block, what has happened to it now?--It was sold to a hobby farmer.

What year?--It would have been later on, after Mr. Phipps leased the flats and bought the 30 acres. The exact date I can't quite remember, but it was certainly later because we had some trouble with a dividing fence.

BY HIS HONOUR: What was the name of the hobby farmer?--Mr. Richter.

BY MR. McMILLAN: Can you recall how much you received from him?--Yes. \$13,900.

That site was - in acres - how big-----

HIS HONOUR: 12 acres. He said it was 12 acres.

WITNESS: 12 acres.

1 HIS HONOUR: If I am allowed to use the sketch, it is 1
5.228 hectares.

BY MR. McMILLAN: When were those plans drawn up for that
house? Can you recall?--The first house?

Yes?--They'd been drawn up for some time - a year or two -
before. They had to be re-drawn by the Ipswich Drafting Service.

10 A year or two before when?--Before I sold to Mr. Phipps. 10

So that would be December 1976 - thereabouts?--Roughly.
May I comment on that block, Mr. McMillan?

BY HIS HONOUR: No. You answer the questions. Mr.
McMillan will ask the questions that he thinks are necessary.
It might be an appropriate time to adjourn.

20 The Court adjourned at 12.59 p.m. till 2.30 p.m. 20

The Court resumed at 2.30p.m.

MR. McMILLAN: I have no further questions.

JAMES JOSEPH WATSON, continuing:

CROSS-EXAMINATION:

BY MR. DAVIES: From some time fairly early in 1977 you were being pressed by the mortgagee, Mr. Fryberg?--Yes.

And that was when you commenced selling off parts of your property?--Exact dates I don't remember, but in that period of time.

In the first half of 1977 you started putting parts of your property on the market?--I can't be sure, but in that time.

In the period approximately the first half of 1977?--Thereabouts.

In fact, your financial position worsened during the course of that year?--Yes.

And your health worsened during the course of that year?--Yes.

And you reached a low point, if I may put it that way, in terms of finances and health in December 1977?--Yes.

I think, to put it in your terms, you came out of hospital in December 1977 and your words, as I recall them, were, "The struggle my wife was putting up - I realised it was too great." Do you remember using those words this morning?--Yes.

That was then the time when you decided you wanted to get out completely?-- Yes. I thought it was the only way.

And it was then that you were for that purpose endeavouring to get rid of, in some way or other, your whole holding - to get out - sell it all or lease it; what ^{ever} you could?-- Yes, unfortunately.

The house block had the dairy on it, the 39 acre block?-- Correct.

That was a registered dairy?--Yes.

One can't get a quota without having a registered dairy, can one?--That's correct.

And it was very difficult then, and still is now, to get new quotas, isn't it?-- Impossible almost.

And it was then impossible almost?--Yes. It was-----

In fact, if someone surrendered their quota to the board it

1 was allotted to people who had existing registered dairies?--
I think so, yes. I think it was done that way at the
time.

If I may take you a little further forward in time
I will come back to some earlier events in a moment. I want to
take you to the occasion when Mr. and Mrs. Phipps came to the
dairy?--Right.

You recall that occasion?-----

10 HIS HONOUR: This is to the side gate?

MR.DAVIES: This is to the side gate.

HIS HONOUR: I mentioned that because there was some
other evidence about a dairy.

20 BY MR. DAVIES: There was only one occasion when Mr. and
Mrs. Phipps came to your dairy, was 't there?--Yes.

I'm sure you told us this morning that was before the
meeting in Mr.Zande's office. That is what you said this
morning?--Well, that will be correct, yes.

I suggest it was probably weeks before the meeting in
Mr.Zande's office?--Could have been.

A couple of weeks?--Could have been.

30 And that puts it, really, some time still in about mid-
December?--I thought it was a little later, but in December
some time.

Could have been mid-December?--I'm not sure.

Could have been?--I'm not sure.

40 You recall, as you said also this morning, discussing
the rates an you aren't sure who brought this up - who first
mentioned the rates?--No, I can't quite remember.

It may have been him, it may have been you; you aren't
quite sure?--I dare say it would have been me.

You are speculating because it was something which you
think now must have been of concern to you, but your actual
recollection does not leave you to conclude who it was?--No,
but I remember well.

50 You remember well it was discussed?--Yes.

But you can't recall who brought it up?--I dare say I did.

Are you saying you did from your recollection? Can you
actually recall or are you just thinking now it probably
would have been the case?--No. It was a vital question.
Rates are heavy out there.

1 No-one is disputing rates were discussed, and one of the things you and Mr.Phipps agreed upon is that the rental would be increased to \$220 a month to cover the rates, but what I am putting to you is that it might have been Mr.Phipps who raised the rates in the first place and finally you agreed.-----

HIS HONOUR: That is really two questions. We will have that read back.

10 (Shorthand notes of relative passage read.) 10

BY HIS HONOUR: What do you say to that, that Mr.Phipps raised the question of rates in the first place? That is the question, really - the first part of it?--Well, I'm sorry. I'm pretty sure I raised the question.

20 BY MR. DAVIES: And then your evidence this morning was, if I can refresh your memory about it, "They said something like" - or - "he said, 'I'd like to purchase the flats.'"?-- Yes. 20

And you said something like, "If that is in agreeance with my wife and myself and they become available in the future, sure, but otherwise, no way." Does that correctly state what you said?--Yes - for sale.

There was no question about the word "option" being mentioned?--"bsolutely not.

30 Never mentioned?--No. 30

And you, as I think you said to us this morning, were terrified by the word "option"?--"hat's right.

So if he had mentioned the word "option" to you you would have said, "Certainly not. You can't have an option." Would you have said something like that?-- I don't think that is what I said.

40 No, I'm not saying you did say that----- 40

BY HIS HONOUR: Mr.Davies is putting a hypothetical situation to you?--Yes.

If you assume-----

50 BY MR. DAVIES: You have told me the word "option" wasn't mentioned. You have also told me you were terrified by the word "option" because your father had had some problems with options; is that right?--Yes. 50

And if the word "option" had been mentioned - if he had said, "Look, I'd like an option." - supposing he had said that to you, you would have said - you were so terrified by the word "option" - "you certainly can't have an option. I'm not having a bar of options", or something like that?--That would be right.

60 And what if he said "a right of first refusal"; would you have said, "I'm not having a bar of that either."?--No. 60

1 But he didn't say that. ~~There~~ was no mention of that?--
I mentioned it.

I thought you said this morning, and I ask^{ed} you again now, and you-agreed that your words were, "If in agreeance with my wife and myself, and the property becomes available, sure, but otherwise, no way." Weren't they your words?--Oh, yes.

10 You had never used the words, "Right of first refusal"?--Yes, I did. 10

This is the first time, isn't it - the first time in this court that you have told us that you used the words "right of first refusal"?--Well, I did, sir.

And in what context did you use those words?--In what context?

20 Yes?--I'd say it would have been virtually in the same line - the same sentence almost. 20

"You can have a right of first refusal."?--Sure - I knew that well.

You say then that Mr.Fhipps mentioned a figure of \$750?-- Absolutely.

You are quite certain of that figure?--Positive.

30 Absolutely no doubt at all?--No doubt. 30

If someone suggested that he had mentioned a figure of \$600 you'd say that was quite untrue?--I disagree to it.

It would be untrue that he mentioned a figure of \$600?-- I remember \$750.

Clearly?--Clearly.

40 And you then said \$1,000; is that right?--Words similar. 40

And you said to us in evidence this morning you were very determined about that - very determined about \$1,000?--Only if he wished to sell.

But you said you were very determined about \$1,000?-- Well, I think we all are when we put a price on something. We want to hang^{on} to it.

50 If you^{were} not binding yourself to sell why were you so determined about the price?--Well, who knew the future at that stage? 50

But you weren't binding yourself. If you weren't binding yourself, either then or in the future, why would you be so concerned about the price?--Because we were about to sign a lease.

60 But the \$1,000 had nothing to do with the lease, did it?-- No, not really. 60

Supreme Court

No.4 Defendant's evidence
J.J. Watson
Cross-examination

1
Let me put it to you again. If you weren't binding yourself to sell then or at any time in the future why were you so concerned - why were you so determined to fix a price?-- I think covering myself in case it ever did arise that we had to sell.

You have to sell? Well, did you understand then that the agreement you were reaching was that at some time in the future, you may be obliged by that agreement to sell?--No, that wouldn't be right.

10
Did you understand that the agreement you were reaching didn't bind you in any way to sell at any price to Mr. Phipps? Is that the understanding you had of the agreement?--I'm sorry, I'm not quite clear on that question.

I will start again: did you understand that the effect of your agreement with Mr. Phipps that day was that at some time in the future you would be bound to sell, if he chose to make you, at the figure of \$1,000?--No, definitely not.

20
Did you understand then that you were not bound in any way to sell to him at any price at any time?--That's correct.

If that was your understanding why were you so determined, to use your words, to fix the price of \$1,000 an acre?--No real reason.

30
And you told us, I think, this morning that you had even obtained an opinion as to what was a proper price from a Mrs. Dorman - is that the name?--Yes.

She was a real estate agent?--Yes.

You had obtained her opinion as to what was a proper price to ask?--Yes.

40
And because she had given you that opinion that is why you weren't prepared to go below it; is that right?--To a certain extent. I had no valuator.

That was your price and you weren't prepared to go below it?--If the - no, that would be correct.

Why did you care if you weren't binding yourself to sell?--I think money meant a lot to me in those days; we were so desparate.

50
As you understand it the effect of what you were agreeing to that day was that it didn't matter if he came up with \$1,000 an acre, you didn't have to sell?--It certainly only took 5 minutes to discuss -----

60
Listen to my question instead of telling me what you think. Why were you so determined to fix a price of \$1,000 an acre if you were not binding yourself in any way to sell at any price?--I'd say because we were - no, I do say because we were about to sign a lease and everything that went into that lease had to be right.

I put it to you again that your understanding was, as you have told us just now, that you were bound in no way at all to sell to him at \$1,000 an acre; then or at any time in the future, is that right?--According to the lease.

According to what you understood you were agreeing on that day - never mind what the lease said?--According to what we were putting in the lease.

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What is your attitude that you are relying on? What is in the lease, in that, in you are standing by that?--Definitely not.

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Let us forget about the lease for the moment and talk about what you and Mr. Phipps discussed that day at the dairy, and what I am putting to you is why would you have any concern about the thousand dollars, if you understood that the agreement, the discussion you were having was not binding you in anyway at all to sell at any price? Have you an answer at all?--I think it is important to ^{convenience} it was important at that stage just to discuss it as matter of ^{for the future, if necessary, if we} decided to sell - no other reason.

Now, the meeting which took place in Mr. Zandy's office with Mr. Palfrey, Mr. Phipps and I think you said his mother; is that right?--Yes.

20
You were shown the contract which is dated 6 January; you recall that?--Yes.

Do you want to see that again?--No.

Mr. Phipps and you were present in the office, you say?--Yes.

And Mrs. Phipps?--Mmmmm.

Was it on the day the contract was signed?--Yes.

30
Because you said you and he signed in Mr. Zandy's office and you saw Mr. Phipps sign the contract?--Yes.

Quite sure of that?--Yes.

No doubt at all?--(No answer.)

40
Do not shake your head, you will have to answer. There was no doubt at all?--He signed there. I remember watching.

You remember watching him sign the contract?--Mmmmm.

MR. DAVIES: Might I have Exhibit 2 which is the contract?

HIS HONOUR: Exhibit 1 is the contract.

MR. DAVIES: Exhibit 1 - I am sorry, the contract.

HIS HONOUR: It is in front of the witness.

50
MR. DAVIES: And Exhibits 3 and 4?

(Handed to witness.)

BY MR. DAVIES: First of all, would you have a look at this document which is Exhibit 3. It is a letter from your solicitors to Mr. Phipps' solicitors dated 19 December, and it says in the first paragraph to be enclosing a copy of the first of the contract for signature by Mr. Phipps; do you see that?--Mmmmm.

1 There was not any other contract. It must have been the contract of sale for the block of land for \$39,500, must it not?-- Yes.

Would you have a look at this document next?--(Handed to witness.)

Perhaps before I ask you this - do you now Mr. Bloxsom?-- No.

Never met him?--No.

Have a look at the front page of that contract. Look at your signature there?--(Witness looks.)

Who witnessed that signature?--Palfrey.

Look below that. Do you see Mr. Phipp's signature?--Yes.

Who appears to be the witness of that signature?--Don't know.

Does the name appear to be "Bloxsom"?--Could be.

Would you have a look at this letter while you have those in front of you. This is a letter dated 21 December which, as you will see, is a letter from Dale and Fallu to your solicitors, and it says it is returning the contract, "Duly completed by our client"; do you see that letter?--Yes.

What signature appears at the bottom of that?--The same as on the contract.

Mr. Bloxsom's signature. I am putting to you that you told an untruth just now. That you did not see Mr. Phipps sign the contract, but he signed it not in your presence but in the office of Dale and Fallu?--He signed something. I stood there and watched him.

You have told us unequivocally that he signed that contract in your presence in Mr. Zande's office?--I was sure of that.

I put it to you now that that is untrue. Do you agree it is untrue?--I am sorry - it must have been, but not a lie from me. I believe that that is what he signed.

Hand those back-----

HIS HONOUR: Mr. Bailiff, bring all those exhibits back. If Mr. Davies is finished with that Exhibit 1 could I see it?

(Handed to His Honour.)

HIS HONOUR: Do you want those exhibits back?

MR. DAVIES: No, I do not, thank you.

BY MR. DAVIES: You went to Mr. Palfrey on several occasions during the course of this transaction, is that right?--Not really, I phoned him quite a few times.

Phoned him quite a few times?--And Mr. Zande.

And Mr. Zande. How many times did you go to Mr. Palfrey?--
I can't remember.

More than once, though?--Yes.

Only once with Mr. Phipps?--Yes.

Do you say that on any occasion you spoke to Mr. Palfrey
either on the phone or in his presence? Did you mention the
word "option"?--No, certainly not.

You are quite confident of that. You are so terrified of
options that you would never have mentioned that word?--It would
have been mentioned to him, but not to be put into the lease.

I see. You would have mentioned it to him, would you?--I dare
say that we would have spoke about it, because that is the main
thing I didn't want in.

I see. You did mention option to him, did you?--To Palfrey.

You did mention the option to Palfrey?--I don't recall.

I thought you said it would have been mentioned to him?--
It may have been.

No. You said to me just now "it would have been mentioned
to him."?--Surely it would have.

And you said to me just now "It would have been mentioned
to him."; do you wish to retract that statement?--No, because it
must have been.

It must have been - not by you?--Either myself or Zande.

Not by you?--Not directly, but I am afraid I didn't have a
lot to do - but I spoke mainly to Zande.

You may have mention option to him?--Only in the negative
sense.

You may have mention option in the sense of saying, "on
no account is an option to be granted."; is that right?--I don't
remember that.

Is that the only way you would have mentioned option?--
I can't remember.

Mr. Watson, I am trying to understand you. You said "Only
in a negative sense." What do you mean by that?--In a negative
sense - I mean that I certainly wouldn't want it have put in
because it hadn't been discussed with me and Phipps.

Did you mention option, the word option in either positive
or negative sense to either Mr. Zandy or Mr. Palfrey?--I'm sorry -
I don't remember.

Might you have done so?--I may have.

Might you have mentioned it in a positive sense as forming part of the agreement you reached with Mr. Phipps?--Certainly not.

If you mentioned it, it could only have been in a negative sense?--I knew what it meant.

If you mentioned it, it could only have been in a negative sense?--Against the lease, yes.

By that you mean, do you, a negative sense, in the sense of, "On no account is an option to be granted to Mr. Phipps."; is that what you mean by "in a negative sense."?--I can't answer that. I think you are just putting words into my mouth.

I am asking you what you mean by "in a negative sense."?--Negative means completely against.

Does that mean, ^{on} no account is an option to be included in the agreement - in the lease agreement?--That would be right.

MR. DAVIES: Might I see Exhibits 12 and 13?

(Handed to Counsel for the plaintiff.)

BY MR. DAVIES: Now, Mr. Palfrey made a note which is headed "Mr. Watson" and underneath it are the words "Not 'furniture', should be 'fixture'". Then underneath that, the word "lease", underlined and underneath that - perhaps I should hand it to you so you can have a look at it. I will start again.

HIS HONOUR: That is Exhibit 13.

(Handed to witness.)

BY MR. DAVIES: Mr. Palfrey told us that those words are "Mr. Watson" and underneath that "Not 'furniture', should be 'fixture'", underneath that the word "lease" underlined; underneath that, "Option to purchase to be at \$1,000 an acre. I am to pay rates he will pay electricity, rental \$220."; do you see that note?--Yes.

You say wherever Mr. Palfrey got that it couldn't have been from you. You did not tell him what is in that?--Maybe I'd say Mr. Palfrey, he was very curious, but he may have -----

No, just answer my questions. Did you tell him that or not-----

BY HIS HONOUR: Mr. Watson, just listen to the question. Just answer the question. Do not try and guess at what the questioner is after. -----

BY MR. DAVIES: Did you tell him what is in that or not?--I don't know.

You do not know?--I wouldn't honestly know where he got it from. I have not signed this. I don't know. I am answering your question.

4/12 cl/rd

You do not know whether you told him that or not?--That's right.

You have-told us that in conversation with Mr. Phipps you would not have mentioned the word "option" because you were terrified of them?--That's correct.

Do you say you would not have mentioned the word "option" at the meeting in Mr. Palfrey's office for the same reason?-- I don't think so, no.

You do not think so. You are not sure now?--Five years ago.

You may have mentioned the word "option"?--Definitely not. Couldn't have.

Definitely not?--That's right.

You would not like to believe that you said it, but you may have; is that putting it correctly?--I wouldn't have.

And so terrified of it, were you, if someone else had mentioned it you would have said, "Certainly not". Do you put it as highly as that?--The word frightens me.

If someone else had mentioned ^{it} in Mr. Palfrey's office, you would have said "Certainly not"?--That's right.

Mr. Watson, you agree that you went to the Board meeting on 27 January 1978 with Mr. Phipps?--Yes.

You agree that you did most of the talking?--Yes, I did most of it.

Do you say that notwithstanding that you did not mention the word "option" to the Board on that day?--I certainly don't remember.

1 Can you swear positively that you didn't?--Why would I? 1

No, can you swear positively that you did not?--No, I can't.

That board meeting, you told us, was the very next board meeting after Mr. Phipps indicated to you that he wanted to milk?--I believed it was the earliest one we could get on, really.

10 You described it this morning as the very next board meeting. They were your words?--Yes, I will have to correct that; it was the earliest possible one. I believe it was the next one. 10

I am not suggesting it wasn't the next one?--Right.

Your clearance sale of cattle had taken place a couple of weeks before that?--I believe so. I will stand corrected there.

20 I won't correct you on that. The cattle you had there at the time were quite good milking cattle?--The majority of them. 20

A good herd, you would say?--Yes, could be better.

But quite good?--Yes.

30 Could be built on?--Absolutely. 30

A good nucleus to start a dairy herd?--No, I wouldn't start a dairy herd with them.

Had no trouble selling them?--Yes.

You sold your dairy equipment except your bulk vat at that clearance sale?--Yes.

40 Had no trouble selling it?--Yes, had trouble. 40

But you sold it all?--Yes, but it went for a very low price.

It was reasonable milking equipment at the time?--Yes, there were a lot later models.

But it was reasonable equipment?--Reasonable.

50 Reasonable for some person who didn't have a great deal of money, starting out, that would be about the strength of it?--That would be correct. 50

The plaintiff never offered to buy any of your cattle?--No.

Never offered to buy any of your milking equipment?--No, that was Hayes' job. He could have, I don't know.

60 He didn't come to you?--I couldn't have sold it to him. 60

1 Why not?--Because it had all been put into the hands
of the auctioneer.

It didn't come to you before you put it in the hands of
the auctioneer?--No.

I am putting it to you it was after your clearance sale
that the plaintiff first decided to go into milking cows.
Could that have been right?--No, we discussed it before.

10 You discussed it before, but in the context in which
you discussed it, he ^{indicated} ~~no~~ interest at all. You and
his brother discussed it; he said he wasn't interested?--Yes,
he was interested.

But the last discussion you had with him before that
in your evidence was the discussion in which he said he
didn't want to milk stinking cows. That is the last discussion
you had with him?--If you read the rest of it -----

20 That is the last discussion you had with him about it?--
That is part of it - jokingly he said that.

Jokingly, was it?--I told you that this morning.

I thought you said it wasn't the interpretation you
put on milking cows?--That's correct.

30 So he was joking when he said that, and really quite
keen to go into milking cows, in that discussion?--I don't
think he said he was quite keen.

He wasn't interested at all at that stage?--He still
did.

Subsequently, but he wasn't interested at all at that
stage, was he?--I would say he was.

40 Nothing he said indicated he was?--He spoke to his
brother.

Nothing he said to you indicated he was?--Yes, he had
beforehand.

There is something else you have not told us, is there?--
No, that was the time we were joking that particular day.

50 Some other part of the conversation you have not told us
about, is there?--Some of the conversation I can't completely
remember, and I don't want to lie about it.

I don't want you to lie, either. Can you tell it what
it was?--I can't remember.

I put to you the truth of the matter is that it was
after your clearance sale that ^{he} first indicated the
intention to go into milking?--That's not true.

60 And in fact, it was at the very next board meeting
on 27 January that you and he went to the board together -

1 the very next board meeting after his indication of an interest in milking?--I'm not sure it was the very next board meeting; it was the first one we could get on. 1

I am using your term this morning?--And I corrected that.

There was a board meeting on 13 January, wasn't there?--I'm not sure.

10 It appears in evidence. There was a board meeting on Christmas Eve?--Could have been. 10

Could I take you now to the conversation which was on your property, you told us, in April 1980. That is the conversation which commenced with his saying to you, "What are you doing?" Remember that one?--Yes.

In fact, not only do you remember it, but you have a clear recollection of that conversation?--I do.

20 So clear, you are able to put it in direct speech to us?--Almost. 20

Your recollection of the conversation was - just correct me if I have taken you down incorrectly - he said, "What are you doing?". You said, "I am preparing to build for when we come back." He was clearly upset by this - this is your evidence - and he said, "You know I can't afford the flats. Would you consider selling me a portion at a time?" You said, "No, they are not for sale." He said, "We will let our solicitors fight about them," and you said, "What a shame. I don't want to fall out with you."?--Almost word for word. 30 30

That was the conversation and that was the whole conversation almost word for word?--That was ^{not} the whole conversation.

Tell us the rest of it?--It was as much as I can remember. 40 40

Was it the whole conversation about this matter?--I can't quite remember that. It was as much as I can remember.

You went on to say this morning that if he had said anything about having an option or having advice that he had an option, you would not have commenced building, and it was shortly after that you commenced building?--Yes.

Is that correct?--Yes. 50 50

So he didn't either say or imply that he thought he had an option? He asked you only if you would consider selling a portion, and when you said, "They are not for sale," he said, "We will let our solicitors fight about it."?--They are the words.

You thought that was a terrible pity; you wouldn't favour anything like that?--No, I would rather discuss that between us. 60 60

1
And if anyone asserts you said, "Let our solicitors fight about that," that would be quite untrue?--I beg your pardon?

If anyone asserts you said, "Let our solicitors fight about that," that would be quite untrue?--Absolutely.

10
And it would be quite untrue if anyone said that he said that he had an option and his solicitor had told him you were obliged to complete?--I don't quite understand the question, I am sorry.

It would be quite untrue to say that he said to you on that occasion that he had an option, and his solicitor said you were obliged to complete?--That's right.

20
That is quite untrue that he said anything like that, because if he had, you wouldn't have commenced building; is that correct?--I must apologise. I am not picking up your question.

I will start again. I will take you to your evidence; you don't want to go through the conversation again, do you?--No.

You said this morning after reciting that conversation that you commenced building shortly after that. Do you recall that?--Yes.

30
You hadn't commenced building then?--No, we hadn't.

Shortly after that you commenced building?--Yes.

You said that you wouldn't have commenced building after that; you wouldn't have put yourself to the expense of commencing building if he had on that occasion, on that day, asserting he had an option? Remember saying that?--I possibly did.

40
Because that is the truth, you say, because you wouldn't have commenced building if he had had an option that day?--I certainly had nothing to fear.

But if he had said - I am going on what you said this morning?--No.

50
You said this morning - correct me if I am wrong - this is my clear recollection of what you said this morning: if he had said he had advice he had an option, or advised you could be obliged to complete, you would not have gone ahead and begun building; is that true? That is what you said this morning?--If that's what I said, that's right.

That would be the truth?--Yes.

60
So there is no question he simply didn't say you were bound to complete - that he had an option and his solicitor said you were bound to complete?--He didn't mention "option".

1 He didn't mention the word "option", and didn't say anything to the effect that you would have to complete or would have to sell to him? He didn't say anything like that because, if he had, you wouldn't have gone on building?-- Yes, he did.

He did what?--He said he could force me to sell.

He did say that?--Yes.

10 You went ahead and built, despite that?--Why not?

It is simply that your case, as you have put it in the box this morning, is that you wouldn't have gone ahead building if he had said anything of that kind. That is the reason you gave in this instance. You said that this morning?--I have misjudged the question.

My question or the one this morning?--This morning.

20 So he did say he would force you to sell?--Words similar to that.

What did you say?--I never said much, if I rightly remember.

And you certainly didn't say, "Let our solicitors fight it out."? He said that?--No, I wouldn't have said that.

Just look at this document?--(Shown to witness.)

30 Is that a document which bears your signature at the bottom of the front page?--That is my signature.

Perhaps you should read the first page of that document, if you wouldn't mind; then would you have a look at the second page when you have done that?--(Witness looks.)

Have you read that?--Yes, there is a mistake there.

40 Look at the bottom of the second page; is that your signature there?--Yes.

Would you just, if you wouldn't mind, read paragraph 6 - the conversation?--(Witness looks).

50 In particular, where Mr. Phipps, you say, said, "I warn you I am going to take up the option. My solicitor said you will have to sell," and you say you replied, "Let the solicitors fight it out then."?--Yes, I shouldn't have said that.

That is quite untrue?--Yes, I should not have signed it.

Quite untrue, isn't it - what you swore there is quite untrue?--It is an absolute - it is a mistake on the solicitor's part that I swore to that.

A mistake on your part, too, isn't it?--No, it is not. It is a mistake that I signed that.

60 That is not your signature on that page?--That is exactly

1
what he said, my friend.

That is not your signature on that page?--Yes, it is.

MR. DAVIES: I tender that.

MR. McMILLAN: Could I see that?

(Handed to Mr. McMILLAN)

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(Handed to His Honour.)

HIS HONOUR: The copy affidavit sworn 24 February 1982 and annexure is Exhibit 20.

(Admitted and marked "Exhibit 20.")

BY MR. DAVIES: I think you and Mr.Phipps are agreed that it was on the second meeting that the final figures for the property and the lease were agreed?--No.

I see. You say the figure for the sale - the \$39,500 - was agreed at the first meeting?--That's right.

And at the second meeting the term of lease - five years and a rental of \$200 was agreed?--Was discussed.

Your evidence this morning was that you suggested a three year lease; is that right?--Yes.

And Mr.Phipps suggested a five year lease?--Yes.

When was that: on the first or the second occasion?--
First.

And it was on the second occasion that you agreed to five years?--After seeing my wife, yes.

Could it ever have been the other way around - that is, that Mr.Phipps suggested a three year lease to you and that you wanted longer?--No. Certainly not.

Did you ever tell your legal advisers that that was the case?--I don't think so. Not that I can remember.

Mr.McMillan, your counsel, put to Mr.Phipps that Mr. Phipps suggested a three year lease?-- Well, he was wrong then.

Or that he, Mr.Phipps' brother suggested a three year lease?--He was wrong.

And you didn't tell anyone that?--I refused a three year lease.

You didn't tell anyone you suggested a three year lease?--
I beg your pardon?

I'm sorry. You didn't say they offered a three year lease?--They wanted a five year.

If I can just put to you the sequence of the meetings so I understand your evidence, the first meeting, you agree, at your property was in mid-December; is that right?--Thereabouts.

At that meeting you say the \$39,500-----

MR. DAVIES: That passage I was referring to is on page 15.

BY MR. DAVIES: At that meeting you mentioned the \$39,500, and the next meeting was the next day?--Wa're not quite sure.

HIS HONOUR: One or two days.

BY MR. DAVIES: One or two days later?--Yes.

And again it was only a day or two after that that you looked at the house at Ipswich?--Not quite sure.

But approximately?--Possibly.

And again it was only a day or two after this that Mr.Phipps and his wife came to the farm and talked about the rates?--
Once again I'm not quite sure of the day.

But it was a matter of days, anyway - I don't want to pin you down to a precise date, but it was a matter of days?--
It wouldn't have been long.

And it was after this that the meeting took place in Mr.Zande's office?--Yes. It would have been.

And then you have told us the clearance sale was early in January; is that right?--In January, yes.

I put to you that it was after that clearance sale and before 27 January that you and Mr.Phipps had a discussion about his doing some dairying and his buying your land?--Yes.

I don't know whether you need to look back at that affidavit again, but you said when you were looking through it there was some mistakes on the first page?--Yes.

One of those you would now say is a mistake?--Yes.

\$600?--Yes. I trusted my solicitor.

Because you have sworn today that if anyone said that you said \$600 that would be untrue?--That's right.

MR.DAVIES: Thank you.

MR. McMILLAN: I have no further questions. I call Elwin Clifford Denman.

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ELWYN CLIFFORD DENMAN, sworn and examined:

BY MR. McMILLAN: Your full name is Elwyn Clifford Denman?--
That's correct.

You reside at 17 Macquarie Street, Booval?--Yes.

You are a registered valuer both in respect of rural and
urban valuations?--I am.

You operate a business at Brisbane Road, Booval?--I do.

Would you tell the court your background as a valuer - your
experience as a valuer?--I joined the Valuer General's department
from school in 1954. I had approximately 19 years with them
in most parts of Queensland. I attained the position of a
valuer, Division 1, with the Department.

BY HIS HONOUR: 19 years in the Valuer General's Office -
that doesn't tell me anything. You could have been a filing
clerk?--I was a valuer - division 1 valuer over the latter
years of that time, starting off as a cadet in 1954 to valuer
in 1972, when I left them. At the time I left the department
I was stationed in the Wide Bay area in charge of all urban
valuations in that area. In the last 10 years I have been
in the Ipswich area in private practice doing valuations on
all forms of real estate for all purposes.

BY MR. McMILLAN: You have had occasion to prepare a
valuation for the defendants in this matter over a certain
property at Fernvale, have you?--I have.

I want you to have a look at these two documents, please?--
(Handed to witness..)

Do you recognise those?--I do.

Are they the valuations you have prepared in respect of
certain river flat lands?--They are.

MR. McMILLAN: I tender those valuations.

HIS HONOUR: The valuation of 27.334 hectares is Exhibit 21.
Exhibit 22 is the valuation of 4.125 hectares.

(Admitted and marked "Exhibit 21.")

(Admitted and marked "Exhibit 22.")

BY MR. McMILLAN: You have copies of those valuations with
you?--I have, yes.

If you could look at Exhibit 21 - that is the valuation
in respect of the 27.334 hectares - that is the valuation over
two allotments bordering the Brisbane river?--That's correct.

And the other valuation in respect of 4.125 hectares -
that is in respect of an area of land on the other side of the
railway line from those first two blocks --That's correct.

If you could turn to page 2 of your valuation?--
(Witness does as requested.)

In the bottom section headed "valuation" where you refer to your valuation in 1977, at what date in 1977 are you referring to?--December.

That shows 27.334 hectares at \$1800 a hectare?--Per hectare. That's correct.

Could you tell the court what your conversion is for price per acre?--That's approximately \$730.

Could you go to the valuation for the other block where you see "December 1977" on page 2. Can you see the figure "\$8,000"? Can you calculate for the court what that rate would be per acre?--Approximately 800.

In February 1982, going back to the larger valuation, the figure of \$4,000 - would \$1600 per acre be-----?--That's an approximate figure, yes.

Approximate conversion?--Yes.

\$20,000 at February 1982 from the other block - could you convert that for the court into an acreage rate?--That would be approximately \$2,000 per acre.

When you valued both these parcels - if I can refer to them as such - did you bring to mind the aspect of a dairy quota?--No.

"Milk quota" I should say?--No, not at all. I valued the lands purely as they were - the river front block with the probability of the availability of water to any owner - that is, irrigation water - and the other site, or the other smaller property, the ten acre property, basically as a rural residential home site rather than as its use as a farm adjunct.

We will come back to that point later, but if those blocks had a milk quota attached to them would you value them any differently?--Well, the milk quota is worth an added value to the property, although the milk quota really, I think, attaches to the person more than to the property, or to both. Over the last three or four years it has been clearly common knowledge within the industry that a litre of milk is worth \$50, but in all probability in this modern day and age with milk farms having a ready return as far as banks and lending institutions are concerned, it could well be that it does add more than \$50. Actually, I have got no evidence to prove that.

Have you valued a block with a milk quota on it and included in it a factor for that milk quota?--I never differentiate. When I am doing a dairy I include that in with the property because in general there I am comparing dairy properties with dairy properties because the quota is within.

If you had to, for example, value what was a dairy producing property without that milk quota, what quota would you use to value it?--Looking to the property, I would be looking to sales of properties that didn't have a quota attached.

In your experience would they be less acre for acre than one with a milk quota?--I believe so, but I haven't any evidence to actually prove that.

Turning to the larger block, the one at the equivalent of \$730 an acre in December 1977, that was valued, as you say, without a milk quota attached to it?--That's correct.

With the knowledge that there was a milk quota attached in December 1977 would you increase that figure, and if so, to what degree?--Well, I guess I would increase it by a minimum of \$50 a litre for the quota that was there. Whether I could justify any further amount over and above that, I don't know. I haven't done any research in that area, but I would think that at least it would increase by that \$50 per litre.

Are you aware of the litreage quota attaching to those two blocks?--I believe that there is a quota for that area - to cover that area of 170 litres.

You have checked that out, have you?--Not with the factory.

You obtained that information from where-----

MR. DAVIES: I object to that unless he checked it with the factory. Obviously these witnesses are allowed some latitude, but unless he checked it from proper sources -----

HIS HONOUR: Yes, I think that is a proper objection. I uphold it.

BY MR. McMILLAN: You mentioned that the valuation for the smaller block, that is sub-division 1 of re sub-division C, was based on a residential figure?--What term a rural residential home site basis.

It is property fit to carry dairy cattle though?--Yes. It has been used for grazing and it is suitable for that purpose but in the market place today it would more likely be used for rural residential home site purposes.

BY HIS HONOUR: What you are saying is that on its own it would carry very few cattle?--That's correct.

It is a hobby farm for a weekend - a ten acre block, really?--That's correct.

BY MR. McMILLAN: If it was farmed in conjunction with the other two blocks would you have valued it at the same rate?--I would have valued it in an amalgamation with the other two properties at a lesser rate.

At a lesser rate?--Yes.

Could you give any indication at all what that would be?--Without having any cognizance of the residential site on it I'd say \$500 to \$600 per acre.

Were you aware of what the market was like in the year 1977 in relation to dairy properties in the Fernvale and contiguous areas?--Not particularly. There isn't a lot of sales to go on, particularly on the river, which would indicate to me that the market generally was slow, although I think it must be remembered of the last 5 or 6 years, with the exception of the calendar year 1981, the market has been slow.

What significance does the calendar year 1981 have?--I would term it as being in general a mini boom within the Real Estate Industry, more particularly in relation to residential and rural residential home sites but with some influence going onto the rural areas, as always happens.

Is that reflected in the figure per hectare that you have estimated in February 1982?--That is correct.

There has been in something like five years quite a jump?--In my opinion it is most likely that the rural segment, if we can work in average increases, probably rose about 10 per cent per annum in 1978, 1979 and 1980, and by a much larger percentage - probably 30 per cent - in the 1981 year. There again I haven't got a great magnitude of sales to prove that, but being involved in the real estate industry over the period that would be my estimate of what did occur.

And did that mini boom start right in January 1981 or did it start to rise and pick up over the months?--My memory of my real estate office was that it happened directly from the start of January 1981 and went through into February 1982, and then tailed off.

MR. McMILLAN: Thank you.

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Supreme Court
No.4 Defendant's evidence
E.C. Denman
Exam.-in-chief

MR. DAVIES: No cross-examination.

PAULINE ELAINE WATSON, sworn and examined:

BY MR. McMILLAN: Your full name is Pauline Elaine Watson and you reside with your family at 11 Globe Street, Gailes?--That's correct.

And you are one of the defendants in this action?-- That's right.

You and your husband have had an interest in the rural areas for some time?--That is correct.

And that came to some success in 1974, did it?--That is right.

When you bought some land at Fernvale?--That is right.

What was the intention when you and your husband went onto that property?--The idea was to farm it and run a dairy farm there, and also to stay in the district for as long as we wanted to and to rear our children there.

And how did things go over the years from that time on?-- Well, we started there in 1974 - at the end of 1974. The dairy industry shortly afterwards took a downturn. The milk industry just wasn't what it used to be. We had droughts, we were being pressed very, very heavily from our second mortgage person, Mr. Fryberg, that we owed a considerable amount of money to. We were also being pressed by the Bank of New South Wales that had the first mortgage over the farm, and we found that we just couldn't make ends meet. We had to subsequently sell off a portion of our property-----

When did this occur?--About 1976, I think - I would not quite be sure. We sold it to Mr. Phipps' brother. That was a 40 acre block - a dry block. We used to just run some dry cows on it.

That was Ken Phipps, was it?--No, this was Mick - I can't remember.

Doug Phipps?-- Doug Phipps, that's right. We also still had financial difficulties. We didn't have very much rain; we were using our electrical equipment for pumping for irrigating our crops which was causing considerable hardship as much as we couldn't afford to pay our electricity accounts all the time. We had to eventually make a decision what we were going to do. We wanted to stay in the area; we wanted to live in the area; but we had to make another decision what we were going to do. We kept a 12 acre block - I think it was around about the end of 1977 because we did have a buyer on that block.

1 We decided that we would possibly have to sell the whole of
the farm, that was, the rest of the farm. 1

10 When were you coming to this decision?--That was - actually,
it would have been round about June/July of 1977. We had been
discussing what we were going to do for quite a considerable
amount of time, and it caused us a great deal of distress.
We saw what we had been working for all our years suddenly
crumble in front of us. We didn't want to leave the area
but we knew that we would have to make a decision, and the
decision was made later on that we would sell another portion
of that farm which was the 30-acre block that we subsequently
sold to Mr. Glen Phipps. It was another - it was a house block
with an older type home on it, with a dairy shed on it and
some other out buildings. Then ---- 10

20 The decision was made to do that towards the end of
1977, was it?--That's right, yes, round about - I think,
about December.

20 You recall your husband discussing with you, the meetings?--
We had not stopped discussing those for months and months,
but he did discuss ----- 20

MR. DAVIES: I object to what they may have ----

HIS HONOUR: Yes. Inadmissible.

30 BY MR. McMILLAN: You were aware that your husband was
speaking to Glen Phipps about the sale?--Yes, I was aware of it. 30

But you were not involved^{at} any stage in the negotiations?--
No, not directly.

You were working, were you not?--I was working, yes.

Do you recall your husband coming to you and telling you ----

MR. DAVIES: No, I object to that.

40 HIS HONOUR: How do you make that admissible, Mr. McMillan? 40

BY MR. McMILLAN: Do you recall a contract being signed?--
I recall a contract being signed.

With Mr. Phipps as the ----?--Mr. Phipps as being the
purchaser, yes.

50 You also recall the leases?--Many. There were quite a
few, yes. They seemed to be floating around everywhere. 50

Do you recall reading through those?--I read them completely
at the time.

Would you have a look at Exhibit 2, I think it is?--(Handed
to witness.)

You see your name at the top of that document?--Yes, I do.

1 Do you recognise that document: Just have a quick look at it?--Yes, this was one of the leases.

Could I direct your attention to paragraph 3(a). It is on page 4, halfway down?--That's right, yes, I have it.

Would you just read that to yourself there?--(Witness does as requested.) Yes, I have read it.

10 That is not the first time you read that clause?--No, I've read it many times.

HIS HONOUR: Mr. McMillan, it is a little ambiguous. Does the witness mean she has read it many times in that document?

MR. McMILLAN: I was going to go on, Your Honour.

20 BY MR. McMILLAN: Have you read that clause in that document on more than one occasion?--Not in - only once in this document, and I have just read it.

Have you seen it in other documents, that clause?--I have seen this clause in other documents.

What it says there - did you discuss any of the terms of that clause with Mr. Phipps?--Never.

30 Your intention in December 1977 in relation to the 30-acre block was to do what?--In 1977?

BY HIS HONOUR: The 30-acre block is the one with the house and dairy, so that you know what your barrister is talking about?--The 30-acre block in question was sold to Mr. Phipps.

BY MR. McMILLAN: That was your intention to do that?--Yes.

40 In so far as the rest of your farm was concerned, what was your intention in December 1977?--Never to sell the whole of the farm. The idea behind it was that if we did decide to sell at a future date within the lease period, well, the lease wasn't even mentioned at that time, but if we did decide to sell later because of any number of reasons - ill health, or whatever - that Mr. Phipps could have the opportunity to purchase our property.

MR. McMILLAN: I have no further questions.

50 CROSS-EXAMINATION:

BY MR. DAVIES: You did not discuss any of this matter with Mr. Phipps because you left all of the negotiations to your husband?--I didn't leave all the negotiations to my husband. We had -----

You did not do any of them?--I didn't do them exactly, but we did have indirect - I had -----

You had discussed ----?--We had talked about it.

No doubt you discussed it with your husband, but you left him with authority to talk to Mr. Phipps about it?--On my behalf?

Yes, on your behalf?--Yes.

Is that right; and you agree, with Mr. Phipps, on your behalf?--Not entirely. If we came to an arrangement about certain things, that would have been all right. I wouldn't agree to anything. It had to be something that was agreeable to us.

But so far as - perhaps I have not put it correctly, clearly enough to you, but so far as you and Mr. Phipps were concerned, you left your husband to be the intermediary, to be the initiator?--That's right.

Mrs. Watson, finally, I put it to you that your intention in December 1977 was to lease that 79 acres to Mr. Phipps with an option for him to purchase?--Never.

During the lease period?--Never.

MR. DAVIES: I have nothing further.

MR. McMILLAN: If the witness could be excused?

HIS HONOUR: Yes, you are excused from further attendance.

MR. McMILLAN: That is the case for the defence.

HIS HONOUR: Any evidence in rebuttal at all?

MR. DAVIES: No.

MR. DAVIES addressed His Honour.

MR. McMILLAN addressed His Honour.

BETWEEN:

GLEN ROBERT PHIPPS

Plaintiff

AND:

JAMES JOSEPH WATSON
and PAULINE ELAINE WATSON

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Defendants

JUDGMENT - SHEPHERDSON J.

Delivered the 19th day of August, 1983. 20

The plaintiff seeks an order for rectification of a lease made on the 7th April 1978 between the plaintiff as lessee and the defendants as lessors under which the defendants leased to the plaintiff an estate in fee simple in the land therein more particularly described for a period of five years commencing from 17th February 1978 at a rental therein specified. The land in question which is registered under The Real Property Acts 1861-1981 has a total area of 77 acres 2 roods 38 perches (31.459 hectares) and is situated at Fernvale. The lease itself is not yet registered in the Titles Office but had been lodged for registration in that office on 4th May 1979, rejected by that office on 9th July 1979 and lodged once again on or about 17th December 1981. The lease contains among the mutual agreements between the parties cl. 3(a) which reads as follows:-

"(a) At all times during the said term or at the expiration of the said term the lessee may offer to purchase the demised land from the lessor for the consideration equivalent of one thousand dollars (\$1,000.00) per acre."

It is this clause which the plaintiff seeks to have rectified 1
"so as to embody an option to purchase conferring upon the
plaintiff the right to purchase the lands ... during the subsistence
of or at the expiration of the lease ... at a price of \$1,000.00
per acre". If rectification is ordered the plaintiff seeks a
declaration that the plaintiff's purported exercise of the option 10
to purchase on 11th February 1982 be deemed to be a valid and
proper exercise of the option. The plaintiff further seeks specific
performance of the agreement as rectified.

Before me the principal issue was whether or not the plaintiff 20
had made out a case for rectification.

The plaintiff's case was that there was a prior oral agreement
made between the plaintiff and the defendants whereby it was agreed
that the lease would contain a clause conferring on the plaintiff
an option to purchase the defendants' land during the subsistence 30
of the lease or at the expiration thereof for a consideration
equivalent to \$1,000.00 per acre, that the lease was intended to
embody that prior oral agreement, that the lease was so signed by
the plaintiff and the defendants in the belief that it embodied
that prior oral agreement but that the lease was drawn up and 40
signed under a mutual mistake of fact in that both the plaintiff and
the defendants were at all material times of the belief that the
agreement contained a valid and enforceable option clause. The
defendants put all these claims in issue. By a late amendment to
his statement of claim the plaintiff pleaded in the alternative 50
that if there was no prior oral agreement as alleged it was the
common intention of the plaintiff and the defendants continuing
up to the time of execution of the lease that a term such as that
alleged be included in the lease and by mistake it was not.

The plaintiff's case depended largely on the evidence of the plaintiff and his wife and of a Mr Palfrey, a solicitor in the employ of Messrs Dale and Fallu the firm of solicitors acting for the defendants.

There were serious issues of credibility. The plaintiff is a young man who in mid December 1977 had heard that the defendants had their property at Fernvale up for sale. This property consisted of the land which is the subject of the above lease and a block containing 30 acres. On this latter block was a dwelling house, a dairy, a garage, a barn and a shed. In evidence the 30 acre block was called "the top portion" and the remaining land of some 77 acres was called "the river flat area". The latter area had quite a large frontage to the Brisbane River. The top portion and the river flat area were separated by a road and the top portion appears to have been some distance to the south and east of the river flat area. In mid December 1977 the plaintiff's brother named Ken Phipps had lived on a property adjoining the defendants' and the plaintiff himself had earlier lived with his brother on that property for about five years. On the top portion the defendants operated a registered dairy and all the land was used in this operation. The river flat area which was cultivated with lucerne and oats provided grazing for the dairy herd and the defendants strip fed the herd on this part of the land. Any person using the top portion as a dairy needed the river flat area to have any chance of success as a dairy farmer.

In mid December 1977 the plaintiff and his brother spoke to the male defendant at the defendants' property and asked him if it would be possible for the plaintiff to purchase the top portion of the farm on condition that the plaintiff could lease the river flat

area. A price for the top portion was mentioned - it was \$39,500.00. 1
The term of a lease was discussed and possible terms of three and
five years were mentioned. I pause to point out that in respect of
this first discussion there was disagreement between the parties as
to certain aspects of the discussion. For his part the plaintiff
asserted that the male defendant agreed to give a five year lease 10
with a rental of \$200.00 per calendar month - the male defendant
said there was no agreement as to term or rent.

One or two days later the plaintiff, accompanied by his brother
Ken, again met the male defendant on the defendants' property.
According to the plaintiff he and the male defendant agreed that 20
the plaintiff would buy the top portion bare of stock for \$39,500.00
and the defendants would give him a five year lease over the river
flat area at a rental of \$200.00 per calendar month. The \$39,500.00
was to be satisfied to the defendants by the plaintiff transferring 30
to the defendants a house at Coalfalls Ipswich said to be worth
\$25,000 and by paying the balance in cash. The male defendant
was to inspect the Coalfalls house. There was basic agreement between
the parties as to the matters to which I have just referred. The
male defendant however said that save for agreeing on the five 40
year term there was at that stage no agreement as to who was to
pay rates, electricity, etc.

The plaintiff said that shortly after this conversation he
went to the office of his solicitors, Messrs Dale and Fallu, and
there saw a Mr Bloxsom. The date of this interview was not disclosed 50
in evidence although the plaintiff said it was in mid December.
The plaintiff received certain advice from Mr Bloxsom as a
result of which on the same day at about 4 to 5 p.m. he and
his wife went to the defendants' farm and there saw the male
defendant who was in the dairy milking. The plaintiff swore that the

male defendant had a discussion with him and his wife at the side gate to the dairy.

According to the plaintiff there was initially a discussion about who was to pay the rates on the leased area and as a result of this discussion the plaintiff offered to pay an extra \$20.00 per month on the lease of the land and the defendants would pay the rates. The plaintiff said the male defendant agreed to this. The plaintiff claimed that he then had a discussion with the male defendant which resulted in the agreement on which he bases his claim for rectification. His evidence was:-

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After that I asked him would he give me an option to purchase the 79-acre block of land that I was going to lease, and he said he would and he then went on to explain to me how good they were -----

How good what were?-- How good the land was. He said it was very good land. It was river soil, and he also said that considering the lease is a five-year lease he believed he would have to ask \$1,000 per acre.

How did that price compare so far as you knew with current prices of land of that area?-- Well, I believed it was rather steep. I also know that -----

What was the going rate?-- Well, the going rate, I believe, was about \$600, \$700 to \$800, depending on the land, of course, but similar land, and that was top going in my opinion at that time.

I interrupted you. You said that he said seeing as the lease had another 5 years to run he would have to ask \$1,000?-- That's correct.

What did you say to that?-- I agreed to it."

The plaintiff's wife gave evidence to support her husband. Her evidence so far as related to the discussion after the agreement by the plaintiff to pay an extra \$20.00 per month in return for the defendants' paying the rates was:-

" BY MR DAVIES: After that discussion what else was said?-- Glen asked him would he consider an option to purchase within the lease period.

" And what did Mr Watson say?-- He said - well, he said he would have to consider how well the flats were and what the price rise would be within five years and he asked for \$1000 an acre. 1

Was it all said as quickly as that?-- No, there was other general discussion between -----

Was this discussion about the flats area as short as that?-- No. He went on to say how well they were, and that's about it - just how well they were. 10

He said he would have to ask \$1000 an acre?-- Yes.

What did your husband say to that?-- Glen agreed to it."

For his part the male defendant admitted an occasion when the plaintiff and his wife had come to the side gate near the dairy. He agreed that there was there a discussion with the plaintiff and his wife as a result of which he agreed that the plaintiff would pay the electricity and the defendants would pay the rates and the rent on the lease would increase to \$220.00 per calendar month. However, he denied the accuracy and veracity of the claims by the plaintiff and his wife as to the conversation thereafter. According to the male defendant he said that the plaintiff had asked if he would "accept \$750.00 an acre if we ever sold and I said no it would be more like \$1,000.00 and it would have to be \$1,000.00. I was very determined on that matter". The male defendant said in evidence during cross-examination that he had told the plaintiff and his wife that they could have a right of first refusal. 20 30 40

This meeting at the side gate to the dairy and what was said at it was a focal and vital point in the plaintiff's case. I should here say that the exact chronology of all events including meetings between the parties was difficult and indeed impossible to piece together accurately. 50

What was clear however was that the following events did occur but in some instances the date of occurrence was uncertain:-

1. At some date probably in mid December 1977 the male defendant visited the plaintiff's house at 1 Ashgrove Avenue, Coalfalls and satisfied himself that it was worth \$25,000.00 and that the defendants would accept a transfer of this house to them as part payment of the purchase price of \$39,500.00 for the 30 acre block. 10

2. By a letter dated 19th December 1977 Richard Zande and Associates, the solicitors acting for the defendants wrote to Dale and Fallu a letter which, omitting formal parts, read:- 20

" Re: Watson sale to Phipps

We enclose herewith contract for sale in duplicate for signature by your client and return to our office at your earliest convenience.

We understand from our clients' instructions that your client will have the option to purchase certain other lands during the currency of a lease yet to be prepared and that such option shall be contained in the said lease. 30

We await receipt of your further advices herein at your earliest convenience."

(See Exhibit 3). 40

3. By letter dated 21st December 1977 (see Exhibit 4) Dale and Fallu wrote to Richard Zande and Associates as follows:-

"RE: PURCHASE G.R. PHIPPS FROM J.J. & P.E. WATSON

With reference hereto we return herewith contract of sale in duplicate duly completed by our client and shall be pleased to receive the original thereof when same has been executed by your client vendors. 50

We shall also be pleased to receive the lease contained in the option to purchase in due course."

3. There was a meeting in the office of Richard Zande
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and Associates at which were present the plaintiff,
the plaintiff's mother, the male defendant and
his solicitor, Mr Palfrey.

4. On 6th January 1978 the defendants signed a
contract in writing whereby they sold to the
defendants for \$39,500.00 the 30 acres forming the
top portion of their farm at Fernvale (see Exhibit 1).
This contract expressly provided in a special type-
written condition:-

"(c) This contract is also subject to the
vendors granting to the purchaser a lease
for five years (5) over approximately 78
acres adjoining the property the subject of
the within contract."

5. On 25th January 1978 Richard Zande and Associates
wrote to Dale and Fallu & letter (Exhibit 5) which
(omitting formal parts) reads:-

" Further to our previous correspondence we
enclose herewith your client's copy of the
relevant contract of sale together with draft
lease for your perusal.

We acknowledge receipt of deposit of \$100.00
and expect to be in a position to advise you
of the vendor's application for finance pursuant
to special clause (a) of the contract in the near
future.

We invite you to complete the draft lease
where blanks occur and we would appreciate your
further advices in the near future."

The \$100.00 deposit therein referred to appears to have
been the deposit referred to in the contract (Exhibit 1).

6. On 27th January 1978 the plaintiff and the male
defendant attended a meeting of the full board of
directors of the Queensland Farmers Co-operative
Association Limited.

7. On 1st February 1978 Richard Zande and Associates wrote

a letter to Dale and Fallu (Exhibit 6) which
(omitting formal parts) reads as follows:-

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" We enclose herewith lease in triplicate
duly executed by our client. Kindly
request your client to execute same and
return these documents to us for payment of
stamp duty and registration. We also
enclose herewith our account for consideration
by your client."

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8. On 9th February 1978 Dale and Fallu wrote to Richard
Zande and Associates a letter (Exhibit 7) which
(omitting formal parts) reads:-

" We refer to your letter of the 1st instant
and to our recent telephone conversation and
enclose herewith lease in triplicate duly
signed by our client. We will forward you our
client's cheque in payment of your account on
receipt thereof ... P.S. Cheque for \$372.20
herewith. Please acknowledge."

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This letter appears to have been signed by Mr Bloxsom.

9. A document styled "LEASE" made between the defendants
as lessors and the plaintiff as lessee over the river
flat area was executed. This lease which is Exhibit
19 was signed by the plaintiff on 6th February 1978
and by the defendants on 1st February 1978. It
contained among the mutual agreements between the
parties a clause, Clause 3(a) which is in identical
terms to the Clause 3(a) of the lease in respect of
which rectification is sought.

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10. On or about 17th February 1978 the sale and purchase
of the 30 acres being the top portion was completed
at settlement.

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At the meeting of the directors of the Queensland Farmers
Co-operative Association Limited the male defendant made certain
statements. Minutes of that meeting were tendered in evidence

(Exhibit 15) and these minutes show:-

" At approximately 10.20 a.m. Messrs Watson and Phipps were received by the Board. Both the suppliers had appeared at Head Office requesting an opportunity to discuss with the Board matters relating to a sale from Watson to Phipps and the involvement of the quota.

Mr Watson stated that he had recently sold 30 acres and his dairy and house to Mr Phipps and leased a further 90 acres to Mr Phipps with an option to purchase. He had not supplied since 15th January 1978.

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After answering questions the visitors retired."

I should here say that in oral evidence the male defendant denied that he had made to the board the statement attributed to him in the minutes. He was unable to swear positively that he did not mention to the board the word "option".

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In the plaintiff's case no evidence was led to prove the circumstances under which the plaintiff on 6th February 1978 had signed the lease (Exhibit 19) which lease had obviously come into the plaintiff's solicitors' hands before the plaintiff signed it (see Exhibits 6 and 7).

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It was not in issue between the parties that the lease (Exhibit 19) was not in a form which could be registered in the Titles Office and therefore a fresh lease thought to be in registrable form was executed by the parties. That lease (Exhibit 2) is the document dated 7th April 1978 of which rectification is sought. One notes that on 7th April 1978 the plaintiff's solicitors wrote to the defendants' solicitors a letter (Exhibit 8) which omitting formal parts reads:-

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" RE: LEASE PHIPPS FROM WATSON

With reference hereto we advise our client has now called on us and completed the lease herein which in spite of our instructions to have same forwarded to us was handed to your client who took same to Mr Phipps and requested him to sign same.

" We have been through the lease and point out that we have marked errors on pages 2 and 5 which require amending and request that you will attend thereto before lodging in the Titles Office.

We would also wish to bring to your notice that our client has informed us your client has not delivered to him the Tyne Rippers and the Blowamist Portable although he has stated on several occasions he would have same delivered. We bring this to your notice as these items are contained in Schedule No. 2 which are not yet in the possession of our client and in the event of any termination of the lease we require it put on record until such time as we notify you these items have been delivered to our client."

I pause to point out that that letter indicates clearly that the plaintiff's solicitors had been through the lease apparently with some care because certain items referred to in Schedule No. 2 to the lease were said not to have delivered to the plaintiff.

One notes also that the plaintiff's signatures to both leases (Exhibits 19 and 2) were witnessed by the same person.

A major witness in the plaintiff's case was Mr Warren Harold Palfrey a solicitor who in December 1977 had been employed in the office of Richard Zande and Associates for about twelve months. Mr Palfrey was admitted as a solicitor in April 1976. He was a young man. His work with Zande and Associates was, he said "perhaps exclusively in the common law field. I did very little conveyancing" He also said that it was the first farming lease he had done. His evidence-in-chief was provided principally in a signed statement dated 25th July 1983 attached to which were photocopies of certain notes he had made and a photocopy of the letter dated 19th December 1977 (Exhibit 3). It was clear from that statement (which is Exhibit 11) and indeed from the whole of Mr Palfrey's evidence that he had virtually no recollection of his dealings with or involving the defendants or either of them and that what he said in evidence before me was really based on what he said was his memory refreshed

from the notes he had made at the time. Four pages of such notes were put into evidence (Exhibit 12). When they were made did not appear. I formed the view that they were made at the same time and probably some short time before the letter dated 19th December 1977 (Exhibit 3) under cover of which the contract of sale was sent to the plaintiff's solicitors.

The first page of Exhibit 12 is almost all in the hand-writing of Mr Palfrey and that includes the following:-

"Lease bottom flats for 5 years. Option to purchase for this (?) as well." (The question mark is mine).

The third page of Exhibit 12 is all in the hand-writing of Mr Palfrey and this hand-writing includes the following:-

"Lease 5 yrs option to purchase.
Rental \$200 - calendar mth. Rates to be paid by lessor."

Pausing here I find it difficult to place the latter reference to the rates before 19th December 1977 because if the plaintiff is correct this matter was not agreed until the meeting at the gate when he said agreement was reached that the rent would be \$220.00 per calendar month. At the top of p. 3 of Exhibit 12 the rent is said to be \$200.00 per calendar month. This point illustrates well the difficulty I have had in attempting to piece together in reasonably accurate chronological order the meetings between the parties and the discussions at those meetings.

Exhibit 13 is a single page containing hand-written notes by Mr Palfrey. He translated this hand-writing in evidence in the witness box and it reads:-

"Mr Watson
not furniture should be fixture
lease
option to purchase to be at \$1000 per acre
I am to pay rates
he will pay electricity
rental \$220.00

"advise Mr Bloxsom of R.P.O. description."

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I shall have more to say about Exhibit 13 later - it was the document on which the plaintiff relied heavily.

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The defendants tendered in evidence through Mr Palfrey another signed statement by Mr Palfrey (Exhibit 14). This was a statement signed by Mr Palfrey at the request of the defendant's solicitors shortly before he gave evidence before me. It dealt with a meeting in Mr Palfrey's office at which the male defendant and the plaintiff and the plaintiff's mother were present to discuss, as Mr Palfrey said, the preparation of a lease. At the time of making the statement (Exhibit 14) Mr Palfrey had before him hand-written notes which he said were made by him at the time of the interview. In the witness box Mr Palfrey indicated the four pages of notes (Exhibit 12) as being the notes which he there referred to. In his statement (Exhibit 14) he said that he was unable, even after reading the notes, to say what the intention of the parties was. In reference to cl. 3(a) in the lease he said in his statement "I agree that the clause in its present form does not constitute an absolute option to purchase".

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In the witness box Mr Palfrey agreed that he could give no indication of the identity of the person from whom came the word "option" used in the notes (Exhibit 12). To return to Exhibit 13 - the plaintiff relied heavily on this because in the plaintiff's submission this clearly showed that the male defendant had told Mr Palfrey that the plaintiff, who was the lessee under the lease, was to have an option to purchase the leased land at \$1,000.00 per acre. The plaintiff also relied heavily on the letter of 19th December 1977 (Exhibit 3) and the statement therein relating to an option to purchase. This letter was composed by Mr Palfrey but not

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signed by him.

Although in his signed statement (Exhibit 11) Mr Palfrey said
(in referring to the letter of 19th December 1977):-

"In using the word option to purchase in that letter
I again intended to use the word in the sense and to
convey the meaning of 'legally enforceable option'."

I am not at all satisfied that when Mr Palfrey used the word "option"
in that letter he intended to convey the meaning he now says he did.
I take the same view of Mr Palfrey's use of the word "option" in
the hand-written notes (Exhibits 12 and 13). Mr Palfrey was I
though easily suggestible in evidence before me and that virtually
all his evidence was his present reconstruction based on his notes
and other documents which had come into existence at about that time.
Mr Palfrey was well aware of the importance of his evidence in this
case. In assessing what weight I should give to Mr Palfrey's
evidence, I was not helped at all by a complete lack of evidence
about how this young solicitor, inexperienced in conveyancing and
especially in preparing farm leases, went about drafting the lease
and in particular drafting cl. 3(a) which appeared in the first
lease (Exhibit 19) and the second lease (Exhibit 2). Did Mr
Palfrey have a suitable precedent? If so, from whence did he obtain
that precedent? Or did he, without the aid of any suitable
conveyancing precedent for an option to purchase, draft cl. 3(a)
and therein set out what he then believed was the intention of the
lessor at that time? I thought these were matters of vital signific-
ance because after all it is part of the plaintiff's case that both
the leases were signed by both the plaintiff and the defendants in
the belief that each embodied the oral agreement conferring the
option to purchase at \$1,000.00 per acre which the plaintiff alleges
was made at the side gate to the dairy.

No evidence was called as to the circumstances under which the
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plaintiff signed each lease and more particularly of what attention
the plaintiff's solicitors paid to the lease when it was received
by them first in draft form under cover of the letter of 25th
January 1978 (Exhibit 5), later when it was sent by the defendants'
solicitor to the plaintiff's solicitor under cover of a letter
dated 1st February 1978 (Exhibit 6), later when on 9th February
1978 (see Exhibit 7) the executed first lease was sent by the
plaintiff's solicitors to the defendants' solicitors and later still
when on 7th April 1978 the executed second lease was sent by the
plaintiff's solicitors to the defendants' solicitors (see Exhibit
8).

That letter of 7th April 1978 makes it quite clear that the
plaintiff's solicitors perused the lease and I infer examined it
fairly closely - they pointed out certain errors. No complaint
was made then that cl. 3(a) did not express the true agreement
between the parties. Clause 3(a) is in identical terms in each
lease. The only sensible construction that can be placed on
cl. 3(a) is that during the term of the lease or at the expiration
thereof the plaintiff as lessee had the right to offer to buy the
land for \$1,000.00 per acre and there is no obligation on the
defendants as lessor to accept that offer. In short cl. 3(a) is
what may be commonly called a right of first refusal or very loosely, an
agreement to agree. Such an agreement has no binding effect in
law.

I thought the absence from the witness box of any person from
the plaintiff's solicitors' office and especially the absence of
Mr Bloxsom was surprising because it was the plaintiff's case that
it was as a result of Mr Bloxsom's advice that he and his wife
went back to see the male defendant to try to obtain an option to

purchase the land. If that were true one would reasonably have expected therefore that the plaintiff's solicitors would have been careful to ensure that the lease contained this option. There was indeed evidence from the plaintiff's wife that she could recall the plaintiff going to Dale and Fallu and reading through the lease with Mr Bloxsom.

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I have mentioned at this stage these particular aspects because of the onus of proof lying on a plaintiff who seeks rectification upon the ground of mistake. In Joscelyne v. Nissen & Anor. (1970) 2 Q.B. 86 Russell L.J. in giving the judgment of the Court of Appeal said (at p. 98):-

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" Lastly, reference was made to a decision of Megaw J. shortly noted in London Weekend Television Ltd. v. Paris and Griffith (1969) 113 Sol J. 222. He expressed the view that the propositions of Simonds J. in Crane's case [1939] 1 All E.R. 662 were binding as a result of their express approval by this court. He then used this phrase, according to the report, a phrase which if correct covers the present case, at p. 222:

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'Where two persons agreed expressly with one another what was the meaning of a particular phrase but did not record their definition in the contract itself, if one of the parties sought to enforce the agreement on the basis of some other meaning, he could be prevented by an action for rectification.'

In our judgment the law is as expounded by Simonds J. in Crane's case with the qualification that some outward expression of accord is required. We do not wish to attempt to state in any different phrases that with which we entirely agree, except to say that it is in our view better to use only the phrase 'convincing proof' without echoing an old-fashioned word such as 'irrefragable' and without importing from the criminal law the phrase 'beyond all reasonable doubt'. Remembering always the strong burden of proof that lies on the shoulders of those seeking rectification, and that the requisite accord and continuance of accord of intention may be the more difficult to establish if a complete antecedent concluded contract be not shown, it would be a sorry state of affairs if when that burden is discharged a party to a written contract could, on discovery that the written language chosen for the document did not on its true construction reflect the accord of the parties on a particular point, take advantage of the fact."

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To summarize my views on the value of Mr Palfrey's evidence - his evidence failed to satisfy me that the male defendant told him that he had agreed to give the plaintiff an option to purchase the leased lands at a price of \$1,000.00 per acre such option to be exercised during the currency of the lease or at the expiration thereof. I thought that when Mr Palfrey used the word "option" he was probably using some form of shorthand and that his drafting of cl. 3(a) produced a result entirely consistent with what the male defendant said was one result of the discussion at the side gate to the dairy - the other result was agreement to increase the rent.

I should at this stage comment upon criticism made by the defendants' counsel of the absence from the witness box of the plaintiff's mother. His mother was, I am satisfied, present at a meeting at the office of Richard Zande and Associates when there were also present the plaintiff, the male defendant and Mr Palfrey. In my view the defendants' criticism of her absence carries little weight if Mr Palfrey is correct when he says that the four pages of notes (Exhibit 12) were made during the meeting at which she was present. I find these notes probably were made at that time. The notes say nothing about the purchase price be it option or first refusal and thus her evidence as to what she might say occurred at that meeting seems to me to be of little or no value. It is to be remembered that these notes (Exhibit 12) refer to a rental of \$200.00 per month and thus this meeting in the solicitor's office was probably before the vital one at the side gate to the dairy. Mr Palfrey considered that Exhibit 13 came into existence on an occasion other than the meeting in the office - I find that Exhibit 13 probably did come into existence after the meeting in the solicitor's office and after the meeting at the side gate to the

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dairy.

The plaintiff called oral evidence from Neil Leslie Zabel, who on 27th January 1978, was a director of Queensland Farmers Co-operative Association Limited and present at a meeting of the board of directors of that organization held on that day. He swore that he could remember that meeting clearly and that he had no need to refresh his memory from the minutes. He said that he could remember the plaintiff and the male defendant being at the meeting. According to Mr Zabel he remembered the gist of what the male defendant had said to the meeting. This gist was, he said:-

"That he was selling part of his property to Mr Phipps initially and that Mr Phipps had an option to purchase - a lease with an option to purchase the remainder in five years' time."

When asked whether any price was mentioned for the option by Mr Watson he replied:-

"Well I can recall the figure of \$1,000.00 an acre being mentioned at the time."

He thought Mr Watson mentioned it.

Mr Zabel was adamant that the defendant had used the word "option". The minutes (Exhibit 15) which cover some three foolscap pages were, he said, a true and correct record, include what Mr Zabel said the male defendant said at the time. There was evidence that the minutes of the meeting were taken down in longhand by Mr Whyte, the Co-operative's secretary. According to Exhibit 15, the meeting lasted from 9.30 a.m. to 6.32 p.m. with a break for lunch from 12.50 p.m. to 1.25 p.m. According to the minutes copies of the contract of sale and lease agreement were presented to the meeting later in the day, the minutes noting that they had been left there by the male defendant.

I should here say that there was no explanation given as to how

a copy of a lease agreement, which was not executed until 1st February 1978, could be left with the meeting on 27th January 1978. Mr Whyte, the secretary, was not called as a witness.

I told counsel during addresses that when Mr Zabel first entered the Court he waved and smiled to the plaintiff in a friendly gesture. This behaviour was unobserved by any counsel - the plaintiff was sitting towards the rear of the Court and not close to his legal representatives. This perhaps unfortunate first impression of Mr Zabel was confirmed in his evidence. In my view he attempted in the witness box to help the plaintiff as much as he could - embellishing the contents of the minutes by mentioning a price. In short he did not impress me as a person on whose evidence I could safely rely. I reject his claim that the male defendant told the meeting that he had given the plaintiff an option to purchase the leased area and at a price of \$1,000.00 per acre. I reject too the accuracy of the relevant statement in the minutes which are to say the least sparse indeed when one considers the length of time of the meeting.

In rejecting Mr Zabel's evidence and the evidence of the minutes I take into account the admission of the male defendant that he could not swear positively before me that he did not mention "option" to the board on 27th January 1978. Despite this admission I have formed the view that, on the balance of probabilities, the male defendant did not tell the board that he had given the plaintiff an option to purchase the land which was to be leased to the plaintiff.

I turn now to the evidence in the defence case which rested principally upon the male defendant. His credibility was strongly attacked. In the witness box, when under cross-examination, he was

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shown to have made a number of inconsistent statements. Attention naturally focussed on the meeting at the side gate to the dairy. According to the male defendant the plaintiff asked if the defendants would accept \$750.00 per acre. In cross-examination it appeared that in an affidavit sworn by the male defendant on 24th February 1982 (Exhibit 20) he had stated that the plaintiff mentioned \$600.00 per acre. Next, the male defendant mentioned for the first time in cross-examination that during this conversation he had told the plaintiff he could have a right of first refusal. He was adamant that he had used these words. In cross-examination there also appeared a variation in evidence as to a conversation between the plaintiff and the male defendant in April 1981. The male defendant also swore that he had seen the plaintiff sign the contract of sale at the meeting with Mr Palfrey in the solicitor's office when an examination of the contract (Exhibit 1) shows that the plaintiff's signature as purchaser was apparently witnessed by Mr Bloxson who was not present at that meeting.

The plaintiff's counsel submitted that these incidents coupled with what he said was the male defendant's poor performance in the witness box showed that the male defendant was not telling the truth about the discussion at the side gate to the dairy. He submits that I should find that the male defendant's conduct has been deceptive and therefore, he submits, the plaintiff's ultimate burden of proof is made lighter.

In the view which I take of all the evidence before me I have come to the conclusion that I prefer the male defendant's version of what occurred and what was said at the vital conversation at the side gate to the dairy. I find that the male defendant did not agree to give the plaintiff an option to purchase the leased lands during the currency of the lease or at the expiration thereof at a

price of \$1,000.00 per acre but that he told them that they could have what he called a right of first refusal at a price of \$1,000.00 per acre. I make this finding taking into account the criticisms made of the male defendant's performance in the witness box. I should here say that I have found it important in assessing the evidence in this case to bear in mind the onus of proof lying on the plaintiff and to which I have earlier referred. I have considered all the evidence in reaching the conclusion just expressed. I had doubts about the plaintiff and his wife while they were giving evidence and these doubts were not dispelled by the lack of evidence in respect of various matters to which I have already referred.

The principles applicable in a case such as the one before me were recently restated by the High Court of Australia in Pukallus & Anor. v. Cameron (1982) 56 A.L.J.R. 907. At p. 909 Wilson J. (with whom Gibbs C.J. agreed) said:-

" The case raises no issue as to the principles which govern the rectification of a contract. Those principles are not in dispute. There need not be a concluded antecedent contract, but there must be an intention common to both parties at the time of contract to include in their bargain a term which by mutual mistake is omitted therefrom: Crane v. Hegeman-Harris Co. Inc. [1939] 1 All E.R. 662, at p. 664; Slee v. Warke (1949), 86 C.L.R. 271, at p. 280; Joscelyne v. Nissen [1970] 2 Q.B. 86, at p. 98; Maralinga Pty. Ltd. v. Major Enterprises Pty. Ltd. (1973), 128 C.L.R. 336, at p. 350. So long as there is a continuing common intention of the parties, it may not be necessary to show that the accord found outward expression, notwithstanding the views expressed to the contrary in Joscelyne (at p. 98), and Maralinga (at p. 350). The opposing view is argued by Mr Bromley Q.C. in an article in 87 L.Q.R. 532. It is unnecessary to pursue the distinction in the present case because the representation of the respondent and its acceptance by the appellants plainly established such an accord.

The second principle governing the rectification of a contract which is material to this case is that which requires the plaintiff to advance 'convincing proof' (Joscelyne, at p. 98) that the written contract

Supreme Court

"does not embody the final intention of the parties. The omitted ingredient must be capable of such proof in clear and precise terms: Australian Gypsum Ltd. and Australian Plaster Co. Ltd. v. Hume Steel Ltd. (1930), 45 C.L.R. 54 at p. 64; Slee v. Warke, at p. 281; Maralinga, at p. 349. The Court must not assume for itself the task of making the contract for the parties."

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Brennan J. at p. 911 referred with approval to the following passage in Fowler v. Fowler (1859), 4 De G. & J. 250, at p. 265; 45 E.R. 97, at p. 103:-

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" It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to shew exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement."

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I have already referred to several unsatisfactory aspects of the evidence in the case which have assisted me in reaching my conclusion on the issue of credibility.

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There was one other area in the evidence which also helped me to clarify the issue of credibility in favour of the defendants and I shall now mention it. In early December 1977 the defendants were encountering problems in running their farm. I find there was a heavy drought which required irrigation of the river flat area. This, I am satisfied, required of the male defendant substantial physical work. His health deteriorated. At that time the farm was subject to two mortgages - one to the Bank of New South Wales and a second mortgage to a Mr Fryberg, securing unpaid balance purchase monies. Fryberg was, I find, in December 1977, pressing for foreclosure and giving the defendants a difficult time causing the defendants to decide to sell the farm. Against this background

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- 25 -

the 30 acres including the house and dairy were sold to the plaintiff 1
and on completion of this sale, Fryberg's mortgage was paid out
in full. Thus the financial pressure on the defendants eased and
there was no pressing need for them to agree to sell the river
flat land even at a future date.

In late 1979 the defendants bought some 25 acres of land 10
adjoining the 30 acres on which was erected the house and dairy
bought by the plaintiff. According to the male defendant (and I
accept his evidence on this point) it was the defendants' intention
to build on this 25 acre block and develop it so that he and his 20
family could return to live there and use it as a dairy farm in
conjunction with the river flat area. According to the male
defendant, by April 1980 or 1981 - the year was uncertain but I
find it was probably 1981 - he had put a dam in but building a
house had not commenced. In April 1981 the plaintiff met the 30
male defendant at the entrance to this 25 acre property. According
to the plaintiff the male defendant said to him "Now Glen, what's
your intention about this leased land" and the plaintiff replied
"Well look Jim, I won't tell you a lot of nonsense; I'll come
straight to the point. I've recently put my 30 acre block of 40
land up for sale and I intend to use the money from the sale of
that land to purchase the leased area". The male defendant replied
"I don't believe that Pauline and I wish to sell that area of
land now" to which the plaintiff responded "Well as far as I'm
concerned I don't think you have any option at all". 50

In oral evidence the male defendant denied this version of
the meeting. The gist of that conversation according to the male
defendant was that he told the plaintiff that he was preparing to
build for when the defendants came back, that the plaintiff said
"You know I can't afford the flats. Would you consider selling me

"a portion at a time" and the male defendant replied "No they are not for sale". The plaintiff said "We will let our solicitors fight about them" and the male defendant said "What a shame I don't want to fall out with you". The male defendant was challenged in cross-examination as to the accuracy of his oral evidence of this conversation. He was referred to a copy of his affidavit sworn on 24th February 1982 (Exhibit 20) in which he gave the following version of the conversation:-

"Mr Phipps came upon my property and said 'I warn you I am going to take up the option. My solicitor said you'll have to sell'. I replied to him 'Let the solicitors fight it out then'. I informed Mr Phipps that I did not then and indeed I do not have now any intention to sell the property."

Although there was an obvious conflict in the male defendant's evidence I did not regard that as fatal to the defendants credibility in respect of a vital issue, namely what was the oral agreement reached at the side gate to the dairy. Nor do I regard it as relevant to the principal issue of mistake.

What has concerned me about this purchase by the defendants and their expressed intentions is that it is inconsistent with their having given to the plaintiff the option to purchase which he claims. It seems to me most unlikely that the defendants would buy 25 acres so close to the river flat lands unless they believed that at the expiration of the five year term the land would revert to them and that even if the plaintiff did offer to buy at \$1,000.00 per acre they could reject it. An alternative view is that the defendants knew that cl. 3(a) of the lease contained an error that that error was in their favour and that with knowledge of that error they decided to buy the 25 acres hoping that if the matter of the option ever came to Court they would succeed and retain the river flat area. Having seen and heard the defendants

in the witness box I am quite unable to accept that alternative. 1
To accept it would mean that the defendants and especially the
male defendant were devious and cunning persons - I am quite unable
to accept this view of them.

Yet another possible reason why the defendants bought the
25 acres was simply that they wished to live there irrespective 10
of the river flat area. I do not consider this possible reason to
have had any weight.

Valuation evidence was led in the case but although it showed
that the value of the leased land had increased substantially
I regarded it as of peripheral relevance only on the issue of 20
credibility of the parties.

In the result I have concluded that on the whole of the
evidence the plaintiff has failed to satisfy me that there was
made between the parties the oral agreement on which he relies.
As to the alternative claim, namely that it was the common intention 30
of the plaintiff and the defendants continuing up to the time of
execution of the lease that a term similar to the alleged oral
agreement was to be included in the agreement for lease and by
mistake it was not, I find on the evidence that the plaintiff has
failed to satisfy me that there was such a common intention. 40

On the whole of the evidence I find that there was no mutual
mistake and indeed I have reached the clear view that cl. 3(a)
represents what was the agreement or arrangement made between the
parties at the side gate to the dairy.

I should add that there was evidence that on 11th February 1982 50
the plaintiff had purported to exercise the alleged option to
purchase and that the defendants by their solicitors denied any
such option. It becomes unnecessary to consider the further ancillary

relief claimed by the plaintiff.

For reasons already expressed I give judgment for the defendants against the plaintiff with costs to be taxed.

IN THE SUPREME COURT

OF QUEENSLAND

No. 4554 of 1981

BETWEEN:

GLEN ROBERT PHIPPS

Plaintiff

AND:

JAMES JOSEPH WATSON and PAULINE ELAINE WATSON

Defendants

375

FEE	46-20
ASSESSOR	
RECEIPT	97862
ENTERED	
CHECKED	

Before the Honourable Mr. Justice Sheperdson the 19th day of August, 1983

JUDGMENT

This action having been tried before the Honourable Mr. Justice Sheperdson without a jury on the 26th, 27th and 28th days of July and the 19th August, 1983 and Mr Davies of Queens Counsel, with him Mr. Myers having been heard for the Plaintiff and Mr McMillan of Counsel having been heard for the Defendant

SUPREME COURT
OF QUEENSLAND
20. JAN. 1984
FILED
BRISBANE

IT IS THIS DAY ADJUDGED pursuant to the Order of the said Mr Justice Sheperdson that the Plaintiff do recover nothing against the Defendants and that the Defendants recover against the Plaintiff their costs to be taxed.

LAN MITCHELL
Solicitor
Brisbane Street
BRISBANE 4305
TELEPHONE: 2812277
SOLICITORS
A. SCIACCA & ASSOC
Solicitors
7 George Street
BRISBANE
TELEPHONE: 221-9100

BY THE COURT

1/ DEPUTY REGISTRAR

IN THE SUPREME COURT

1981

OF QUEENSLAND

NO. 4554 of 1982

BETWEEN:

GLEN ROBERT PHIPPS

Plaintiff/Appellant

AND:

JAMES JOSEPH WATSON and

PAULINE ELAINE WATSON

Defendants/Respondents

TAKE NOTICE that the Full Court will be moved by way of appeal on ~~31st~~ ^{Monday} the 31st day of October 1983 or as soon thereafter as Counsel can be heard by Counsel on behalf of the abovenamed Appellant/Plaintiff for an Order that the whole of the Judgment of the Honourable Mr. Justice Shepherdson given on the Nineteenth day of August, 1983 whereby it was adjudged that there be Judgment for the Respondents/Defendants against the Appellant/Plaintiff with costs to be taxed be set aside or varied and that in lieu thereof it may be ordered or adjudged that the Appellant/Plaintiff do have Judgment against the Respondents/Defendants and that the lease made between the parties on the Seventh day of April, 1978 be rectified to incorporate an option to purchase, a declaration that that option to purchase was validly exercised by the Appellant/Plaintiff on the Eleventh day of February, 1982 and an Order that the Respondents/Defendants do specifically perform the agreement as rectified and

NOTICE OF APPEAL

Security \$500.
15966
/

WALSH & FALLU,
Solicitors,
42 Brisbane Street,
MUSWICK.
Telephone No.
31-4999.

own Agents:

COL ROBINSON & KIDD,
Solicitors,
60 Queen Street,
BRISBANE.
Telephone No.

Full Court

410

SUPREME COURT
OF QUEENSLAND
13. SEP. 1983
FILED
BRISBANE

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that the Respondents/Defendants do pay the Appellant/Plaintiff's costs to be taxed including the costs of this appeal.

AND TAKE FURTHER NOTICE that the grounds of this appeal are as follows:-

1. That the findings of the learned trial judge were against the evidence, the weight of the evidence and were not such as could reasonably be found and held upon the evidence before him.
2. That the findings of the learned trial judge were wrong in and contrary to law, were unreasonable and plainly unjust.
3. That on the evidence the learned trial judge should have found that there was a prior oral agreement made between the parties that the subject lease would contain an option to purchase or, alternatively, that there was a common intention that the lease would incorporate an option to purchase and that under a mutual mistake the option to purchase was not incorporated in the said lease.
4. That His Honour was in error in acting upon the unreliable and contradictory evidence of the first-named Respondent/Defendant.
5. That His Honour was in error in rejecting the evidence of the Respondents/Defendants' Solicitor, Warren Harold Palfrey.
6. That His Honour was in error in rejecting the evidence of the witness, Neil Leslie

Zabel on tenuous grounds.

7. That his Honour was in error in failing to attach weight or in failing to attach sufficient weight to the minutes of the meeting of the Queensland Farmers Co-operative Association Limited which were tendered in evidence before him.
8. That His Honour was in error in relying upon the Respondents/Defendants' acquisition of a parcel of land in proximity to the subject land as supporting a contention that there had been no intention to grant an option to purchase.
9. That His Honour misapplied the principle with respect to the burden of proof in rectification cases to defeat the Plaintiff's claim.

DATED this Ninth day of September, 1983.


Solicitors for the Appellant/Plaintiff

TO: The Respondents/Defendants

AND TO: Their Solicitor,
Mr. Alan Mitchell,
40 Brisbane Street,
Ipswich.

BETWEEN:

GLEN ROBERT PHIPPS

(Plaintiff)

Appellant

- and -

JAMES JOSEPH WATSON and
PAULINE ELAINE WATSON

(Defendants)

Respondents

JUDGMENT - KELLY J.

Delivered the *second* day of *November* 1984.

In December 1977 the appellant negotiated with the male respondent for the purchase of part of a property owned by the respondents at Fernvale containing an area of 30 acres (referred to as "the top portion") and for the lease of the remainder of the property containing an area of about 77 acres (referred to as "the river flat area"). A registered dairy was operated by the respondents on the top portion and they grew feed for the dairy herd on the river flat area and strip fed the herd on that land. It appears to have been accepted that the river flat area was necessary for the operation of the dairy business conducted by the respondents.

Following these negotiations a contract dated 6th January 1978 was entered into for the sale of the top portion and this was made subject to the respondents' granting to the appellant a lease for five years over the river flat area. Such a lease dated 1st February 1978 was then executed but as it was not in a form which could be registered in the Titles Office a fresh

lease dated 7th April 1978 was executed. Each lease contained a mutual covenant, cl. 3(a), in the following terms:-

"At all times during the said term or at the expiration of the said term the lessee may offer to purchase the demised land from the lessor for the consideration equivalent to one thousand dollars (\$1,000-00) per acre."

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It is apparent that this clause had no legal effect and the appellant brought an action seeking rectification of the agreement for lease and certain consequential relief. The appellant's case was that there had been a prior oral agreement made between the appellant and the respondents in about December 1977 whereby it was agreed that the lease would contain a clause conferring upon the appellant an option to purchase the respondents' land during the subsistence of the lease or at the expiration thereof for a consideration equivalent to \$1,000.00 per acre, that the lease was intended to embody that agreement and was signed by the parties in the belief that it did so but that the written agreement was drawn up and signed under a mutual mistake of fact in that both parties were at all material times of the belief that it contained a valid and enforceable option clause. In the alternative it was pleaded that if there was no prior oral agreement as alleged it was the common intention of the parties continuing up to the time of the execution of the lease that a term such as that alleged be included in the lease and by mistake it was not.

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The appellant's claim was to have the written agreement rectified so as to embody an option to purchase conferring upon him the right to purchase the land during the subsistence of or at the expiration of the lease at the price of \$1,000.00 per acre and to have the agreement treated as being so rectified.

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The appellant further sought a declaration that his purported exercise of the option to purchase on 11th February 1982 be deemed a valid and proper exercise of the option and he also sought specific performance of the agreement as rectified.

The learned trial judge found that the male respondent did not agree to give to the appellant the option to purchase which he alleges. The learned judge concluded that on the whole of the evidence the appellant had failed to satisfy him that there was made between the parties the oral agreement on which he relied and, as to the alternative claim, the learned judge found on the evidence that the appellant had failed to satisfy him that there was the common intention alleged. The learned judge further found that there was no mutual mistake and he reached the clear view that cl. 3(a) represented the agreement or arrangement made between the parties. Accordingly rectification was refused and it became unnecessary to consider the further ancillary relief claimed.

Evidence of the conversation during which it is claimed by the appellant that the oral agreement to grant the option was made was given by the appellant and his wife and by the male respondent. It is common ground that such a conversation took place at the side gate to the respondents' dairy but there is a conflict between the evidence of the appellant and his wife on the one hand and that of the male respondent on the other as to what was said. The learned trial judge preferred the male respondent's version of what was said, the effect of which was that no agreement was reached, whereas the effect of the evidence of the appellant, supported by that of his wife, was that there was an oral agreement to grant the option.

There was documentary evidence in which reference was made to the matter of an option. In a letter dated 19th December 1977 from the respondents' solicitors to the appellant's solicitors with which the contract for the sale of the top portion was forwarded for signature by the appellant, the respondents' solicitors said:-

"We understand from our clients' instructions that your client will have the option to purchase certain other lands during the currency of a lease yet to be prepared and that such option shall be contained in the said lease."

The appellant's solicitors in returning the signed contract under cover of a letter dated 21st December 1977 said:-

"We shall also be pleased to receive the lease contained in the option to purchase in due course."

Also in evidence were notes made at the time by Mr Palfrey, a solicitor then employed by the respondents' solicitors, who had composed the letter of 19th December 1977 although it was not signed by him and who drafted both the original lease and also the subsequent lease of which rectification is sought. The learned trial judge formed the view that the notes comprising Ex. 12 in which the words "option to purchase" in relation to the lease twice occur were made at the same time and probably some short time before the letter of 19th December and the learned judge referred to the evidence given by Mr Palfrey that he could give no indication of the identity of the person from whom came the word "option" used in the notes. The learned judge said that it was clear that Mr Palfrey had virtually no recollection of his dealings with or involving the respondents or either of them and that what he said in evidence was really based on what he said was his memory refreshed by the notes. A further note written by Mr Palfrey comprised Ex. 13. This note begins

with the words "Mr Watson" and in reference to the lease includes the words "option to purchase to be at \$1,000.00 per acre". The appellant relied heavily on this note at the trial as clearly showing that he was to have the option claimed. The learned trial judge found that the note probably came into existence after a meeting at the office of the respondents' solicitors at which were present the appellant and his mother, the male respondent and Mr Palfrey and after the meeting at the side gate to the dairy. The learned judge thought that Mr Palfrey was easily suggestible in evidence and his evidence failed to satisfy the learned judge that the male respondent had told him that he had agreed to give the appellant an option to purchase in the terms claimed by the appellant.

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Another relevant document to which the learned judge referred and upon which the respondents placed reliance is a letter dated 7th April 1978 from the appellant's solicitors to the respondents' solicitors. This letter states that the appellant's solicitors have been through the lease, points out certain errors which require amendment and mentions certain items referred to in Schedule 2 to the lease which were said not to have been delivered to the appellant. The learned judge inferred from this letter that the appellant's solicitors had examined the lease fairly closely but had made no complaint then that cl. 3(a) did not express the true agreement of the parties.

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On 27th January 1978 the appellant and the male respondent attended a meeting of the full board of directors of the Queensland Farmers Co-operative Association Limited for the purpose of discussing with the board matters relating to the sale and the involvement of the milk quota. The following appears in the

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minutes:-

"Mr Watson stated that he had recently sold 30 acres and his dairy and house to Mr Phipps and leased a further 90 acres to Mr Phipps with an option to purchase. He had not supplied since 15th January 1978."

Subsequently it is recorded that Mr Watson had left copies of the contract of sale and lease agreement which were presented to the meeting and that:-

"It was decided that after viewing the documentation that the Board could only agree to the transfer of quota if the whole of the property was purchased."

The terms of a motion giving effect to this decision are then recorded. In his oral evidence the male respondent denied that he had made to the board the statement attributed to him in the minutes although he was unable to swear positively that he did not mention to the board the word "option". Evidence was given by Mr Neil Zabel who was a director of Queensland Farmers Co-operative Association Limited and present at the meeting on 27th January 1978. Mr Zabel said that he remembered the gist of what the male respondent had said to the meeting which was:-

"That he was selling part of his property to Mr Phipps initially and that Mr Phipps had an option to purchase - a lease with an option to purchase the remainder in five years' time."

and that he could recall the figure of \$1,000.00 an acre being mentioned at the time. Mr Zabel also said that the minutes were a true and correct record. The learned trial judge rejected Mr Zabel's claim that the male respondent had told the meeting that he had given the appellant an option to purchase the leased area and at a price of \$1,000.00 per acre and he also rejected the accuracy of the relevant statement in the minutes which he considered to be sparse in relation to the length of time

of the meeting. The learned judge referred to the absence of an explanation as to how a copy of a lease agreement which was not executed until 1st February 1978 could be left with the meeting on 27th January 1978. In relation to Mr Zabel the learned trial judge said this:-

"I told counsel during addresses that when Mr Zabel first entered the Court he waved and smiled to the plaintiff in a friendly gesture. This behaviour was unobserved by any counsel - the plaintiff was sitting towards the rear of the Court and not close to his legal representatives. This perhaps unfortunate first impression of Mr Zabel was confirmed in his evidence. In my view he attempted in the witness box to help the plaintiff as much as he could - embellishing the contents of the minutes by mentioning a price. In short he did not impress me as a person on whose evidence I could safely rely."

The learned judge formed the view that, on the balance of probabilities, the male respondent did not tell the board that he had given the appellant an option to purchase the land which was to be leased to the appellant.

The learned judge dealt with the attack made on the credibility of the male respondent and to certain inconsistent statements he was shown to have made when under cross-examination but, on the view which he took of all the evidence, came to the conclusion that he preferred the male respondent's version of what occurred and what was said at the conversation at the side gate to the dairy. The learned judge said that he had doubts about the plaintiff and his wife while they were giving evidence and that these doubts were not dispelled by the lack of evidence in respect of various matters to which he had already referred. Matters on which the learned judge previously referred to a lack of evidence were (a) the absence from the witness box of any person from the office of the respondents' solicitors and especially the absence of a Mr Bloxson who, on the evidence, would appear

to have had the conduct of the matter on behalf of those solicitors and who in particular was said to have given the appellant advice as a result of which he and his wife went to see the male respondent to try to obtain an option to purchase; (b) the absence from the witness box of the appellant's mother (although he had said that he attached little weight to this); (c) the circumstances under which the appellant signed each lease and of what attention his solicitors paid to it at various times and (d) how Mr Palfrey, who was inexperienced in conveyancing and especially in preparing farm leases, went about drafting the lease and in particular drafting cl. 3(a) (although the learned judge had dealt with this last matter in the context of assessing what weight he should give to Mr Palfrey's evidence).

The learned judge referred to one other area in the evidence which also helped to clarify the issue of credibility in favour of the respondents. In this regard the learned judge referred to two matters. The first was that on completion of the sale of the top portion a second mortgage to a Mr Fryberg who had been pressing for foreclosure was paid in full thus easing the financial pressure on the respondents so that there was no pressing need for them to agree to sell the river flat area even at a future date. The second matter was that in late 1979 the respondents had bought some 25 acres of land adjoining the top portion and according to the male respondent, whose evidence on this point was accepted by the learned judge, it was his intention to build on this 25 acre block and develop it so that he and his family could return to live there and use it as a dairy farm in conjunction with the river flat area. The learned judge considered this to be inconsistent with the respondents' having given to the

Full Court

appellant the option to purchase which he claims and he took the view that it was unlikely that the respondents would buy 25 acres so close to the river flat land unless they believed that at the expiration of the five year term the land would revert to them and that even if the appellant did offer to buy at \$1,000.00 per acre they could reject it.

A fundamental matter is whether there is any basis on which this court is entitled to interfere with the findings of fact made by the learned trial judge. Over the years this matter has been the subject of a great deal of judicial consideration by courts of the highest authority. In Craine v. Australian Deposit and Mortgage Bank Ltd. (1912) 15 C.L.R. 389 the majority of the court applied a passage from Knoo Sit Hon v. Lim Thean Tong (1912) A.C. 323, at p. 325, which is referred to by Griffith C.J. at p. 392:-

"... Lord Robson, who delivered the opinion of the Judicial Committee, commenting on the duty of a Court of Appeal on the hearing of an appeal from a decision of a Judge founded upon oral testimony, and pointing out that as a rule it is very difficult to reverse it, said:- 'Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony.' "

In Paterson v. Paterson (1953) 89 C.L.R. 212 Dixon C.J. and Kitto J. in a joint judgment at pp. 218-224 reviewed authorities up to that time including Craine's Case (supra). The judgment referred, at p. 224, to the statement of the principle to be applied set out in Watt or Thomas v. Thomas (1947) A.C. 484,

at pp. 487-488:-

"I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

The matter was again dealt with by the High Court in Riebe v. Riebe (1957) 98 C.L.R. 212 where, at p. 226-227, the Court in a joint judgment said:-

"The rules of practice governing the exercise by a court of appeal of its power to set aside findings of fact by a judge who has tried the case on oral evidence have been dealt with in this Court comparatively recently in Paterson v. Paterson (1953) 89 C.L.R. 212 and since then the House of Lords has referred to them in Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370. The present case seems to us to fall substantially within the language of Lord Sumner in S.S. Hontestroom v. S.S. Sagaporack (1927) A.C. 37 to which reference is made in Paterson v. Paterson (1953) 89 C.L.R., at p. 223. After saying that there is jurisdiction in a court of appeal to retry a case on the shorthand note Lord Sumner said - 'None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy or it. If his estimate of the man forms any substantial part of

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No.8 Reasons for Judgment
(Kneipp and Kelly JJ.
per Kelly J.)
 2 November 1984

his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone' (1927) A.C., at p. 47."

The subsequent decision of the High Court in Warren v. Coombes (1978-1979) 142 C.L.R. 531 is not apposite to the present case as the court was there considering the situation of an appellate court reaching its own conclusion about inferences to be drawn from primary facts, which is not the position here.

The Judicial Committee in Queensland Mines Ltd. v. Hudson (1978) 52 A.L.J.R. 399 referred to the matter when Lord Scarman in delivering the opinion of their Lordships said, at p. 401:-

"Their Lordships are very conscious of their duty to respect a trial judge's findings of fact. In particular, they accept the judge's finding that Mr. Hudson was an unsatisfactory witness. But, if upon an examination of events and documents, the existence of which is beyond dispute, it becomes clear that the learned trial judge drew the wrong conclusions, it is then the duty of their Lordships' Board to substitute their view of the facts for that of the trial judge."

On consideration of the authorities to which I have referred I have reached the conclusion that, despite the disadvantage suffered by this Court in not having seen and heard the witnesses, this case is one in which it would be justified in going behind the findings of fact made by the learned trial judge and, whilst giving them due weight, reaching its own conclusion on the relevant questions of fact. There are several reasons why this course should be adopted. The first is that the learned judge clearly failed to give sufficient weight to the evidence provided by contemporaneous documents. In my view there is no reason to suppose that in using the word "option" in the letter of 19th December 1977 for the composition of which he was responsible Mr Palfrey who was, after all, a solicitor even though with no great experience, intended to use that word otherwise than

in the sense in which a solicitor might be expected to use it, that is, a legally enforceable option. In view of his notes made at the time, the accuracy or authenticity of which was not challenged, the statement regarding the option made in that letter cannot lightly be disregarded. Likewise I am unable to see a proper basis for rejecting the accuracy of the statement in the minutes of the meeting of the board of directors of Queensland Farmers Co-operative Association Limited which records the male respondent's statement regarding an option to purchase. With respect, I would not have thought that the length of the minutes in relation to the duration of the meeting was any indication of the accuracy of what was recorded.

In rejecting the evidence of Mr Zabel it appears that the learned judge was adversely influenced by the fact that when this witness first entered the court he waved and smiled to the appellant in a friendly gesture. I would not have thought that such a gesture should be interpreted as an indication of partiality towards the appellant, nor would I have thought that, when he was specifically asked whether any price had been mentioned for the option, by his recall of the figure of \$1,000.00 an acre being mentioned, a matter to which reference was not made in the minutes, it could be said that Mr Zabel was thereby embellishing the contents of the minutes. The document which is referred to in the minutes as a lease agreement was obviously not then executed, since that agreement was not executed until some five days later, but the fact that it was not executed may well not have been adverted to by the writer of the minutes, who it would appear was a layman, so that the matter is hardly one that calls for an explanation.

To my mind it appears that the learned judge was unduly concerned by the absence of evidence on certain matters. In particular, it is at least doubtful what relevant evidence Mr Bloxson could have given had he been called.

As to the matters which the learned judge found of assistance in clarifying the issue of credibility in favour of the respondents, I need say no more than that whilst these matters are certainly consistent with the respondents not having given to the appellant the option to purchase which he claims, they cannot be regarded as providing any real indication that this was the case and they are also consistent with other explanations. Both matters relate to a time after the oral agreement was allegedly made and they are no more than two further pieces of evidence which must be weighed along with all the other evidence in reaching a conclusion as to whether there was such an agreement.

Proceeding then on the basis that this court may reach its own conclusions on the relevant questions of fact the matter which then requires consideration is the degree of conviction which the court requires before it will grant rectification in a case such as the present. The principles to be applied in the case of rectification are set out in the recent judgment of the High Court in Pukallus v. Cameron (1982) 56 A.L.J.R. 907. Wilson J. with whom Gibbs C.J. agreed, said, at p. 909:-

" The case raises no issue as to the principles which govern the rectification of a contract. Those principles are not in dispute. There need not be a concluded antecedent contract, but there must be an intention common to both parties at the time of contract to include in their bargain a term which by mutual mistake is omitted therefrom: Crane v. Hegeman-Harris Co. Inc., [1939] 1 All E.R. 662, at p. 664; Slee v. Warke (1949), 86 C.L.R. 271, at p. 280; Joscelyne v. Nissen, [1970] 2 Q.B. 86, at p. 98; Maralinga Pty. Ltd. v. Major Enterprises Pty. Ltd. (1973), 128 C.L.R. 336, at p. 350. So long as there is a continuing

common intention of the parties, it may not be necessary to show that the accord found outward expression, notwithstanding the views expressed to the contrary in Joscelyne (at p. 98), and Maralinga (at p. 350). The opposing view is argued by Mr. Bromley Q.C. in an article in 87 L.Q.R. 532. It is unnecessary to pursue the distinction in the present case because the representation of the respondent and its acceptance by the appellants plainly established such an accord.

The second principle governing the rectification of a contract which is material to this case is that which requires the plaintiff to advance 'convincing proof' (Joscelyne, at p. 98) that the written contract does not embody the final intention of the parties. The omitted ingredient must be capable of such proof in clear and precise terms: Australian Gypsum Ltd. and Australian Plaster Co. Ltd. v. Hume Steel Ltd. (1930), 45 C.L.R. 54, at p. 64; Slee v. Warke, at p. 281; Maralinga, at p. 349. The Court must not assume for itself the task of making the contract for the parties."

Brennan J. said, at p. 911:-

"Although the remedy of rectification is no longer held to depend upon proof of an antecedent concluded contract (Slee v. Warke (1949), 86 C.L.R. 271, at p. 280; Maralinga Pty. Ltd. v. Major Enterprises Pty. Ltd. (1973), 128 C.L.R. 336), it is necessary to show a concurrent intention of the parties, existing at the time when the written contract is executed, as to a term which would have been embodied in the contract if the parties had not made a mistake in expressing their intention. Proof of such an intention is necessary to 'displace the hypothesis arising from execution of the written instrument, namely, that it is the true agreement of the parties' (per Mason J. in Maralinga at p. 351)."

On the same page the learned judge referred to a party being able:-

"to satisfy the requirements to which Lord Chelmsford L.C. referred in Fowler v. Fowler (1859), 4 De G. & J. 250, at p. 265; 45 E.R. 97, at p. 103 in a passage expressly approved by this Court in Australian Gypsum Ltd. and Australian Plaster Co. Ltd. v. Hume Steel Ltd. (1930), 45 C.L.R. 54, at p. 64 and in Maralinga at p. 349:

'It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of

its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement.' "

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As I understand the judgments in Pukallus v. Cameron (supra) whilst it is not necessary that there should be a concluded antecedent contract, whether or not there is such a contract there must be a continuing common intention of the parties existing at the time when the written contract is executed to include in their bargain a term which by mutual mistake is omitted therefrom and the omitted ingredient must be capable of convincing proof in clear and precise terms. The burden of advancing such proof rests upon the plaintiff.

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In my view the conclusion which should properly be reached on the whole of the evidence is that there was a concluded antecedent contract between the appellant and the respondents that the lease would contain a clause conferring upon the appellant an option to purchase the respondents' land during the subsistence of the lease or at the expiration thereof at the price of \$1,000.00 per acre. When proper regard is had to the documentary evidence to my mind there is convincing proof of this in clear and precise terms. This then was the common intention of the parties at the time the antecedent contract was made and there is no evidence which would show that such intention did not continue up to the time when the written contract of which rectification is sought, namely the lease dated 7th April 1978, was executed and, that being so, it would be proper to presume that it did so continue. I would not consider that the letter of that date

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from the appellant's solicitors is to be regarded as indicating otherwise. The absence of any complaint in that letter that cl. 3(a) did not express the true agreement of the parties is not to be taken as indicating the contrary, namely, that the clause did express the true agreement; the letter is simply silent on the matter. In my opinion there is convincing proof that there was a continuing common intention existing at the time when the lease was executed that it should contain an option clause in the terms which I have indicated and that this term was omitted by mutual mistake. Mr Palirey failed to draw cl. 3(a) in a form which gave effect to his instructions and nothing was done by the appellant's solicitors after they had perused the lease to draw the attention of the respondents' solicitors to the shortcomings in the form of the clause.

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Consequently in my view the appellant is entitled to have the written agreement rectified in the manner which he claims. That being so, he would then be entitled to a declaration that his purported exercise of the option to purchase on 11th February 1982 be deemed to be a valid and proper exercise of the said option. Accordingly I would allow the appeal with costs, set aside the judgment appealed from and in lieu thereof make an order for rectification and a declaration in the terms sought. The respondents should pay the appellant's costs of the trial.

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In the way in which the case was conducted before the learned trial judge it would appear that attention was not directed to the matter of specific performance and on the view which he took it was unnecessary for the learned judge to consider this relief. This aspect will require further consideration before judgment on the appeal is finally given.

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IN THE SUPREME COURT
OF QUEENSLAND

No. 4554 of 1981

BETWEEN:

GLEN ROBERT PHIPPS

(Plaintiff)

Appellant

AND:

JAMES JOSEPH WATSON and
PAULINE ELAINE WATSON

(Defendants)

Respondents

JUDGMENT - CARTER J.

Delivered the *2nd* day of *November* 1984.

I have had the advantage of reading the judgment prepared by my brother Kelly. I agree with it and with the order which he proposes. There are some matters which I wish to add.

In finding that the male respondent did not agree to give the appellant an option to purchase the leased lands during the currency of the lease or at its expiration at a price of \$1,000.00, the learned judge went on to find "that he (the male respondent) told them (the appellant and his wife) that they could have what he called a right of first refusal at a price of \$1,000.00 per acre". Clause 3(a) of the lease in the form in which it was drawn confers no contractual right of substance upon the appellant. The appellant's right to offer to purchase the leased lands is not, as such, a right which is to be conferred by a contract. The appellant could, if he had wished, have offered to purchase the lands in any event either for \$1,000.00 per acre or for any other price. However, it cannot in my view, be said that cl. 3(a), in its terms, confers upon the appellant

Full Court

the contractual right to have the leased lands offered to him by the respondents for purchase before being offered to any other person. If that is so, it follows that cl. 3(a) did not in any event reflect the agreement contended for by the respondents because cl. 3(a) did not in its terms confer on the appellants a right of first refusal. The clause expressly purports to confer upon the appellant a right of some kind which was to be exercised "during the term or at the expiration of the said term". The real issue at the trial therefore was whether by agreement there was an irrevocable offer by the respondents to the appellant to purchase at \$1,000.00 per acre supported by consideration, or whether there was given to him a contractual right to receive the first offer to purchase if the respondents during the term or at the expiration of it chose to sell. The contemporaneous documents, namely, those written by Palfrey the solicitor then acting for the respondents and the minutes of the meeting of the association of 27th January, 1978, for the reasons given by my brother Kelly, support only a finding that the agreement was for an option.

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I wish however to comment further concerning the evidence of the witness Zabel and of the minutes of the meeting, exhibit 15. Given the evidence of the male respondent that he was unable to swear that he had not used the word "option" when informing the meeting of the agreement between himself and the appellant, I can see no sound basis for the rejection of the evidence that the minutes correctly recorded the effect of what the male respondent had said. The minutes of the next meeting of the board of directors held on 9th February, 1978 (part of exhibit 15) do record that at that later meeting it was moved and seconded that the minutes

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of the meeting of 27th January, 1978 be signed as a correct record of the business transacted at the earlier meeting. That fact provided some additional independent support for the evidence of Zabel. The finding that the male respondent did not tell the Board that he had given the plaintiffs an option was one which in my view could not have been made, having regard to the contemporaneous record made in the minutes coupled with the male respondent's inability to deny that he had said at that meeting that the appellant had an option to purchase the river flat lands.

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The learned judge's rejection of the evidence of Zabel is based at least to a significant extent on two factors - the friendly gesture of Zabel towards the plaintiff as Zabel entered the courtroom and the suggested embellishment by Zabel in his evidence by mentioning a price of \$1,000.00 per acre. The latter could in no way have been seen as being an embellishment. It was common ground that \$1,000.00 per acre was the price mentioned between the parties. It was the price recorded in cl. 3(a); it was the price asserted by the male respondent himself as being the price which attached to the offer of first refusal; it was the price at which the learned judge found that the male respondent had given the right of first refusal to the appellant. The price per acre was not a matter which was in dispute. If at the meeting the male respondent had said that he had given only a right of first refusal and a price had been mentioned, that price could not have been other than \$1,000.00 per acre. I fail to see how it could be said that Zabel was deliberately assisting the appellant by swearing that that figure was mentioned at the meeting. On the contrary it would seem to me to give

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some support for the correctness of Zabel's recollection because in fact that was the price asserted by the male respondent himself and as I have mentioned it is the price which is included in the learned judge's findings set out above.

The gesture by Zabel towards the plaintiff by itself created in the learned judge's mind "an unfortunate first impression". At that stage Zabel had not been sworn. The language of the judgment clearly suggests that that impression might equally have been described as an "unfavourable" one. In relation to the view taken by the trial judge concerning this I wish to add two things. Firstly, the gesture was observed only by the learned judge. It was allowed to pass without comment. Counsel remained unaware of it until well after Zabel had left the witness box. If the making of the gesture in that form had created in the learned judge an unfortunate or unfavourable impression of the person about to give evidence it was for him to say so and to inform counsel accordingly so that Zabel could have been examined and cross-examined in relation to it and so that counsel could have then addressed the learned judge on what effect the making of such a gesture should have upon him in the light of any evidence touching the possible relationship between Zabel and the appellant. Secondly, the appellant, the male respondent and Zabel were members of a rural community. The appellant and the respondent were neighbours. They were dairy farmers. Zabel was a director of the Farmers Co-operative Association which was concerned in the transfer of the milk quota. It is a fair inference that Zabel himself was a dairy farmer. The appellant and the male respondent had together been at the meeting at which Zabel had been present when the subject of this transaction

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had been discussed. Perhaps that meeting was the first contact between Zabel and the appellant and was in fact the full extent of any relationship between them; perhaps they were mere acquaintances being persons who had known each other for a much longer period; perhaps they enjoyed a much more friendly relationship; perhaps they were related by blood or by marriage. The mere making of the friendly gesture was in the circumstances of the case purely equivocal. It may have been no more than a mere idiosyncrasy of Zabel's who momentarily overlooked the formality of the courtroom. Indeed, he might also have been as well known to the male respondent at least from the time of the meeting referred to above. The contact in the courtroom could only have been momentary. In my view the learned judge could not properly have formed a view of the witness based on the fact of the gesture alone. It may be that some form of rebuke was appropriate but the assessment of the witness and of his evidence had to be made in the light of the evidence which he was about to give from the witness box and the manner in which he gave it and also made in the light of the other evidence in the case including of course that of the documentary evidence to which reference has been made. Evidence as to the nature and extent of the relationship, if any, between the appellant and Zabel could only have assisted the making of that assessment. However, in my view, the mere gesture in the circumstances in which it made ought by itself to have been of no significance nor should it have formed the basis for an adverse finding.

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I wish to add a further comment concerning the fact that Bloxsom was not called to give evidence. This court was told that Bloxsom was an unqualified law clerk in the office of the

solicitors then acting for the appellant. The learned judge in considering his assessment of the evidence given by the appellant and his wife regarded Bloxsom's absence from the witness box as significant. He regarded Bloxsom's absence as "surprising" because the plaintiff and his wife had sworn that they had gone back to the male respondent to try to obtain an option and that this was on Bloxsom's advice. That being so the learned judge observed that one would reasonably expect the plaintiff's solicitors (presumably Bloxsom) would have been careful to ensure that the lease contained this option. Accordingly the absence of evidence from Bloxsom as to what had happened between him and the plaintiff and his wife was an important factor in the learned judge's rejection of the plaintiff's evidence.

Again I wish to add two things. Firstly, assuming the admissibility of evidence from Bloxsom along the lines suggested, the learned judge seems to have assumed that the unqualified Bloxsom would have noticed the deficiency in cl. 3(a). By contrast he was not prepared to accept that when the qualified Palfrey used the term "option" in the relevant letter he intended a reference to a legally enforceable option. Secondly, the appellant called as a witness the solicitor Palfrey who had acted for the respondents. Palfrey gave evidence admissible against the respondents as to the instructions given to him by them. One would have thought that having that evidence available the appellant's advisers might well have decided not to call Bloxsom whose evidence as to what took place between him and the appellant could at best only have been admissible as original evidence and relevant, if at all only to explain why the appellant had later said what he had said to the male respondent at the dairy

gate. Besides Bloxom's evidence as to what he understood cl. 3(a) to mean (assuming he read it) could hardly have been of assistance. As I have mentioned cl. 3(a) reflects neither the contention of the appellants nor of the respondents.

The above considerations and the reasoning of my brother Kelly persuade me that in this case this court should interfere with the learned judge's findings. Accordingly I agree with the course proposed by my brother Kelly.

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OF QUEENSLAND

21. DEC. 1984

IN THE SUPREME COURT

OF QUEENSLAND

No. 4554 of 1981

BETWEEN

GLEN ROBERT PHIPPS

(Plaintiff) Appellant

AND

JAMES JOSEPH WATSON and
PAULINE ELAINE WATSON

(Defendants) Respondents

Full Court before : THEIR HONOURS MR JUSTICE KNEIPP, MR
JUSTICE KELLY AND MR JUSTICE CARTER

THE TWENTYFIRST DAY OF DECEMBER, 1984

THIS ACTION having on the fourth day of October 1984 come on for hearing by way of Appeal from the Judgment of the Honourable Mr Justice Shepherdson pronounced at Brisbane on the nineteenth day of August 1983 WHEREBY IT WAS ADJUDGED that the Plaintiff do recover nothing against the Defendants and that the Defendants recover against the Plaintiff their costs to be taxed AND UPON HEARING Mr Davies of Queen's Counsel, with him Mr Myers of Counsel for the Appellants and Mr Morley of Queen's Counsel, with him Mr McMillan of Counsel, for the Respondents

IT IS THIS DAY ORDERED that the said Appeal be allowed and that the said Judgment be set aside and in lieu thereof IT IS ORDERED that there be judgment for the Appellant against the Respondents and that Clause 3(a) of the Lease made between the parties on the seventh day of April 1978 be rectified by omitting the words "may offer" where they appear therein and by substituting

Full Court

No.10 Formal Order
21 December 1984

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BRISBANE

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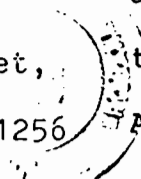
SEE	69-90
ASSESSOR	✓
RECEIPT	216997
ENTERED	
CHECKED	

ORDER

LE & FALLU,
Solicitors,
2 Brisbane Street,
SWICH.
Telephone: 2814999

OWN AGENTS:

COL ROBINSON &
OD,
Solicitors,
0 Queen Street,
ISBANE.
Telephone: 31 1256



therefor the words "has the option" AND IT IS DECLARED that the option to purchase contained in the said lease as so rectified was validly exercised by the Appellant on the eleventh day of February 1982 AND IT IS ORDERED that the Respondents do specifically perform and carry into execution the agreement constituted by such exercise of the option contained in the lease as so rectified AND IT IS THIS DAY ORDERED that the Appellant do deliver to the Solicitors for the Respondents on or before the fourth day of January 1985 a Memorandum of Transfer in registrable form of an estate in fee simple of the lands described in the said Agreement as Subdivision 1 of Resubdivision A Subdivision 1 of Resubdivision C and Subdivision 2 of Resubdivision A of Subdivision 1 of Portion 126 on Registered Plan Number 45048 situate in the County of Churchill Parish of North containing areas of 29 acres 2 roods 18 perches, 10 acres 31 perches and 37 acres 3 roods 29 perches respectively and being the whole of the land contained in Certificates of Title Volumes 4865 Folios 142, 143 and 144 free of all encumbrances, such transfer to be in favour of the Appellant, Declaration Form F and all such other documents necessary to enable the Appellant to become registered as proprietor of an estate in fee simple in the said lands free of all encumbrance AND IT IS THIS DAY FURTHER ORDERED that the Respondents do execute the said Memorandum of Transfer, Declaration Form F and other documents necessary to enable the Appellant to become registered as proprietor of the



estate in fee simple in the said lands as aforesaid free of all encumbrance

AND IT IS THIS DAY FURTHER ORDERED that at 3 p.m. on the twentyfifth day of January 1985 the Respondents do deliver to the Solicitors for the Appellant at the office of the Registrar of the Supreme Court of Queensland, George Street, Brisbane, the duly executed Memorandum of Transfer, Declaration Form F, Certificates of Title to the said lands free from all encumbrances and other documents necessary to enable the Appellant to become registered as proprietor of an estate in fee simple in the said land free of all encumbrance

AND IT IS THIS DAY FURTHER ORDERED that at the time and place aforesaid the Appellant do pay into Court to the credit of this action the sum of SEVENTYSEVEN THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS (\$77,750.00) being the purchase money due under the agreement as rectified

AND IT IS THIS DAY FURTHER ORDERED that at the time and place aforesaid the Respondents do deliver possession of the said lands to the Appellant

AND IT IS THIS DAY FURTHER ORDERED that the Respondents be at liberty to apply at any time and from time to time on notice to the Appellant's Solicitor for an order for the payment out of Court to the Solicitors for the Respondents of such sum or sums as may be necessary to discharge any encumbrance upon the said lands or to gain possession of the relevant Certificates of Title in order to perform their obligations under the said Agreement or this Order

AND IT IS THIS DAY FURTHER ORDERED that if at the time of the transfer of the said lands to the Appellant any encumbrance remains undischarged, an enquiry be had as to the amount necessary to discharge the encumbrance, and that the purchase price be abated by that amount and that the Registrar certify the amount accordingly

AND IT IS THIS DAY FURTHER ORDERED that there be payment out of Court of the certified amount of any abatement or abatements to the Appellant

AND IT IS THIS DAY FURTHER ORDERED that the Appellant recover against the Respondents the costs including any reserved costs of the action to be taxed and his costs of the appeal to be taxed

AND IT IS THIS DAY FURTHER ORDERED that an account be taken as to the adjustment of rates, taxes and outgoings in respect of the said lands up to the date of possession and the amounts found due to the party entitled to the same be paid by the party responsible therefor

AND IT IS THIS DAY FURTHER ORDERED that the amounts found due to the Appellant and the Respondents upon the taking of the account and the taxation of costs hereinbefore directed be set off and that the Registrar certify the balance so found due and the party to whom it is due AND IT IS ORDERED that if the balance be due to the Appellant that the sum then standing to the credit of this action in Court be appropriated to pay the same so far as it will extend and that to the extent that it is so appropriated it be paid out accordingly to the Solicitors for the Appellant



AND IT IS THIS DAY FURTHER ORDERED that any balance remaining in Court to the credit of this action after the payment out of the sums referred to herein be paid out to the Solicitors on the record for the Respondents

AND IT IS THIS DAY FURTHER ORDERED that any party be at liberty to apply as they may be advised and that leave be reserved to all parties to move for the making of such further orders for the purposes of specifically performing the said agreement as rectified or for any other purpose as circumstances may require.

BY THE COURT



[Handwritten Signature]
DEPUTY REGISTRAR



IN THE FULL COURT
OF THE SUPREME COURT
OF QUEENSLAND

No. 4554 of 1981

IN THE MATTER of The Rules Regulating Appeals to Her Majesty in Council from the State of Queensland (Imperial Order in Council dated 18th October 1909)

- and -

IN THE MATTER of "The Judicial Committee (General Appellate Jurisdiction) Rules Order 1982"

- and -

IN THE MATTER of a judgment of The Supreme Court of Queensland exercising appellate jurisdiction dated 21st December 1984

- and -

IN THE MATTER of an application for leave to appeal from that judgment to Her Majesty in Council by JAMES JOSEPH WATSON and PAULINE ELAINE WATSON (his wife)

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SUPREME COURT
OF QUEENSLAND
07. JAN. 1985
FILED
BRISBANE

FEE	49-90
ASSESSOR	
RECEIPT	219232
ENTERED	no
CHECKED	

DER

FULL COURT

BEFORE THE HONOURABLE MR JUSTICE KELLY

THE SECOND DAY OF JANUARY, 1985

LAN MITCHELL ESQ.,
licitor,
Brisbane Street,
SWICH 4305

1: 281 2277

WN AGENTS:

EARY & HOARE,
licitors,
Charlotte Street,
ISBANE 4000

1: 221 4099

UPON MOTION made to the Court this day AND UPON READING the Notice of Motion and the Affidavit of JOHN JOSEPH HOARE both filed the 28th December, 1984 and the Affidavit of JAMES JOSEPH WATSON sworn 31st December, 1984 and filed this day by leave AND UPON HEARING Mr Morley of Queen's Counsel and with him Mr McMillan of Counsel for the Applicants, JAMES JOSEPH WATSON and PAULINE ELAINE WATSON and Mr Myers of Counsel for the

Full Court

Respondent, GLEN ROBERT PHIPPS

AND UPON the Applicants undertaking through their Counsel to give forthwith the security required by the aforesaid Rules regulating Appeals from Queensland all parties thereupon being in agreement that, subject to the giving of such security, no objection exists to the Court proceeding to make a final order rather than a conditional order pursuant to Rule 5 of the aforesaid Rules should it be disposed to do so

AND UPON the Applicants further undertaking through their Counsel that they shall not sell, lease, mortgage, encumber, obtain any further advance on the existing discharged, though not registered as discharged, mortgage or otherwise deal with the land the subject of this Appeal

AND UPON the Applicants further undertaking through their Counsel to lodge in conjunction with the Respondent the duly released Bill of Mortgage on the subject property for registration

AND UPON the Applicants further undertaking through their Counsel to pursue the Appeal with due diligence and to attend in conjunction with the Respondent upon the Registrar on or before 21st January, 1985 for the purposes of settling the Appeal Record

AND UPON the Applicants further undertaking through their Counsel that they will cause the said Record to be reproduced within Queensland, subject to the exigencies imposed by the Court Reporting Bureau, and transmitted to the Registrar of the Judicial Committee of the Privy

Full Court

-188- . No.11 Order of Kelly J.
granting final leave
to appeal
2 January 1985

IT IS ORDERED:-

- (a) That an Appeal be allowed to be made to Her Majesty in Council from the Judgment and Orders of the Full Court of Queensland made in the said Appeal in action No. 4554 of 1981 whereby the Appeal of the Respondent to this Application was allowed, certain rectification to an instrument of lease was decreed, a declaration that a certain option to purchase should be deemed to have been exercised, specific performance of an agreement was declared and decreed and other orders and directions were made and given including an order that the Respondent to this Application recover the costs of the action to be taxed and his costs of the Appeal to be taxed;
- (b) That pending ^{the execution of} the Appeal to Her Majesty in Council, the Judgment of the Full Court of 21st December, 1984 be suspended;
- (c) That the costs of and incidental to this Motion abide the event unless Her Majesty in Council should otherwise order;
- (d) That the said costs be paid by the Applicants in the event that the said Appeal be not proceeded with or dismissed for non-prosecution.



BY THE COURT

DEPUTY REGISTRAR

Full Court

No. 11 Order of Kelly J.
granting final leave
to appeal
2 January 1985

No. 3 - Letter, then Solicitors
for Defendants to
Solicitors for Plaintiff
(tendered by Plaintiff).

RICHARD ZANDE & ASSOCIATES

RICHARD ZANDE
SOLICITOR SUPREME CT. QLD.
HIGH CT. AUST.
BARRISTER & SOLICITOR A.C.T.
COMMISSIONER FOR AFFIDAVITS
(N.S.W., Vic., S.A., W.A.)
NOTARY PUBLIC

SOLICITORS
REGISTERED TAXATION AGENTS
PHONE: OFFICE 281 1633
PRIVATE: 281 1633

P.O. BOX 42, IPSWICH, 4305
49 Ellenborough Street,
Ipswich, Qld., 4305

OUR REF. WP:RH

YOUR REF. Mr Bloxom

19th December, 1977

Messrs Dale & Fallu,
Solicitors,
Brisbane Street,
IPSWICH...4305

Dear Sirs,

Re: Watson sale to Phipps

We enclose herewith Contract for Sale in duplicate for signature by your client and return to our office at your earliest convenience.

We understand from our clients' instructions that your client will have the option to purchase certain other lands during the currency of a lease yet to be prepared and that such option shall be contained in the said lease.

We await receipt of your further advices herein at your earliest convenience.

Yours faithfully,

RICHARD ZANDE & ASSOCIATES

per: *J. C. Zanani*

Exhibits

-190-

No.3 Letter, then Solicitors
for Defendants to
Solicitors for Plaintiff
(tendered by Plaintiff)
19 December 1977

DALE & FALLU

SOLICITORS

P. B. FALLU
PAUL FALLU

TELEPHONES:

OFFICE 281 4999
(3 LINES)
PRIVATE P. B. FALLU 281 4742
PRIVATE PAUL FALLU 281 4003
P.O. BOX 30

142 BRISBANE STREET,
Ipswich 4305.

WB:JM

21st December, 1977.

Messrs. Richard Zande & Associates,
Solicitors,
Ellenborough Street,
IPSWICH. 4305.


Dear Sirs,

RE: PURCHASE G. R. PHIPPS FROM J. J. & P. E.
WATSON

With reference hereto we return herewith
Contract of Sale in duplicate duly completed by our client
and shall be pleased to receive the original thereof when
same has been executed by your client Vendors.

We shall also be pleased to receive the
Lease contained in the option to purchase in due course.

Yours faithfully,
DALE & FALLU,

Per: 

Enc.

Exhibits

SP. 50
L.S.

DECLARED PRINCIPAL
PLACE OF RESIDENCE

COPYRIGHT

ADOPTED BY THE REAL ESTATE INSTITUTE OF QUEENSLAND
APPROVED BY THE QUEENSLAND LAW SOCIETY INCORPORATED, 1975

DUTY DENOTED
ON TRANSFER

CONTRACT

1978-12-79 196810 JMS. 750*59250
I/We JAMES JOSEPH WATSON & PAULINE ELAINE WATSON (his wife)

~~as Agents for the Vendor~~ as joint tenants
1978-12-79 196810 JMS. 750*42007

do hereby acknowledge that
this day I/we have sold on the terms and conditions hereunder written and as hereinafter printed
to GLEN ROBERT PHIPPS

of 1 Ashgrove Street, Coalfalls, Ipswich
the following property situated at Fernvale
being i. The land described as Subdivision 1 of Portion 161 on
Registered Plan No. 28893

County Churchill Parish North Town/City _____
containing an area of thirty acres (30 acs)
a little more or less being the whole of the land contained in
Deed of Grant/Certificate of Title Volume 4865 Folio 146
(Local Authority _____ Rate Assessment No. _____)

G.R.P. ii. All improvements on or belonging to the said land being (state whether dwelling
house, etc.) dwelling house & furniture, double garages, dairy, small
barn & grain shed
(See Clause 14 re insurance)

iii. The following items of property: (attach separate schedule if necessary) _____

subject to the tenancies and encumbrances (if any) set out hereunder for the sum of
\$ 39,500-00 clear of rates and taxes

and have received the sum of \$ 100-00
by way of deposit and in part payment of the said purchase money provided that if the deposit is
paid by cheque which is not duly honoured on presentation, the vendor may at his option cancel
this Contract. The said deposit shall be retained by me/us as agent for the vendor until the date
of completion when it shall be accounted for to the vendor but if this sale shall not be com-
pleted for any reason other than the default of the purchaser the said deposit shall be refunded
to the purchaser. Any such refund to the purchaser shall be deemed to be made without pre-
judice to any right which I/we may have against the vendor under or connected with this
Contract. It is hereby agreed that this authority by the vendor for payment to the purchaser
shall be irrevocable.

Dated at Ipswich this 6th day of January 1978
Lo Pall Witness
[Signature] Vendor's Agent

And I/we the abovenamed Purchaser hereby acknowledge that I/we have this day purchased the
said property for the sum first above mentioned and agree to fulfil in all respects and to be
bound by the Conditions of Sale on my/our part hereunder written and as hereinafter printed.

[Signature]
Witness

G.R. Phipps
Purchaser

Exhibits

CONDITIONS OF SALE
(STRIKE OUT EITHER CLAUSE 1 or 2)

1. The balance of purchase money shall be paid on the date for completion stated in the Schedule hereto in exchange for possession (such possession to be vacant if no tenancies be set out hereunder) and together with a duly executed Memorandum of Transfer in favour of the Purchaser capable of immediate registration in the appropriate office and accompanied by all instruments of Title free from encumbrances except as set out hereunder.

2. ~~THE balance of purchase money shall be paid by instalments as follows~~ 3 P. 10-11-78

~~The Purchaser shall also pay interest at the rate of _____ per centum per annum on the balance of purchase money from time to time owing such interest to be calculated from the date of possession by _____ rests and to be paid on _____~~

~~in each year beginning _____~~

~~Without _____ days of the date hereof the Purchaser shall pay to the Vendor~~

~~the further sum of \$ _____ in part payment of the price and the Vendor shall execute a Memorandum of Transfer in favour of the Purchaser and the Purchaser shall at his cost execute a Mortgage in duplicate and deliver same to the Vendor or his Solicitor to secure payment of the unpaid instalments and interest as aforesaid such Mortgage to be prepared and registered by the Vendor's Solicitor at the expense of the Purchaser and to contain the usual terms and conditions appropriate to such Mortgages provided that the execution by the Vendor of such Memorandum of Transfer shall be subject to the execution by the Purchaser of the said Mortgage. Possession shall in the absence of other mutual written agreement be given to and taken by the Purchaser on the date for completion stated in the Schedule hereto and upon such delivery to the Vendor or his Solicitor of the said Mortgage, such possession to be vacant if no tenancies be set out hereunder. The Vendor agrees promptly to do all such acts reasonably within his power to procure the registration of the said Memorandum of Transfer in the office of the Registrar of Titles or other appropriate office without undue delay.~~

3. IF possession shall be given before payment of the purchase price in full, the following subclauses shall take effect:

- (i) As from the date of possession and until the whole of the purchase moneys and interest shall have been fully paid the Purchaser shall at his own expense insure and keep insured against loss or damage by fire storm and tempest in the joint names of the Vendor and Purchaser with an Insurance Company approved by the Vendor to their full insurable value all improvements and property of an insurable nature upon the land and all moneys received in respect of such insurance shall at the option of the Vendor be applied in repairing or reinstating the buildings or erections insured or shall be retained by the Vendor in or towards payment or part payment as the case may be of the unpaid balance of the purchase money and interest thereon. If the Purchaser neglects or refuses to pay the annual premium or any part thereof necessary to obtain or renew such insurance policy the Vendor may pay the amount of such premium and thereafter demand and recover by process of law from the purchaser the amount so paid.
- (ii) So long as any purchase money be owing by the Purchaser to the Vendor on the property hereby sold the Purchaser shall keep and maintain the same and all improvements and property thereon at all times in as good and substantial repair as at present and shall not alter or add to same and shall not fall or remove the timber thereon or remove soil gravel or turf therefrom without the consent in writing of the Vendor first had and obtained and the Vendor shall have the right to impose such reasonable conditions as he shall think fit for such consent.
- (iii) Any Act Regulation or Proclamation now in force or hereafter to be enacted issued or made in any wise tending to restrain restrict or delay the rights remedies and powers by this Contract granted to the Vendor shall not apply and is hereby expressly negatived.
- (iv) The Purchaser will from time to time and at all times so long as any purchase money shall remain unpaid keep the said land free from noxious weeds and plants and will comply with the provisions of any Statute or Local Government By-Law hereafter in force relating to noxious weeds and plants.
- (v) The Purchaser shall not mortgage sublet or part with possession or occupancy of the said property or any part thereof without the prior consent of the Vendor.

4. THE Purchaser or his Solicitor shall within fourteen days from the date the duly executed Contract is received by the Purchaser or his Solicitor deliver to the Vendor or his Solicitor all requisitions or objections (if any) on or to the title. The Vendor shall at the request of the Purchaser or his Solicitor produce all unregistered documents relating to the subject land or property and full and proper particulars of all unregistered dealings which so relate. All requisitions or objections not included in any such writing so delivered shall be deemed waived by the Purchaser and in default of such requisitions and objections (if none) and subject to such (if any) as are so delivered the Purchaser shall be deemed to have accepted title of the subject land.

5. IF the Purchaser shall within the said fourteen days make any such requisition or objection as aforesaid which the Vendor shall be unable or unwilling to remove or comply with the Vendor or his Solicitor (whether the Vendor shall have attempted to remove or comply with the same and notwithstanding any negotiation or litigation in respect thereof) may give to the Purchaser or his Solicitor notice in writing of the Vendor's intention to rescind the agreement at the expiration of seven days without prejudice to any other rights he may have. Unless such requisition or objection shall be withdrawn or waived within such seven days the contract shall thereupon be rescinded and the Vendor shall repay to the Purchaser all deposit and other moneys received by him or his Agent on account of the purchase money but without interest, costs or damages and the same shall be accepted by the Purchaser in full and final satisfaction of all claims.

6. IT shall be the responsibility of the Purchaser to satisfy himself as to the boundaries of the said land and the location of improvements and for such purpose the Purchaser shall be entitled to conduct an identification survey.

7. SUBJECT to compliance by the Purchaser with his obligations under this contract the Vendor shall as required do all acts and execute all necessary documents and paperwritings for the purpose of completing the sale and ensuring that the Purchaser obtains a proper and valid title to the property hereby sold, but all transfer documents shall be prepared by and at the expense of the Purchaser and delivered to the Vendor or his Solicitor within a reasonable time prior to the due date of completion. Should the Instruments of Title and/or other Deeds or Documents relating to this property relate to other properties also the Vendor shall not be obliged to deliver same to the Purchaser but shall enter into such reasonable covenants with the Purchaser as the Purchaser may require for production of such Instruments of Title and/or Deeds and Documents as aforesaid as are in his possession or under his control.

8. THE Vendor will at any time accept payment of all or part of any moneys owing hereunder with interest calculated up to date of payment.

9. IF any mistake be made in the description of the premises or any other error whatsoever shall appear in the particulars of the property such mistake or error shall not annul the sale but a compensation or equivalent shall be given or taken by the Vendor or Purchaser as the case may require.

Exhibits

10. THAT notwithstanding anything in "The Dividing Fences Act of 1953-1972" or any amendment thereof to the contrary defined the Vendor shall not be liable to or required at any time by the Purchaser his executors administrators or assigns to join contribute towards the expense of maintaining or erecting any fence or fences erected or to be erected or for fencing any of the dividing lines between the lands sold and any land unsold or held by the Vendor.

11. IF the Purchaser shall neglect or fail to pay his deposit or the balance or any instalment of purchase money or part thereof or any interest or shall fail to comply with any agreement on his part herein contained then (subject to the "Property Law Act 1974-1975" as amended from time to time so far as the said Act may apply) the Vendor shall be at liberty in addition to any other rights and remedies conferred upon him at law or in equity:

- (i) to sue the Purchaser for damages for breach of Contract; or
- (ii) to sue the Purchaser for specific performance of this Contract and/or damages; or
- (iii) to rescind this Contract and

- (a) forfeit the deposit; and/or
- (b) sue the Purchaser for damages for breach of Contract

and in the event that the Vendor shall so rescind this Contract he shall, in addition to any other rights and remedies herein provided, be at liberty to resume possession and/or to resell the property in such manner and upon such terms and conditions as the Vendor may think proper. Any deficiency in price on such resale and the expenses of and incidental to any possession and to the present sale and such resale and any abortive attempt to resell and any outgoings in respect of the said land arising after the date for completion herein shall be paid to the Vendor by the present Purchaser and shall be recoverable as a liquidated sum.

12. ALL rates and taxes and outgoings (including Land Tax and Insurance Premiums) with respect to the property shall be paid and discharged by the Vendor up to the date of possession and from that date by the Purchaser such rates taxes and outgoings if necessary being apportioned and the Purchaser will thereafter punctually pay all rates taxes and outgoings charged upon the said land or any part thereof or upon the owner or occupier thereof and in the event of the Purchaser failing so to do the Vendor may pay all such rates taxes and outgoings and such amounts so paid shall be recoverable forthwith by the Vendor from the Purchaser and/or shall be deemed to be part of the moneys owing hereunder and shall bear interest at the same rate as applied to any other moneys payable under this agreement. Land Tax shall be apportioned on the basis that as at midnight on the previous 30th June the Vendor owned no other land than that described in this Contract for Sale.

13. IF the Purchaser shall have signed this Contract and paid the said cash deposit the possession or receipt of the rents and profits of the property shall be retained by the Vendor up to the date of possession inclusive and as from that date the possession of the property or receipt of the rents and profits thereof shall be taken by the Purchaser and if necessary such rents or profits shall be apportioned. Such possession or receipt merely is not to amount to an acceptance of the title or affect the Purchaser's rights hereunder.

14. THE PROPERTY SHALL BE AT THE RISK OF THE PURCHASER FROM THE DATE HEREOF and the Vendor whilst continuing in possession will use the said land and all improvements and items of property with reasonable care. Until the date of completion or possession whichever the earlier occurs the Vendor shall continue the existing policy or policies of insurance on the improvements and other property included in the sale and subject to completion hereunder the Purchaser shall have the benefit of any insurance moneys paid or payable by the Insurer to the Vendor but the Vendor does not warrant the enforceability of any policy or the adequacy of any insurance.

15. ANY sale of land hereunder where the consent of any Minister or Officer of the Crown is required to such sale shall be subject to such consent being given and both Parties will forthwith do all things necessary on their part respectively to obtain such consent.

16. POSSESSION of the property hereby sold shall be given and taken in accordance with paragraph 1 hereof or upon such other date as may be mutually agreed in writing between the parties hereto.

17. SHOULD it be established within twenty-one (21) days from the date hereof that at the date of this Contract the property be or would be adversely affected by any proposed road work resumption acquisition or rezoning by or approved by any Government or any duly empowered Authority or Body then either Party shall be entitled to rescind this Contract upon notice in writing to the other.

18. THE Vendor and the Purchaser shall each pay his own costs of and incidental to this sale and purchase but all stamp duty hereon and on any duplicate hereof and any duty in respect of the Memorandum of Transfer shall be paid by the Purchaser.

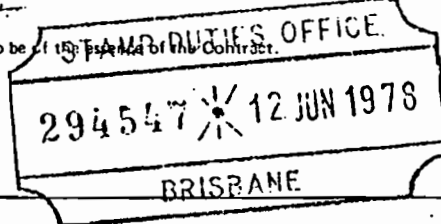
19. NOTWITHSTANDING the completion of this sale and purchase any general or special conditions or any part or parts thereof to which effect is not given by the conveyance and which is capable of taking effect after completion shall remain of and in full force and effect.

20. COMPLETION shall be effected in the city/town named in the Schedule hereto and at the place notified in writing by the Vendor or his Solicitors to the Purchaser or his Solicitors at least three (3) days prior to the date provided for completion or failing such notification then at the office of the Solicitors for the Vendor or if the Vendor has no solicitors in this transaction then at the office of the Solicitors for the Purchaser.

21. THE Purchaser acknowledges that prior to entering into this Contract he received a statement in writing in compliance with Section 66 of the "Auctioneers and Agents Act, 1971-1975".

22. TIME shall in all cases and in every respect be deemed to be of the essence of the Contract.

23. SALE is subject to confirmation by the Vendor.



EXTRACT FROM PROPERTY LAW ACT CONCERNING DESTRUCTION OF OR DAMAGE TO A DWELLING HOUSE BEFORE COMPLETION OF SALE.

SECTION 64. Right to rescind on destruction of or damage to dwelling-house.

- (1) In any contract for the sale of a dwelling-house where, before the date of completion or possession whichever earlier occurs, the dwelling-house is so destroyed or damaged as to be unfit for occupation as a dwelling-house, the purchaser may, at his option, rescind the contract by notice in writing given to the Vendor or his Solicitor not later than the date of completion or possession whichever the earlier occurs.
- (2) Upon rescission of a contract pursuant to this section, any moneys paid by the Purchaser shall be refunded to him and any documents of title or transfer returned to the Vendor who alone shall be entitled to the benefit of any insurance policy relating to such destruction or damage subject to the rights of any person entitled thereto by virtue of an encumbrance over or in respect of the land.
- (3) In this section the term "sale of a dwelling-house" means the sale of improved land the improvements whereon consist wholly or substantially of a dwelling house or the sale of a unit within the meaning of the "Building Units Titles Act 1965-1972".
- (4) This section applies only to contracts made after the commencement of this Act and shall have effect notwithstanding any stipulation to the contrary.

SPECIAL CONDITIONS (if any)

- (a) This contract is subject to the vendors obtaining suitable finance from the Bank of New South Wales at Booval to enable the vendors to pay out the existing second mortgage over the within described land;
- (b) the parties hereby agree that the purchase moneys shall be made up as follows


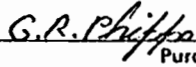
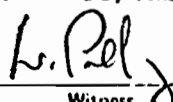

(i) House property at 1 Ashgrove Street, Coalfalls free from all encumbrances valued at	\$25,000-00
(ii) Cash	14,500-00
	\$39,500-00
- (c) This contract is also subject to the Vendors granting to the purchaser a Lease for Five Years (5) over approximately 78 acres adjoining the property the subject of the within Contract

SCHEDULE

DATE FOR COMPLETION 17th February, 1978
 CITY/TOWN FOR COMPLETION Ipswich

TENANCIES (if any) nil

ENCUMBRANCES (if any)
 Bill of Mortgage to Bank New South Wales
 Second Bill of Mortgage

 _____ Witness	 _____ Purchaser
Confirmed by Vendor  _____ Witness	 _____ Vendor

Vendor's Solicitor Richard Zande & Associates Phone 281-1633

Purchaser's Solicitor Dale & Fallu Phone 281-4999

Exhibits

No. 5 - Letter, then Solicitors
for Defendants to
Solicitors for Plaintiff
(tendered by Plaintiff).

RICHARD ZANDE & ASSOCIATES

RICHARD ZANDE
SOLICITOR SUPREME CT. QLD.
HIGH CT. AUST.
BARRISTER & SOLICITOR A.C.T.
COMMISSIONER FOR AFFIDAVITS
(N.S.W., Vic., S.A., W.A.)
NOTARY PUBLIC

SOLICITORS
REGISTERED TAXATION AGENTS
PHONE: OFFICE 281 1633
PRIVATE: 281 1633

P.O. BOX 42, IPSWICH, 4305
49 Ellenborough Street,
Ipswich, Qld., 4305

OUR REF. WP:JB

YOUR REF.

25th January, 1978.

Messrs. Dale & Fallu,
Solicitors,
Brisbane Street,
IPSWICH 4305

Dear Sirs,

Re: J.J. & P.E. WATSON sale to G.R. PHIPPS

Further to our previous correspondence we enclose herewith your clients copy of the relevant Contract of Sale together with draft Lease for your perusal.

We acknowledge receipt of deposit of \$100-00 and expect to be in a position to advise you of the Vendors application for finance pursuant to special clause (a) of the Contract in the near future.

We invite you to complete the draft Lease where blanks occur and we would appreciate your further advices in the near future.



Yours faithfully,
RICHARD ZANDE & ASSOCIATES.

PER: 

Exhibits

-196-

No.5 Letter, then Solicitors
for Defendants to
Solicitors for Plaintiff
(tendered by Plaintiff)
25 January 1978

No. 6 - Letter, then Solicitors
for Defendants to
Solicitors for Plaintiff
(tendered by Plaintiff).

RICHARD ZANDE & ASSOCIATES

RICHARD ZANDE
SOLICITOR SUPREME CT. QLD.
HIGH CT. AUST.
BARRISTER & SOLICITOR A.C.T.
COMMISSIONER FOR AFFIDAVITS
(N.S.W., Vic., S.A., W.A.)
NOTARY PUBLIC

SOLICITORS
REGISTERED TAXATION AGENTS
PHONE: OFFICE 281 1633
PRIVATE: 281 1633

P.O. BOX 42, IPSWICH, 4305
49 Ellenborough Street,
Ipswich, Qld., 4305

OUR REF. WP:CM

1st February, 1978

Messrs. Dale & Fallu,
Solicitors,
Brisbane Street,
IPSWICH. 4305

"ATTENTION MR. BLOXUM"

Dear Sirs,

Re: J.J. & P.E. WATSON sale to G.R. PHIPPS

We enclose herewith Lease in triplicate duly executed by our client. Kindly request your client to execute same and return these documents to us for payment of stamp duty and registration. We also enclose herewith our account for consideration by your client.

Yours faithfully,
RICHARD ZANDE & ASSOCIATES,



L E A S E

TO BE REPRODUCED FOR FURTHER STAMPING ONLY b. 2. 81

We, JAMES JOSEPH WATSON and PAULINE ELAINE WATSON (his wife) of Mail Service 240, Fernvale, Via Ipswich in the State of Queensland (hereinafter called "the Lessor") being the registered proprietors of an estate in fee simple as joint tenants SUBJECT HOWEVER to such encumbrances liens and interests as are notified by Memorandum endorsed hereon in all that piece or parcel of land more particularly described in Schedule 1 hereto DOTH HEREBY LEASE to GLEN ROBERT PHIPPS of 1 Ashgrove Street, Coalfields, Ipswich in the State of Queensland (hereinafter called "the Lessee") an area of vacant land already identified by the parties and used as farming land which is that part of all that land as described in Schedule 1 hereto (hereinafter called "the demised land") together with certain farming equipment more fully described in Schedule 2 hereto (hereinafter called "the demised farming equipment") for the space of five (5) years commencing (not withstanding the date hereof) from the *Seventeenth* day of *February* 1978 at a monthly rental of TWO HUNDRED AND TWENTY DOLLARS (\$220) per calendar month payable in advance on the day of *Seventeenth* each and every month subject to the following covenants conditions and restrictions -

G.R. Phipps.
G.R. Phipps.
G.R. Phipps.

1. THE LESSEE and to the intent that the obligations may continue throughout the term hereby created and any extension or renewal thereof and the period thereafter during which the lessee may be in occupation of the demised premises HEREBY COVENANTS WITH THE LESSOR as follows -

(a) To pay the rent hereby reserved at the times and in the manner hereinbefore appointed for the payment hereof free from all deductions whatsoever to the lessor at Ipswich or to such other person or persons company or companies Bank or Banks at Ipswich aforesaid *as the lessor may from time to time* in writing direct.

(b) To pay all charges *in respect of electric power and light and gas (if any) and all telephone charges and all excess water rates trade waste charges (if any) cleansing dues*

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BRISBANE

STAMPED COPY OF ORIGINAL

Exhibits

(if any) and license permit or inspection fees (if any) which may from time to time be assessed imposed levied or charged in respect of or attributable to the demised land or the lessee's use thereof.

(c) Not to assign transfer demise sub-let set over or part with the possession of or otherwise by any act or deed procure the demised land or any part or parts thereof to be assigned transferred demise sub-let/^{set}over or the possession of the same or any part or parts thereof otherwise parted with unto any person or persons body corporate or incorporate whomsoever or whatsoever without the consent in writing of the lessor first had and obtained PROVIDED HOWEVER that the consent of the lessor to any such assignment or sub-letting shall not be unreasonably withheld in the case of a respectable and financially responsible person firm or body corporate or incorporate (the burden of proof whereof shall lie upon the Lessee) who or which shall carry on a business or trade approved by the lessor AND PROVIDED FURTHER that it shall be deemed to be a condition precedent to the granting of any such consent hereunder that the lessor may require the lessee to pay the lessor's legal costs in connection with or incidental to the giving of such consent and the lessor may require the lessee on or before the date of any such assignment or sub-letting to obtain and deliver to the lessor a Deed of Covenant to be prepared by the Lessor's Solicitors (but at the expense of the lessor in all respects) whereby any such assignee or sub-tenant will covenant with the lessor to carry out/observe perform fulfil and keep all the covenants conditions and stipulations herein contained or implied whether positive or negative and whether running with the land or otherwise and on the part of the lessee to be observed performed fulfilled and kept. The provisions hereinbefore contained are intended by the lessor and the lessee to be in addition to and not in substitution for or in derogation from the provisions of Section 121 (1) of the Property Law Act 1974 (as amended for time to time) or any part thereof and shall be read

Exhibits

accordingly.

(d) At all times during the said term to keep and at the expiration or sooner determination of the said term deliver up and demised land and the demised farming equipment in a good condition as to be fit for immediate use by the lessor and his assigns.

(e) At all times during the said term to keep and maintain and make all necessary payments to keep the demised farming equipment in a good state of repair as may be reasonably expected having regard to fair wear and tear and useage.

(f) At all times during the said term to ensure that all persons operating driving and or using the demised farming equipment from time to time have full knowledge in the operation driving and use of the said equipment and further that all such persons hold current licences working tickets or such other written authority to enable such persons to operate drive and use the demised farming equipment.

(g) At all times during the said term to use the demised land for the purpose of farming dairying and for grazing of stock or such similar purpose and should the lessee wish to use the land for any other purpose written consent must first be had and obtained from the lessor.

(h) At all times during the said terms to keep the demised land in reasonably good condition and not to accumulate any waste debris garbage or similar refuse upon the said land.

(i) At all times during the said term to indemnify and save harmless and keep insured the lessor from all loss and damage to the demised land and the demised farming equipment or to neighbours in the area by the negligent use or misuse of the demised and/or the demised farming equipment.

(j) At all times during the said term to keep the demised land together with any stock thereon whether owned and controlled by the lessee or otherwise free from all infectious and contagious diseases pests illnesses and plagues and at his own expense and cost to fumigate and disinfect the demised land and stock upon the said land.

Exhibits

(k) At all times during the said term to permit the lessor or his agent or agents or prospective purchasers and during one calendar month immediately preceding the termination of this tenancy to permit the lessor or his agent or agents or prospective tenants or purchasers and other with written authority from the lessor or his agents at reasonable times during the day to view the premises.

(l) That the lessee will pay all costs (on a Solicitor and own client basis) and expenses of and incidental to the preparation execution and stamping of this lease including all stamp duty and consent fees payable thereon all moneys which the lessor may expend in consequence of any default that may be made by the lessee in the performance or observance of any covenants or agreement herein contained or implied or which shall have been authorised entered into or made by the lessee or of or incidental to any consent of the lessor required in favour of the lessee pursuant to the terms hereof.

(m) That the lessee will and he doth hereby indemnify and save harmless the lessor against all losses damages and expenses which the lessor^{or} any of its other tenants may sustain expend or be put to by reason or any neglect misconduct misperformance or nonperformance on the part of the lessee of any of the covenants and agreements on his part herein contained and the lessee will at his own cost and expense pay for all such loss and damage.

2. THE LESSOR HEREBY COVENANTS WITH THE LESSEE as follows -

(a) That the lessee paying the said rent and other moneys payable by it at all times and in the manner hereinbefore appointed for payment thereof and performing and observing the several covenants conditions and restrictions herein contained and on the part of the lessee to be observed performed fulfilled and kept may peaceably hold and enjoy the said premises during the said term without any interruption by the lessor or any person lawfully claiming through under or in trust for it.

(b) That the lessor will pay all Local Authority and Water and Sewerage Rates and Land Tax whatsoever to be charged upon or payable in respect of the land on which the demised premises are

Exhibits

4
E.H.G.

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situate ~~except to the extent that the same are payable by the~~
lessee hereunder.

(c) The powers in the lessor implied by Section 107 of the Property Law Act 1974(as amended from time to time) shall apply to this lease except in so far as such powers are excluded or varied by the powers of this lease.

3. AND IT IS HEREBY MUTUALLY AGREED BY AND BETWEEN THE PARTIES HERETO as follows -

(a) At all times during the said term or at the expiration of the said term the lessee may offer to purchase the demised land from the lessor for the consideration equivalent to one thousand dollars (\$1,000-00) per acre.

(b) That if the rent hereby reserved or any part thereof shall be in arrears for the space of fourteen (14) days after the same shall become payable although no legal or formal demand shall have been made therefor it being hereby agreed that no such demand shall be necessary or if the lessee shall make a breach of any covenant obligation condition or agreement (express or implied) in this lease or if any writ or Execution be levied on the real or personal property of the lessee and such breach shall not be remedied after a period of fourteen (14) days from the date the lessor shall have served on the lessee a notice pursuant to Section 124 (1) of the Property Law Act 1974 (it being specifically agreed by and between the lessor and the lessee that the said period of fourteen (14) days is a reasonable time under the said Section 124 (1) to remedy any such breach) THEN and in any of the said cases it shall be lawful for the lessor immediately thereupon or at any time thereafter and notwithstanding that the lessor may have waived any previous default of a like nature to enter by force if necessary into and upon the demised premises or any part thereof in the name of the whole and to take possession thereof and determine this lease OR at its option the lessor may serve notice in writing upon the lessee that thenceforth the lessee shall and shall be deemed to hold the demised premises as tenant from month to month on the terms of this lease so far

Exhibits

as the same are applicable to a monthly tenancy and such monthly tenancy may be determined by one (1) calendar month's notice in writing given by either party to the other expiring on any day EUT in either case without prejudice to any right of action or remedy of the lessor in respect of any antecedent breach of any covenant condition agreement or stipulation on the part of the lessee herein contained.

(c) That if after the determination of the said term or any extension thereof from any cause whatsoever the lessee shall remain in possession of the demised premises with the consent of the lessor without any express arrangements being made for a further term the lessee shall hold the demised premises from the lessor as tenant from month to month at the same calendar monthly rental as the payable at the determination of the said term or extended term as the case may be payable in advance and otherwise upon the same terms and conditions as are herein tenancy and such tenancy may be determined at any time upon one (1) month's notice being given in writing by either party to the other expiring on any day.

(d) The failure by the lessor to take advantage of any default or breach of agreement on the part of the lessee shall not be construed as a waiver thereof nor shall any custom or practice which may grow up between the parties in the course of administering this agreement be construed to waive or lessen the right of the lessor to insist upon the performance by the lessee of any agreement on its part or to exercise any rights given to the lessor on account of any such default or if the waiver has been made upon a condition which is specifically broken by the lessee. A waiver of a particular breach or default shall not be deemed to be a waiver of any other breach or default whether of a similar nature or otherwise. The acceptance of rent by the lessor shall not be construed to be a waiver of any breach of agreement on the part of the lessee. The provisions hereinbefore contained are intended by the lessor and the lessee to be in addition to and not in substitution for or in derogation from the provisions of

Exhibits

Section 119 of the Property Law Act 1974 (as amended from time to time) or any part thereof and shall be read accordingly:

(e) Any notice or demand required to be given by either party to the other hereunder shall be in writing and signed by the party or his Solicitor (or, where that party is a Company by a Director or Secretary thereof) AND shall be sufficiently served if served in accordance with any of the modes of services set forth in Section 257 of the Property Law Act 1974 (as amended from time to time) PROVIDED HOWEVER that in addition in the case of a notice to be given by the lessor to the lessee it shall be sufficiently served if delivered to or left for the lessee at the demised premises.

(f) Except where inconsistent with the context wherever herein used the word "lessor" shall mean and include the lessor and its successors and assigns, the word "lessee" shall mean and include in the case of a natural person the lessee and his her or their executors administrators and permitted assigns and in the case of a corporation the lessee and its successors and permitted assigns. Word importing the singular and plural number shall be read as importing the plural or singular number and any gender shall include the other genders, except where the context otherwise requires. Where more than one lessee is a party hereto the covenants agreements and stipulations on the part of the lessee herein contained or implied shall be deemed to be entered into by the lessees jointly and severally.

(g) The lessor shall not be responsible for any failure of the supply of electricity from the producers thereof arising from any cause known or unknown or for any failure of the electrical system in the demised premises due to breakdown repairs maintenance strikes and accidents or unavoidable causes of any class or.

SCHEDULE 1

Volume No. 4865, Folio No. 142, Subdivision 1 of Resubdivision 1 of Portion 126, 29 acres, 2 roods, 18 perches, County Churchill, Parish North. Volume No. 4865, Folio No. 143

Exhibits

Subdivision 1 of Resubdivision C of Subdivision 1 of Portion 126 on Registered Plan Number 45048, 10 acres, 31 perches, County Churchill, Parish North.

-Volume No. 4865, Folio No. 144, Subdivision 2 of Resubdivision A of Subdivision 1 of Portion 126, 37 acres, 3 roods, 29 perches County Churchill, Parish North.

SCHEDULE NO. 2

Carry-all Fiat Code No. A702 Serial 692.
Tyne Rippers, Massey Ferguson 35 Tractor,
Curly Tyne rippers, New Holland Hayliner 69
Serial AS69G010, Fordson Major Diesel,
International GL 223 Mower, Boom spray unit,
Hay rake, Ford offset Disc Tandem, Blowmist
portable, Conner-shea combine, 1 hay trailer
Spray lines 65 lengths x 3in
Main lines 42 lengths x 4in
Underground main lines
25 H.P. Motor Kelly & Lewis pump
Automatic Switch Board

I, GLEN ROBERT PHIPPS of 1 Ashgrove Street, Coalfields, Ipswich DO HEREBY ACCEPT THIS Lease of the demised premises hereinbefore described to be held as Lessee and subject to the covenants and restrictions herein contained.

DATED the *First* day of *February* 1978.

SIGNED by the said JAMES JOSEPH WATSON and PAULINE ELAINE WATSON (his wife) as Lessor this *First* day of *February* 1978 in the presence of -

L. P. Pol
A Justice of the Peace *W. Linton*

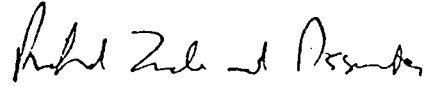
SIGNED by the said GLEN ROBERT PHIPPS as Lessee this *Seventh* day of *February* 1978 in the presence of - *G.R. Phillips*

E. H. Meekins Jr.
A Justice of the Peace

Exhibits

DATED this First day of February, 1978

Correct for the purpose of registration



Solicitors for the Lessor

Correct for the purpose of registration

Solicitors for the Lessee

THIS AGREEMENT made this _____ day of February, 1978
BETWEEN JAMES JOSEPH WATSON of Mail Service 240, Fernvale
Via Ipswich in the State of Queensland on the First Part
AND GLEN ROBERT PHIPPS of 1 Ashgrove Street, Coalfields,
Ipswich in the State of Queensland on the Second Part WHEREAS
the party on the first part supplies milk to the QUEENSLAND
FARMERS CO-OPERATIVE ASSOCIATION LTD at Booval pursuant to
a certain milk quota AND WHEREAS the party on the second
part has now leased certain lands from the party on the
First Part which said lands are directly associated with
the production and supply of the said milk quota IT IS
HEREBY AGREED as follows :-

1. The party on the second part shall hereinafter be responsible for all expenses incurred in the production and supply of the relevant milk board.
2. The party on the second part shall be entitled to receive all profits associated with the supply of the said milk quota to the said Milk Board.
3. That upon the future sale of the said milk quota by either party the party on the first part shall be entitled to receive benefits thereof.
4. The parties hereby agree that the said milk quota shall be sold at a time mutually agreed upon between themselves.

DATED at Ipswich this *Third* day of *February* 1978.

SIGNED by the said JAMES JOSEPH
WATSON in the presence of:
& PAULINE ELAINE WATSON

James Watson
J.S. Anthony

A Justice of the Peace

SIGNED by the said GLEN ROBERT
PHIPPS in the presence of:

G.R. Phipps
J.S. Anthony

A Justice of the Peace

Exhibits

No. 7 - Letter, Solicitors for
Plaintiff to then
Solicitors for Defendants
(tendered by Plaintiff).

DALE & FALLU

SOLICITORS

P. B. FALLU
PAUL FALLU

WB:SF

142 BRISBANE STREET,
Ipswich 4305.

TELEPHONES:

OFFICE 281 4999
(3 LINES)
PRIVATE P. B. FALLU 281 4742
PRIVATE PAUL FALLU 281 4003
P.O. BOX 30

9th February, 1978

Messrs. Richard Zande & Associates,
Solicitors,
Ellenborough Street,
IPSWICH. Q4305

Dear Sirs,

Re: Lease - G.R. Phipps from J.J.
and P.E. Watson
Your Reference: WP:CN

We refer to your letter of the 1st instant and
to our recent telephone conversation, and enclose herewith
Lease in triplicate duly signed by our client.

We will forward you our client's cheque in
payment of your account on receipt thereof.

Yours faithfully,
DALE & FALLU.

per: *[Signature]*

*P.S. Cheque for \$372.20 herewith
Please acknowledge*

Encls.

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Exhibits
No.7 Letter, Solicitors for
Plaintiff to then
Solicitors for Defendants
(tendered by Plaintiff)
9 February 1978

GENERAL BUSINESS
CONT'D

GENERAL BUSINESS CONT'D

FULL BOARD MEETINGS

IT WAS AGREED that the Monthly Meetings of the Full Board of Directors of the Q.F.C.A. for February, 1978 be as follows:- Thursday, 9th February, 1978 and Friday, 24th February, 1978 respectively.

CLOSURE OF
MEETING

CLOSURE OF MEETING

The Meeting closed at 6.00 p.m.

Confirmed

27th January, 1978

L.G. Zabel
.....
Chairman of Directors

MINUTES OF THE MEETING OF THE FULL BOARD OF DIRECTORS OF THE
Q.F.C.A. HELD AT HEAD OFFICE, MOOVAL ON FRIDAY, 27TH JANUARY,
1978 AT 9.30 A.M.

PRESENT

PRESENT

Mr. L.G. Zabel (Chairman); Mr. G.H. Horrocks (Deputy Chairman); Messrs. K. Hughes; M. Jendra; J.J. Ploetz; M.E. Steinhardt; and N.L. Zabel (Members of the Board); Mr. R.G. Baker, General Manager and Mr. T.J. Whyte, Secretary.

VISITORS

VISITORS

Mr. G.C. Muller, Accountant and Mr. P.L. Horton, Technologist
Milk Suppliers - Messrs. G.R. Phipps and J.J. Watson

Mr. L.G. Zabel opened the Meeting and all present participated in signing of cheques and checking of accounts certified for payment.

At approximately 10.00 a.m., Messrs. Watson and Phipps were received by the Board. Both these suppliers had appeared at Head Office requesting an opportunity to discuss with the Board matters relating to a sale from Watson to Phipps and the involvement of the quota.

Mr. Watson stated that he had recently sold 30 acres and his dairy and house to Mr. Phipps and leased a further 90 acres to Mr. Phipps with an option to purchase. He had not supplied since 1st January, 1978.

After answering questions, the visitors retired.

From Board discussion,

Mr. Hughes moved (That the Board of the Q.F.C.A. request Mr. N.L. Zabel seconded) Mr. Phipps to submit a formal application with accompanying documentation to establish (i) the purchase of 30 acre block freed from J. Watson and (ii) proof of the lease arrangements and details of all the involved provisions."

Exhibits

The Secretary advised Messrs. Watson and Phipps who would furnish this information later in the Meeting.

OF
MINUTES

APPROVAL OF MINUTES

Mr. Horrocks moved)"That the Minutes of the Full Board Meeting
Mr. Steinhardt seconded) held at Head Office, Booval on Friday, 13th
January, 1978, be signed as a correct
record of the business transacted."

CARRIED

Mr. Jendra moved)"That the Drafts of the Minutes of the
Mr. N.L. Zabel seconded) Annual General Meeting of Shareholders
held at R.S.L. Memorial Hall, Nicholas
Street, Ipswich on Friday, 30th September,
1977 and the Extra-Ordinary General Meeting
of Shareholders held at the Marburg Show
Hall on Monday, 12th December, 1977 be
accepted as presented."

CARRIED

OF
ADDRESS

CHAIRMAN'S ADDRESS

Mr. L.G. Zabel advised that the Q.F.C.A.'s submission to the
A.D.I.A.C. re G.M. Spicers Powder, had been turned down by this
Committee in its advice to the Australian Dairy Corporation.

Mr. L. Zabel said he had spoken to Mr. T. McVeigh, Federal
Member for the Darling Downs, who, with other colleagues, would
be having discussions with Mr. Sinclair, Federal Minister for
Primary Industries, on this matter.

Mr. L. Zabel believed we should let these men 'work' after our
approaches to them and their resultant promises pledging support.

Mr. Hughes said that Mr. P. Rowley, State President of the Queensland
Dairymen's Organisation, advised Q.F.C.A. approach the Minister
on their own behalf. He said that the A.D.C. had stated that the
final decision would be made by the Minister.

Mr. Zabel reported the contact he had made with leading Politicians
and Industry Leaders on this matter. The Meeting decided to ring
the A.D.C. Office in Melbourne for further information.

Mr. L.G. Zabel said that there was no information to hand on the
guidelines relating to the new Milk Supply Act.

Discussion followed on who may eventually make up the new Milk
Board and Entitlements Committee.

Mr. Zabel informed the Meeting on a recent Meeting of heads of
the four factories in the zone relating to our area and of the
following nominations:-

<u>BOOVAL</u>	MR. R.G. Baker	Queensland Milk Board
	Mr. L.G. Zabel	
	Mr. R.G. Baker	Milk Entitlements Comm.
	Mr. N.L. Zabel	
<u>CABOOLTURE</u>	Mr. I. Wild	
	Mr. H. Snow	
<u>SOUTH COAST</u>	Mr. Slingsby	
	Mr. Hollindale	
<u>LOGAN & ALBERT</u>	Mr. R. Drynan	
	Mr. K. Moran	

Exhibits

ISSUES
MINUTES
CARRIED

QUINALOW MILK SUPPLY CONT'D

On this discussion, the Meeting adjourned for lunch at 12.50 p.m.

Resuming at 1.25 p.m., the meeting worked on figures relating to the value of raw material to Q.F.C.A. Whole Milk and Bulk Cream - Butter and G.M.S. - Bulk Cream and G.M.S. - and from this discussion it was agreed to refer this matter to the Accountant's Office for costing to be presented to the next Meeting.

Mr. K. Hughes moved) "That the Q.F.C.A. request Mr. Baker to advise Mr. Jendra seconded) Mr. Williams of Kraft, Quinalow that we are looking for a return on milk supplied of \$2.25 per kg., and that we are willing to continue as is for the next ten days pending a detailed analysis on costs."

CARRIED

J.J. WATSON - SALE TO PHIPPS

Copies of the Contract of Sale and Lease Agreement were presented to the Meeting having been left by Mr. Watson.

The Board expressed concern regarding the special conditions on the Contract.

The total area involved was 108 acres not 120 acres as previously believed. Quota on the 30 acre block was equivalent to 66 litres.

It was decided that after viewing the documentation that the Board could only agree to the transfer of quota if the whole of the property was purchased.

Mr. Jendra moved) "That the Board of the Q.F.C.A. agree to Mr. N.L. Zabel seconded) advise Mr. Phipps as to existing Board policy that if he purchases the whole of the property (108 acres) from J.J. Watson and no continuity of supply is broken (except for policy of within 30 days) they will consider the transfer of quota in total. However, as he has indicated outright negotiation for 30 acres, then they are agreeable to transfer 66 litres of quota daily providing he supplies within 30 days from 15th January, 1978."

CARRIED

PLANT ENGINEER

Mr. N.L. Zabel commented on remarks made to him from Staff re our Engineer.

Mr. Baker noted these comments.

CREAM PAY, WAGES AND TRADE ACCOUNTS

Mr. N.L. Zabel moved) "That the accounts for the month totalling Mr. Horrocks seconded) \$1,229,677.31; representing Milk and Cream Pay, Wages and Trade Accounts be passed for payment."

CARRIED

SHARES - APPLICATIONS AND TRANSFERS

Applications - 25 Shares

V.C. & B.M. Gain, GRANDCHESTER 25 Shares
Exhibits

PAY,
AND TRADE
ACCOUNTS
SHARES -
APPLICATIONS
AND TRANSFERS

BUSINESS
CONT'D

GENERAL BUSINESS CONT'D

TECHNICAL COMMITTEE CONT'D

Mr. M. Steinhardt nominated Mr. J. Ploetz who was declared elected to the Technical Committee.

Mr. Horrocks moved) "That the Board agree to appoint Messrs. L.G. Mr. Ploetz seconded) Zabel and K. Hughes as a deputation to meet Mr. Sinclair, Federal Minister for Primary Industries, in Canberra, if, and when required, following arrangements of a Meeting on our behalf by Mr. E. Adermann, Federal Member for Fischer."

CARRIED

CLOSURE OF MEETING

The Meeting closed at 6.32 p.m.

Confirmed

9th February, 1978

L.G. Zabel
.....
Chairman of Directors

MINUTES OF THE MEETING OF THE BOARD OF DIRECTORS OF THE Q.F.C.A. HELD AT HEAD OFFICE, BOOVAL ON THURSDAY, 9TH FEBRUARY, 1978 at 9.30 A.M.

PRESENT

Mr. L.G. Zabel (Chairman); Mr. G.H. Horrocks (Deputy Chairman); Messrs. K. Hughes; M. Jendra; J.J. Ploetz; M.E. Steinhardt; and N.L. Zabel (Members of the Board); Mr. R.G. Baker, General Manager, and Mr. T.J. Whyte, Secretary.

VISITORS

Mrs. J.M. Sanderson and Mr. G.C. Muller
Messrs. Matthews and Horton
Messrs. Cranston and Hansen
Messrs. Parkinson and Kelly

APPROVAL OF MINUTES

Mr. Jendra moved) "That the Minutes of the Full Board Meeting Mr. Horrocks seconded) held at Head Office, Booval on Friday, 27th January, 1978, be signed as a correct record of the business transacted."

CARRIED

CHAIRMAN'S ADDRESS

In opening his address, Mr. L.G. Zabel referred to a recent visit from Mr. M.C. Philipedes re Feta Cheese Production.

Mr. Baker advised that a representative from a Danish Firm who manufacture equipment used to produce Feta Cheese would be at Booval at approximately 11.00 a.m. for discussion with the Board.

Exhibits

OF
MEETING

BY

YES

MINUTE OF
MEETING

CHAIRMAN'S
ADDRESS

STANDARD ASSURANCE CORPORATION
Estimated Total Recd \$ 7,430-00
TO BE RE-PRODUCED FOR
FURTHER STAMPING ON 17/2/81

LEASE 134530 • • • ESTATE 080-200

SCHEDULE 1 of RESUBDIVISION A of Subdivision 1 of Partion 126, 29 acres, 2 roads, 18 perches, County of Penrith, Parish North.
Volume No. 4865, Folio 143
Volume No. 4865, Folio 143
Volume No. 4865, Folio 144, Subdivision 2 of Resubdivision A of Subdivision 1 of Partion 126, 37 acres, 3 roads, 29 perches, County of Penrith, Parish North.
Volume No. 4865, Folio 144, Subdivision 2 of Resubdivision A of Subdivision 1 of Partion 126, 37 acres, 3 roads, 29 perches, County of Penrith, Parish North.

WE, JAMES JOSEPH WATSON and JASLINE BLAINE WATSON (his wife) of Mail Service 240, Fernvale, via Ipswich in the State of Queensland (hereinafter called "the Lessor") being the registered proprietors of an estate in fee simple as joint tenants SUBJECT HOWEVER to such encumbrances liens and interests as are notified by Memorandum endorsed hereon in all that piece or parcel of land more particularly described ~~as~~ BOTH HEREBY LEASE to GLEN ROBERT PHIFPS of 1 Ashgrove Street, Coalfalls, Ipswich in the State of Queensland (hereinafter called the "the Lessee") an area of vacant land already identified by the parties and used as farming land which is delineated in red in the Plan or Diagram attached hereto and marked with the letter "A" which is the whole of the land as described in Schedule 1 hereto (hereinafter called "the demised land") together with certain farming equipment more fully described in Schedule 2 hereto (hereinafter called "the demised farming equipment") for the space of five (5) years commencing (notwithstanding the date hereof) from the seventeenth day of February 1978 at a montly rental of TWO HUNDRED AND TWENTY DOLLARS (\$220-00) per calendar month payable in advance on the seventeenth day of each and every month subject to the following co venants conditions and restrictions -

1. THE LESSEE and to the intent that the obligations may continue throughout the term hereby created and any extension or renewal thereof and the period thereafter during which the lessee may be in occupation of the demised premises HEREBY COVENANTS WITH THE LESSOR as follows -

(a) To pay the rent hereby reserved at the times and in the manner hereinbefore appointed for the payment hereof free from all deductions whatsoever to the lessor at Ipswich or to such other person or persons company or companies Bank or Banks at Ipswich aforesaid as the lessor may from time to time in writing direct.

(b) To pay all charges in respect of electric power and light and gas (if any) and all telephone charges and all excess water rates trade waste charges (if any) cleansing dues (if any) and license permit or inspection fees (if any) which may from time to time be assessed imposed levied or charged in respect of or attributable to the demised land or the lessee's use thereof.

(c) Not to assign transfer demise sub-let set over or part with the possession ~~of the demised land~~ or deed procure the

Exhibits

No.2 Lease, Defendants to Plaintiff (tendered by Plaintiff)
7 April 1978

demised land or any part or parts thereof to be assigned transferred demised sub-let set over or the possession of the same or any part or parts thereof otherwise parted with unto any person or persons body corporate or incorporate whomsoever or whatsoever without the consent in writing of the lessor first had and obtained PROVIDED HOWEVER that the consent of the lessor to any such assignment or sub-letting shall not be unreasonably withheld in the case of a respectable and financially responsible person firm or body corporate or incorporate (the burden of proof whereof shall lie upon the Lessee) who or which shall carry on a business or trade approved by the lessor AND PROVIDED FURTHER that it shall be deemed to be a condition precedent to the granting of any such consent hereunder that the lessor may require the lessee to pay the lessor's legal costs in connection with or incidental to the giving of such consent and the lessor may require the lessee on or before the date of any such assignment or sub-letting to obtain and deliver to the lessor a Deed of Covenant to be prepared by the Lessor's Solicitors (but at the expense of the lessor in all respects) whereby any such assignee or sub-tenant will covenant with the lessor to carry out observe perform fulfil and keep all the covenants conditions and stipulations herein contained or implied whether positive or negative and whether running with the land or otherwise and on the part of the lessee to be observed performed fulfilled and kept. The provisions hereinbefore contained are intended by the lessor and the lessee to be in addition to and not in substitution for or in derogation from the provisions of Section 121 (1) of the Property Law Act 1974 (as amended from time to time) or any part thereof and shall be read accordingly.

(d) At all times during the said term to keep and at the expiration or sooner determination of the said term deliver up the demised land and the demised farming equipment in a good condition as to be fit for immediate use by the lessor and his assigns.

(e) At all times during the said term to keep and maintain and make all necessary payments to keep the demised farming equipment in a good state of repair as may be reasonably expected having regard to fair wear and tear and usage.

(f) At all times during the said term to ensure that all persons operating driving and or using the demised farming equipment from time to time have full knowledge in the operation driving and use of the said equipment and further that all such persons hold current licences working tickets or such other written authority to enable

Exhibits

such persons to operate drive and use the demised farming equipment.

(g) At all times during the said term to use the demised land for the purpose of farming dairying and for grazing of stock or such similar purpose and should the lessee wish to use the land for any other purpose written consent must first be had and obtained from the lessor.

(h) At all times during the said terms to keep the demised land in reasonably good condition and not to accumulate any waste debris garbage or similar refuse upon the said land.

(i) At all times during the said term to indemnify and save harmless and keep insured the lessor from all loss and damage to the demised land and the demised farming equipment or to neighbours in the area by the negligent use or misuse of the demised and/or the demised farming equipment.

(j) At all times during the said term to keep the demised land together with any stock thereon whether owned and controlled by the lessee or otherwise free from all infectious and contagious diseases pests illnesses and plagues and at his own expense and cost to fumigate and disinfect the demised land and stock upon the said land.

(k) At all times during the said term to permit the lessor or his agent or agents or prospective purchasers and during one calendar month immediately preceding the termination of this tenancy to permit the lessor or his agent or agents or prospective tenants or purchasers and other with written authority from the lessor or his agents at reasonable times during the day to view the premises.

(l) That the lessee will pay all costs (on a Solicitor and own client basis) and expenses of and incidental to the preparation execution and stamping of this lease including all stamp duty and consent fees payable thereon all moneys which the lessor may expend in consequence of any default that may be made by the lessee in the performance or observance of any covenants or agreement herein contained or implied or which shall have been authorised entered into or made by the lessee or of or incidental to any consent of the lessor required in favour of the lessee pursuant to the terms hereof.

(m) That the lessee will and he doth hereby indemnify and save harmless the lessor against all losses damages and expenses which the lessor or any of its other tenants may sustain expend or be put to by reason or any neglect misconduct misperformance or nonperform-

such persons to operate drive and use the demised farming equipment.

(g) At all times during the said term to use the demised land for the purpose of farming dairying and for grazing of stock or such similar purpose and should the lessee wish to use the land for any other purpose written consent must first be had and obtained from the lessor.

(h) At all times during the said terms to keep the demised land in reasonably good condition and not to accumulate any waste debris garbage or similar refuse upon the said land.

(i) At all times during the said term to indemnify and save harmless and keep insured the lessor from all loss and damage to the demised land and the demised farming equipment or to neighbours in the area by the negligent use or misuse of the demised and/or the demised farming equipment.

(j) At all times during the said term to keep the demised land together with any stock thereon whether owned and controlled by the lessee or otherwise free from all infectious and contagious diseases pests illnesses and plagues and at his own expense and cost to fumigate and disinfect the demised land and stock upon the said land.

(k) At all times during the said term to permit the lessor or his agent or agents or prospective purchasers and during one calendar month immediately preceding the termination of this tenancy to permit the lessor or his agent or agents or prospective tenants or purchasers and other with written authority from the lessor or his agents at reasonable times during the day to view the premises.

(l) That the lessee will pay all costs (on a Solicitor and own client basis) and expenses of and incidental to the preparation execution and stamping of this lease including all stamp duty and consent fees payable thereon all moneys which the lessor may expend in consequence of any default that may be made by the lessee in the performance or observance of any covenants or agreement herein contained or implied or which shall have been authorised entered into or made by the lessee or of or incidental to any consent of the lessor required in favour of the lessee pursuant to the terms hereof.

(m) That the lessee will and he doth hereby indemnify and save harmless the lessor against all losses damages and expenses which the lessor or any of its other tenants may sustain expend or be put to by reason or any neglect misconduct misperformance or nonperform-

-ance on the part of the lessee of any of the covenants and agreements on his part herein contained and the lessee will at his own cost and expense pay for all such loss and damage.

2. THE LESSOR HEREBY COVENANTS WITH THE LESSEE as follows -

(a) That the lessee paying the said rent and other moneys payable by it at all times and in the manner hereinbefore appointed for payment thereof and performing and observing the several covenants conditions and restrictions herein contained and on the part of the lessee to be observed performed fulfilled and kept may peaceably hold and enjoy the said premises during the said term without any interruption by the lessor or any person lawfully claiming through under or in trust for it.

(b) That the lessor will pay all Local Authority and Water and Sewerage Rates and Land Tax whatsoever to be charged upon or payable in respect of the land on which the demised premises are situate hereunder.

(c) The powers in the lessor implied by Section 107 of the Property Law Act 1974 (as amended from time to time) shall apply to this Lease except in so far as such powers are excluded or varied by the powers of this Lease.

3. AND IT IS HEREBY MUTUALLY AGREED BY AND BETWEEN THE PARTIES HERETO as follows -

(a) At all times during the said term or at the expiration of the said term the lessee may offer to purchase the demised land from the lessor for the consideration equivalent to one thousand dollars (\$1,000-00) per acre.

(b) That if the rent hereby reserved or any part thereof shall be in arrears for the space of fourteen (14) days after the same shall become payable although no legal or formal demand shall have been made therefor it being hereby agreed that no such demand shall be necessary or if the lessee shall make a breach of any covenant obligation condition or agreement (express or implied) in this Lease or if any writ or Execution be levied on the real or personal property of the lessee and such breach shall not be remedied after a period of fourteen (14) days from the date the lessor shall have served on the lessee a notice pursuant to Section 124 (1) of the Property Law Act 1974 (it being specifically agreed by and between the lessor and the lessee that the said period of fourteen (14) days is a reasonable time under the said Section 124 (1) to remedy any such breach) THEN and in any of the said cases it shall be lawful

Exhibits

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No.2 Lease, Defendants to Plaintiff (tendered by Plaintiff)
7 April 1978

✕

for the lessor immediately thereupon or at any time thereafter and notwithstanding that the lessor may have waived any previous default of a like nature to enter by force if necessary into and upon the demised premises or any part thereof in the name of the whole and to take possession thereof and determine this lease OR at its option the lessor may serve notice in writing upon the lessee that thenceforth the lessee shall and shall be deemed to hold the demised premises as tenant from month to month on the terms of this lease so far as the same are applicable to a monthly tenancy and such monthly tenancy may be determined by one (1) calendar month's notice in writing given by either party to the other expiring on any day BUT in either case without prejudice to any right of action or remedy of the lessor in respect of any antecedent breach of any covenant condition agreement or stipulation on the part of the lessee herein contained.

(c) That if after the determination of the said term or any extension thereof from any cause whatsoever the lessee shall remain in possession of the demised premises with the consent of the lessor without any express arrangements being made for a further term the lessee shall hold the demised premises from the lessor as tenant from month to month at the same calendar monthly rental as the payable at the determination of the said term or extended term as that case may be payable in advance and otherwise upon the same terms and conditions as are herein contained and such tenancy may be determined at any time upon one (1) month's notice being given in writing by either party to the other expiring on any day.

(d) The failure by the lessor to take advantage of any default or breach of agreement on the part of the lessee shall not be construed as a waiver thereof nor shall any custom or practice which may grow up between the parties in the course of administering this agreement be construed to waive or lessen the right of the lessor to insist upon the performance by the lessee of any agreement on its part or to exercise any rights given to the lessor on account of any such default or if the waiver has been made upon a condition which is specifically broken by the lessee. A waiver of a particular breach or default shall not be deemed to be a waiver of any other breach or default whether of a similar nature or otherwise. The acceptance of rent by the lessor shall not be construed to be a waiver of any breach of agreement on the part of the lessee. The provisions hereinbefore contained are intended by the lessor and the lessee to be in addition to and not in substitution for or in derogation from the

provisions of section 119 of the Property Law Act 1974 (as amended from time to time) or any part thereof and shall be read accordingly.

(c) Any notice or demand required to be given by either party to the other hereunder shall be in writing and signed by the party or his Solicitor (or, where that party is a Company by a Director or Secretary thereof) AND shall be sufficiently served if served in accordance with any of the modes of services set forth in Section 257 of the Property Law Act 1974 (as amended from time to time) PROVIDED HOWEVER that in addition in the case of a notice to be given by the lessor to the lessee it shall be sufficiently served if delivered to or left for the lessee at the demised premises.

(f) Except where inconsistent with the context wherever herein used the word "lessor" shall mean and include the lessor and its successors and assigns, the word "lessee" shall mean and include in the case of a natural person the lessee and his her or their executors administrators and permitted assigns and in the case of a corporation the lessee and its successors and permitted assigns. Word importing the singular and plural number shall be read as importing the plural or singular number and any gender shall include the other genders, except where the context otherwise requires. Where more than one lessee is a party hereto the covenants agreements and stipulations on the part of the lessee herein contained or implied shall be deemed to be entered into by the lessees jointly and severally.

(g) The lessor shall not be responsible for any failure of the supply of electricity from the producers thereof arising from any cause known or unknown or for any failure of the electrical system in the demised premises due to breakdown repairs maintenance strikes and accidents or unavoidable causes of any class or.

(h) That in consideration of the lease hereby granted the lessee doth hereby irrevocably make nominate constitute and appoint the lessor the true and lawful attorney of him the lessee and as his act and deed to make sign and seal and execute and deliver all and every such instrument deed or other documents as the lessor or the said attorney may ensure absolute discretion see fit for further assuring to the lessor the powers rights and privileges hereinbefore conferred or expressed or intended so to be AND ALSO in the name and on behalf of the lessee to execute and procure the registration of a transfer or a surrender of this lease without any payment or compensation whatsoever to the lessee and from time to time to appoint a substitute and such appointment at pleasure to revoke and another or others to appoint AND generally to do execute and perform all acts matters and things whatso-

Exhibits

-over relating to the land as fully and effectually to all intents and purposes as the lessee could do it the lessee hereby ratifying and confirming and covenanting to ratify and confirm all and whatsoever the said attorneys or attorney shall lawfully do or cause to be done in and about the land and also agreeing not to revoke the powers hereby conferred on any of them at any time during the continuance of this lease PROVIDED ALWAYS and it is hereby agreed and declared that the powers conferred by this Sub-Clause shall not be exercised by the Lessor unless default shall have been made by the lessee in the observance performance or fulfilment of some one or more of the covenants provisions conditions and agreements herein contained or implied or unless this lease shall be determinable or determined under the provisions hereof and sufficient proof of such default or determination shall for all purposes be a statutory declaration by any authorised person acting on behalf of the lessor.

SCHEDULE 1

Volume No. 4865, Folio No. 142, Subdivision 1 of Resubdivision 1 of Portion 126, 29 acres, 2 roods, 18 perches, County Churchill, Parish North.

Volume No. 4865, Folio. 143 Subdivision 1 of Resubdivision C of Subdivision 1 of Portion 126 on Registered Plan Number 45043, 10 acres, 31 perches, County Churchill, Parish North.

Volume No. 4865, Folio No. 144, Subdivision 2 of Resubdivision A of Subdivision 1 of Portion 126, 37 acres, 3 roods, 29 perches, County Churchill, Parish North.

SCHEDULE NO. 2

Carry-all Fiat Code No. A702 Serial 692.

Tyne Rippers, Massey Ferguson 35 Tractor,

Curly Tyne rippers, New Holland Hayliner 69

Serial AS69G010, Fordson Major Diesel,

International GL 223 Mower, Boom spray unit,

Hay rake, Ford offset Disc Tandem, Blowmist

portable, Conner-shea combine, 1 hay trailer

Spray lines 65 lengths x 3 in

Main lines 42 lengths x 4 in

Underground main lines

25 H.P. Motor Kelly & Lewis pump

Automatic Switch Board

Exhibits

No.2 Lease, Defendants to Plaintiff (tendered by Plaintiff)
7 April 1978

I, GLEN ROBERT PHIPPS of 1 Ashgrove Street, Coalfalls, Ipswich
DO HEREBY ACCEPT THIS Lease of the demised premises hereinbefore
described to be held as Lessee and subject to the covenants and
restrictions herein contained.

DATED the Seventh day of April 1978.

SIGNED by the said JAMES JOSEPH WATSON) J. Watson
and PAULINE ELAINE WATSON (his wife) as) P. Watson
Lessor this Seventh day of April)
1978 in the presence of:)

L. Paly
A Justice of the Peace
Scriba

SIGNED by the said GLEN ROBERT PHIPPS) G. R. Phipps
as Lessee this Seventh day of)
April 1978 in the presence of:)

E. M. Mackenzie
A Justice of the Peace

I, GLEN ROBERT PHIPPS of 1 Ashgrove Street, Coalfalls, Ipswich in the said State DO HEREBY ACCEPT THIS Lease of the demised premises hereinbefore described to be held as Lessee and subject to the covenants and restrictions herein contained.

DATED the Seventh day of April 1978.

SIGNED by the said JAMES JOSEPH WATSON and PAULINE ELAINE WATSON (his wife) as Lessor this Seventh day of April 1978 in the presence of;

L. Pelly
A Justice of the Peace
Solomon

SIGNED by the said GLEN ROBERT PHIPPS as Lessee this Seventh day of April 1978 in the presence of -

E. M. Mackinnon
A Justice of the Peace

DATED this 22nd day of May 1978.

Correct for the purpose of registration

L. J. Zullo
.....
Solicitors for the Lessees

Correct for the purpose of registration

J. A. Swann & Company
.....
Solicitors for the Lessors

AY

BANK OF NEW SOUTH WALES SAVINGS BANK LIMITED (hereinafter referred to as "the Bank") being the mortgage under Bill/Memorandum of

Mortgage No. ^{F600860} ~~26037845~~ the premises demised by the within Lease PEREGRY CONSENTS to such Lease as from the date hereof and not otherwise

and subject to the following conditions and provisions, namely:

1. THAT this consent shall be without prejudice to the rights powers and remedies of the Bank under the said mortgage which shall remain in full force and effect as if this consent had not been given except that so long as rental payments are made strictly in accordance with the terms of the within Lease on the due dates therein provided and not otherwise howsoever and so long as the covenants and conditions and provisions of the said Lease are duly observed and performed the Bank will in the event of the exercise of the power of sale or other power or remedy of the Bank on default under the said mortgage exercise the same subject to the then subsisting rights of the Lessee under the said Lease.

2. THAT the Bank's consent hereto shall be without prejudice to the powers and remedies of the Bank as mortgagee as aforesaid and nothing herein contained or implied shall affect the Bank's rights to insist upon receipt of any moneys payable pursuant to any policy of insurance consequent upon the partial or total damage or destruction of the demised premises and the application of such insurance moneys in repayment or partial repayment of the mortgage debt.

3. THAT the Lessee shall observe and perform all the covenants agreements and stipulations contained or implied in the said Lease and will pay the rent to the Bank if required by the Bank.

4. THAT so long as the Bank is the mortgagee of the said premises the Lessee shall obtain the consent or approval of the Bank in addition to the consent or approval of the Lessor in all cases where under the said Lease the consent or approval of the Lessor is required AND without in any way limiting the generality of the foregoing the Lessee will not transfer or assign the within Lease or sub-lease the demised premises or agree to reduce the rent for the demised premises without first obtaining the written consent of the Bank AND the Bank may refuse to give such consent on such terms as it deems fit.

5. THAT upon the Bank giving notice to the Lessee of demand to enter into receipt of rent and profits of the said premises the covenants on the part of the Lessee expressed or implied in the said

Exhibits

Lease shall be deemed to have been entered into by the Lessee with the Bank and all the rights powers and remedies of the Lessor under the said Lease shall vest in and be exercisable by the Bank until such notice be withdrawn or the said mortgage be discharged.

6. THE BANK shall in no way be bound to perform and shall not incur any liability in respect of the covenants and agreements expressed or implied in the said Lease and on the part of the Lessor to be performed and observed.

7. THAT except to the extent that such interpretation shall be repugnant to the context of this Consent the expressions: 'the Lessee' when only one Lessee is a party to the within Lease shall mean and include the Lessee his executors administrators transferees and assigns and when two or more Lessees are parties to the within Lease shall mean and include the Lessees and each or any of them their and any of their executors administrators and assigns; 'the Bank' shall include the Bank and its assigns.

Words importing the singular number or plural number shall include the plural number and singular number respectively and words importing the masculine gender only shall include the feminine and neuter gender and when there are two or more Lessees this agreement shall bind them and any two or greater number of them jointly and each of them severally.

Any reference to 'Lease', 'Lessor' or 'Lessee' shall where the context permits mean and include 'sub-lease', 'sub-lessor' or 'sub-lessee' respectively.

DATED this ELEVENTH day of DECEMBER 1978

Witness:

[Handwritten signature]

A Justice of the Peace

BANK OF NEW SOUTH WALES SAVINGS BANK LIMITED

By Its Attorney

[Handwritten signature]

Branch Securities Officer for the
this being at Brisbane of
Bank of New South Wales.

In consideration of the Mortgagee at the request of the Lessee (which the lessee does hereby acknowledge by his execution hereto) agreeing to consent to the within lease on the abovementioned terms and conditions and to produce the duplicate of the said Bill of Mortgage and the relevant Title Deeds, the lessee hereby accepts the said consent and the terms and conditions contained therein and agrees to be bound thereby.

Dated this twelfth day of December 1978

[Handwritten signature]

[Handwritten signature]

Exhibits

No.2 Lease, Defendants to Plaintiff (tendered by Plaintiff)

7 April 1978

No. 8 - Letter, Solicitors for
Plaintiff to then
Solicitors for Defendants
(tendered by Plaintiff).

DALE & FALLU

SOLICITORS

P. B. FALLU
PAUL FALLU

TELEPHONES:

OFFICE - - 281 4999
(3 Lines)
PRIVATE P. B. FALLU 281 4742
PRIVATE PAUL FALLU 281 4003
P.O. BOX 30

142 BRISBANE STREET,
Ipswich 4305.

WB:JM

Your Ref: WP:MS

7th April, 1978.

Messrs. Richard Zande & Associates,
Solicitors,
Ellenborough Street,
IPSWICH. 4305.

Dear Sirs,

RE: LEASE PHIPPS FROM WATSON

With reference hereto we advise our client has now called on us and completed the Lease herein which in spite of our instructions to have same forwarded to us, was handed to your client who took same to Mr. Phipps and requested him to sign same.

We have been through the Lease and point out that we have marked errors on Pages 2 and 5 which require amending and request that you will attend thereto before lodging in the Titles Office.

We would also wish to bring to your notice that our client has informed us your client has not delivered to him the Tyne Rippers and the Blowamist Portable although he has stated on several occasions he would have same delivered. We bring this to your notice as these items are contained in Schedule No. 2 which are not yet in the possession of our client and in the event of any termination of the Lease we require it put on record until such time as we notify you these items have been delivered to our client.

Yours faithfully,
DALE & FALLU,

Per: *[Signature]*

Exhibits

-225-

No.8 Letter, Solicitors for
Plaintiff to then
Solicitors for Defendants
(tendered by Plaintiff)
7 April 1978

P. B. Fallu
Paul Fallu

Dale & Fallu SOLICITORS

Our Ref. 81.1203.0003

Your Ref.

142 Brisbane Street,
Ipswich, Qld. 4305
P.O. Box 30.

Telephones: 281 4999
281 4151
281 4152

11th February, 1982.

Mr. & Mrs. J. J. & P. E. Watson,
Mail Service 240,
FERNVALE. 4305.

Dear Mr. & Mrs. Watson,

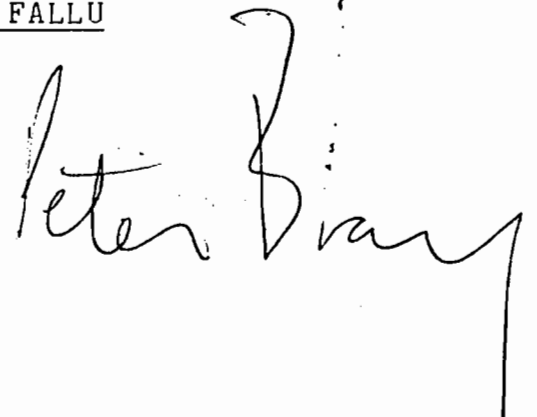
RE: GLEN ROBERT PHIPPS

We refer to the lease between yourselves
and Glen Phipps executed the 1st February, 1978 and in
particular to Clause 3 (a).

Our client hereby formally exercises
his option in Paragraph 3 (a) to purchase the land detailed
in Schedule 1 of the lease at \$1,000.00 an Acre.
We look forward to receiving your Contract of Sale within
seven (7) days of the date hereof for our client's signature.
By our calculations, the purchase price should be shown as
\$77,7337.50.

Yours faithfully,
DALE & FALLU

Per:



*File also in
W. Kent Reg.*

Exhibits

Sciacca and Mitchell

SOLICITORS

Incorporating The Practices of J. A. Sciacca & Co.
and C. W. L. Heiner & Hooper

40 Brisbane Street, Ipswich, Queensland
P.O. Box 163, Ipswich 4305
Telephone: 281 2277 (4 Lines)

Please Refer to: Mr. Mitchell:KME

Your Ref.: 81.1203.0003

17th February, 1982

Messrs Dale and Fallu,
Solicitors,
P.O. Box 30,
ISPWICH 4305

Dear Sirs,

Re: J & P Watson and Phipps

We refer to your letter of 11th February addressed to our clients. As you are aware we act on behalf of the Lessors pursuant to the Lease and we are surprized you did not write to us directly.

On behalf of our clients we formally advise that we do not consider that the Lease provides for an option to purchase the land for the sum of \$1,000.00 per acre nor for any other price. It is not our clients intention to provide you with a Contract of Sale and in any event we note that you have already instituted proceedings in the Supreme Court of Queensland.

We believe the relevant paragraph of the Lease gives your client the right to offer to purchase the land for \$1,000.00 per acre and if indeed your letter of 11th February is such an offer then it is refused.

We ask that you direct future correspondence to us and we also require you to deliver a Statement of Claim to Writ No. 4554 of 1981 with seven days failing which we will make application to have the proceedings struck out with costs.

Yours faithfully,
SCIACCA AND MITCHELL


Allan Mitchell

Exhibits

-227-

No.10 Letter, then Solicitors for Defendants to Solicitors for Plaintiff (tendered by Plaintiff)
17 February 1982

IN THE SUPREME COURT

OF QUEENSLAND

No. 4554 of 1981

BETWEEN:

GLEN ROBERT PHIPPS

Plaintiff

AND:

JAMES JOSEPH WATSON and
PAULINE ELAINE WATSON

Defendants

I, JAMES JOSEPH WATSON of Mail Service 240, Fernvale in the State of Queensland, Manager make oath and say as follows:-

1. I am one of the Defendants in this action. The other Defendant is my wife, PAULINE ELAINE WATSON.
2. I refer to an Affidavit of GLEN ROBERT PHIPPS sworn on 18th November, 1981. My Solicitors inform me that this document was only received by them on 22nd February, 1982.
3. I say that the matters contained in paragraphs 2 and 3 of that Affidavit are correct.
4. At no time did I or my wife give an option to the Plaintiff to specifically purchase 79 acres of land during the period of the Lease for the sum of ONE THOUSAND DOLLARS (\$1,000.00) per acre. When initially I and Mr. Phipps discussed this matter I agreed that he could make an offer to purchase the land during the currency of the Lease if I was at the time inclined to sell the property. Mr. Phipps suggested to me that he would probably make an offer of approximately SIX HUNDRED DOLLARS (\$600.00) per acre and I replied that if I wanted to sell it would have to be at least ONE THOUSAND DOLLARS (\$1,000.00) per acre. I believe that at the time the sum of ONE THOUSAND DOLLARS (\$1,000.00) per acre was below the then market value.
5. I refer to Exhibit "A" to the Affidavit of Glen Robert Phi;

AFFIDAVIT

OF

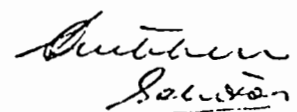
JAMES JOSEPH WATSON

SCLACCA AND MITCHELL
SOLICITORS,
40 BRISBANE STREET,
IPSWICH 4305
TELEPHONE: 281 2277

FIRST SHEET



Deponent



A Justice of the Peace

Exhibits

At no time did I instruct my Solicitors, Richard Zande and Associates that I would grant an option to purchase lands during the currency of the Lease. At all times my instructions to my Solicitors were that I was prepared to listen to a reasonable offer from Mr. Phipps in the event that my wife and I were prepared to sell the property. I believe that the Lease entered into (Exhibit "D") and in particular paragraph 3(a) thereof truly reflects my intentions at all times.

6. I refer to paragraph 13 of the Affidavit of Glen Robert Phipps and say that the contents thereof are totally untrue. I at no stage approached Mr. Phipps with regard to his intentions in relation to an option as I have at no time believed that he was the holder of an option. On the occasion in question Mr. Phipps came upon my property and said, "I warn you I am going to take up the option. My Solicitor said you will have to sell".

I replied to him,

"Let the Solicitors fight it out then."

I informed Mr. Phipps that I did not then and indeed I do not have now, any intention to sell the property.

7. I refer to the application by the Plaintiff seeking an injunction restraining myself and my wife from dealing with the said lands. Firstly, it is not our intention to deal with them in any way, and secondly, I have received notices from the Registrar of Titles informing me that on the 3rd day of August, 1981 and on 12th February, 1982 caveats forbidding registration of dealings with the said lands were lodged by the Plaintiff. Now produced and shown to me and marked with the letters "A" and "B" respectively are copies of the said Caveats.

8. As my previous Solicitors were unable to arrange registration of the Lease because of a number of requisitions I engaged my present Solicitors to rectify the position. I am informed by my Solicitor, and verily believe that the Lease has been relogged with the Registrar of Titles for registration but that registration cannot now be effected because of the lodgment of caveats by Mr. Phipps. I therefore believe any injunction to be superfluous and I seek the dismissal of the Plaintiffs motion with costs.

SWORN by the abovenamed Deponent)

at Ipswich this 24th day of)

February, 1982 in the presence)

of:

[Handwritten signature]
[Handwritten signature]

Exhibits

No.20 Copy Affidavit of James Joseph Watson, with Exhibits (tendered by Plaintiff)
 24 February 1982

QUEENSLAND

04/08/81 R/N 1405365

CAVEAT FORBIDDING REGISTRATION OF DEALING WITH

H 9915
OFFICER
\$1.00

ESTATE OR INTEREST

The Registrar of Titles,
BRISBANE.

TAKE NOTICE that GLEN ROBERT PHIPPS of M.S. 240, Fernvale in the State of Queensland claiming estate or interest in fee simple as Lessee pursuant to a certain Lease Agreement which the Registered Proprietors have failed to register and dated the First day of February, One Thousand Nine Hundred and Seventy Eight made between JAMES JOSEPH WATSON and PAULINE ELAINE WATSON of M.S. 240, Fernvale aforesaid as Lessors and the said GLEN ROBERT PHIPPS as Lessee in respect of the land described as Volume No. 4865, Folio No. 142, Subdivision 1 of Resubdivision 1 of Portion 126, 29 acres, 2 roods, 18 perches, County Churchill, Parish North.

Volume No. 4865, Folio No. 143, Subdivision 1 of Resubdivision C of Subdivision 1 of Portion 126 on Registered Plan Number 45048, 10 acres, 31 perches, County Churchill, Parish North.

Volume No. 4865, Folio No. 144, Subdivision 2 of Resubdivision A of Subdivision 1 of Portion 126, 37 acres, 3 roods, 29 perches County Churchill, Parish North.

FORBID the registration of any Memorandum of Sale or other instrument affecting the said Land until this Caveat be by me withdrawn or by the Order of the Supreme Court or some Judge thereof removed.

DATED this *Third* day of *August*, 1981.

GLEN ROBERT PHIPPS

By his Solicitors:

Witness *W. Shone J.P.*

Correct for the purposes of Registration

Solicitors for the Caveator:

Exhibits

Address for service of the Caveator GLEN ROBERT PHIPPS is in care of his Solicitors, Messrs. Dale & Fallu, 142 Brisbane Street, Ipswich.

Address for service of Caveatees JAMES JOSEPH WATSON and PAULINE ELAINE WATSON is in care of Messrs. J.A. Sciacca and Associates, 40 Brisbane Street, Ipswich.

Address for service of Mortgagee is Bank of New South Wales, Brisbane Road, Booval.

"B"

2208544 37. PAGES OF

CAVEAT FORBIDDING REGISTRATION OF DEALING WITH ESTATE
OR INTEREST

The Registrar of Titles,
BRISBANE.

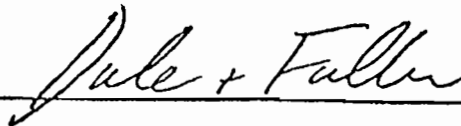
TAKE NOTICE that GLEN ROBERT PHIPPS of 1 Ashgrove Street, Coalfalls, Ipswich in the State of Queensland claiming estate or interest as Purchaser pursuant to an Option exercised by him the Eleventh day of February, 1982 such Option being contained in a Lease executed the First day of February, 1978 made between JAMES JOSEPH WATSON and PAULINE ELAINE WATSON of M. S. 240, Fernvale in the State of Queensland, as Lessor and the said GLEN ROBERT PHIPPS as Lessee in respect of the land described as Volume 4865 Folio 142 Subdivision 1 of Resubdivision 1 of Portion 126, 29 Acres 2 Roods 18 Perches County Churchill Parish North Volume 4865 Folio 143 Subdivision 1 of Resubdivision C of Subdivision 1 of Portion 126 on Registered Plan No. 45048 10 Acres 31 Perches County Churchill Parish North. Volume 4865 Folio 144 Subdivision 2 of Resubdivision 8 of Subdivision 1 of Portion 126 37 Acres 3 Roods 29 Perches County Churchill Parish North

FORBID the registration of any Memorandum of Sale or other instrument affecting the said land until this Caveat be by me withdrawn or by the Order of the Supreme Court or some Judge thereof removed.

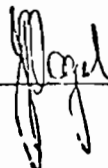
DATED this 12 day of February 1982.

GLEN ROBERT PHIPPS

By his Solicitors:-



(Witness)



CORRECT FOR THE PURPOSES OF REGISTRATION.

Exhibits

- VALUATION : Made this Twenty-first day of July, 1983 by Roland Harvey Vall Pearson, Registered Valuer of 53 Alice Street, Silkstone, Ipswich; In the State of Queensland.
- REQUESTED BY : Messrs Dale & Fallu, Solicitors, 142 Brisbane Street, Ipswich.
- MATTER : Alleged breach of option to purchase.
- PARTIES : Glen Robert PHIPPS v. James Joseph WATSON and Pauline Elaine WATSON (his wife).
- REAL PROPERTY DESCRIPTION : Described as Subdivision 1 of Resubdivision C of Subdivision 1 of Portion 126 on Registered Plan No. 45046, having an area of 10 acres and 31 perches (4.125 ha). Situate County of Churchill, Parish of North and being the whole of the lands contained in Certificate of Title Volume No. 4865 Folio 143
- and
- Subdivision 2 of Resubdivision A of Subdivision 1 of Portion 126, having an area of 37 acres 3 roods 29 perches (15.35 ha). Situate County of Churchill, Parish of North and being the whole of the land contained in Certificate of Title Volume No. 4865 Folio 144
- and
- Subdivision 1 of Resubdivision A of Subdivision 1 of Portion 126, having an area of 29 acres 2 roods 18 perches. (11.984 ha). Situate County of Churchill, Parish of North and being the whole of the land contained in Certificate of Title Volume No. 4865 Folio 142.
- V.G. VALUATION : As at 17.2.1978. Subdivisions 1 and 2 of Resubdivision A. \$4180 (\$62 per acre). Subdivision 1 of Resubdivision C \$420 (\$41 per acre).
- SITUATION and ACCESS : The lands are situated at Fernvale. Subdivision 1 of Resubdivision C fronts the old Lowood Road which is formed and gravelled only. This land backs on to the railway line.
- Subdivisions 1 and 2 of Resubdivision C enjoy frontages to the Lowood - Fernvale Road which is bitumen sealed. These lands back on to the Brisbane River at the rear.
- TOPOGRAPHY and ALUVIUM : The lands are flat and subject to frost. Subdivision 1 of Resubdivision C is of a poorer type sandy loam and was originally a gum-top box flat. It was at one time cultivated and with irrigation and fertiliser could be restored to cultivation. It is watered by a small dam, badly silted and with the overflow bank broken, and is broken by a water course which is causing some soil erosion. This land is presently used for grazing although it does not carry a heavy body of grass.
- Subdivisions 1 and 2 of Resubdivision A back onto the Brisbane River and are irrigated from that stream. The soils closer to the road are light black with a heavy clay content, but nearer the river they are a rich river silt. Some 22 ha are arable of which some 10 ha are presently under crop. (rye grass, sudac, lucerne and clover). The balance area of 5ha consists of water-courses, gullies and river banks, and is used for grazing.
- The irrigation mains do not extend to all of the arable areas. Some 3 ha, presently used for grazing, could be cropped by an extension of the mains. A further 1½ ha of choice arable land backing on to the river is not cultivated at present because of poor access due to a deep water course. Machinery access can only be gained from a neighbouring property.
- FENCING : Internal and road boundaries. 2 miles of split posts enclosed with 4 strands of barbed wire. Fair to good condition.
- Common boundaries. 90 chains of split posts enclosed with 4 strands of barbed wire. Fair condition.
- WATER TROUGHS : Concrete water storage tank. 5000 gallon capacity, feeding water trough set in ground. The water trough is cracked but does not leak.

DATED this Twenty-first day of July, 1983.

R. H. Pearson
R. H. PEARSON
Registered Valuer
(Reg. No. 458)

Exhibits

COMPARISON SALES: There were no sales of unimproved lands in the immediate area in 1978, where such sales comprised a similar acreage to the subject lands. However, smaller developed sites were sold in the immediate area. One parcel of land, described as Lot 5 on Registered Plan No. 138054 and having an area of 5 acres (2.024 ha) was sold on 6.3.1978 by Pilcher to Reynolds for the sum of \$7000 or \$1400 per acre. Pilcher purchased from the developers Mondean Pty Ltd on 30.8.1973, Lots 4 and 5, having an area of 10 acres, for the sum of \$18200 or \$1820 per acre. It is interesting to note that the Vendor Pilcher in the sale to Reynolds sold well below purchase price. In analysing the original sale Mondean Pty Ltd to Pilcher for \$18200, the developers would have been faced with the costs of development, namely roads, surveys, legals, selling costs, advertising and risk of realisation. These costs and risk of realisation would have eaten up more than half of the sale price, thus indicating a value of less than \$1000 per acre for land in its raw state. It is also a fact that small parcels of land realise a higher sale price than larger parcels, mainly, I believe, because of the purchasers ability to pay.

On 9.2.1978, Booker Industries Pty Ltd sold to Mayne Lot 18 on Registered Plan No. 144072, Parish of Burnett, containing an area of 10 acres (4.058 ha), for the sum of \$20000 or \$2000 per acre. This land was highly fertile river silt in Wivenhoe Pocket, across the river from the subject lands. Allowing for the risk of realisation and the development costs, namely roads, surveys, legals, advertising and selling costs, which would have amounted to more than half the sale price, this would indicate the land had an actual value of less than \$1000 per acre in the raw state.

Although some 6 miles from the subject lands, I would consider the sale Peters to Bean to be relevant. Sold in June, 1979, for \$45000. 90 acres (36 ha) of choice scrub lands and brigalow flats situated in the lower portion of the Tallegalla hills. Selectively cleared lands with 40 acres of improved pastures (siratro, lucerne, panic and rhodes), with a further 15 acres of fallow brigalow flats. Watered by 3 large storage dams and a pump over a well. The other improvements consisted of a 3 bedroom home (family style, villa front), hayshed and dairy all in need of paint and minor repairs. No livestock or plant. Even discounting all of the improvements (buildings and dams) a sale price of \$500 per acre is revealed. The Valuer-General valued this property at \$5440 or \$60 per acre.

DATED this Twenty-first day of July, 1983.

R.H. Pearson..
R. H. PEARSON
Registered Valuer
(Reg., No. 458)

<u>VALUATION</u> : Land. 56 acres of cultivation @ \$900		
per acre	\$50,400.00	
11½ acres of gullies (grazing)		
@ \$300 per acre	3,450.00	
10 acres of sandy loam grazing		
@ \$500 per acre	<u>5,000.00</u>	\$58,850.00
Fencing. Internal and road boundaries		
2 miles @ \$700 per mile	\$ 1,400.00	
Common boundaries 90 chain		
@ \$500 per mile - half share	<u>225.00</u>	\$ 1,625.00
Concrete storage tank	\$ 500.00	
Concrete watering trough	<u>100.00</u>	\$ 600.00
		<u>\$61,075.00</u>

The deduced value of the land, plus improvements,
as at 17.2.1978 is therefore \$782 per acre.

DATED this Twenty-first day of July, 1983.

R.H. Pearson...
R. H. PEARSON
Registered Valuer
(Reg. No. 458)

COR. T. R. PEARSON, J.
27/ 7 183
Phipps v. Watson
Ex No. 16
MK
ASSOCIATE

VALUATION

MATTER: Option to purchase

PARTIES: Glen Robert PHIPPS

v.

James Joseph WATSON and

Pauline Elaine WATSON (his wife)

VALUATION: As at 17.2.1973 \$51,075.00
or \$782 per acre.

DATED this Twenty-first day of July, 1983

R. H. PEARSON
Registered Valuer
53 Alice Street
Silkstone
IPSWICH

Exhibits

No.16 Valuation prepared by
witness R.H.V. Pearson
(tendered by Plaintiff)
21 July 1983

A-MARC REAL ESTATE
Auctioneers-Real Estate Agents

P.O. Box 203, Booval
152 Brisbane Road, Booval 4304

Phone: Office 232 4100
A.Hrc. 231 0098

CERTIFICATE OF VALUATION

Purpose of Valuation:

To Determine the Market Value of the
Property as at December, 1977, February,
1982, and as at the present time.

Date:

22nd July, 1983.

Property Situation:

Vernor Road, Fernvale.

Name of Client:

Allan Mitchell,
Solicitor,
P.O. Box 163,
Ipswich.

Name of Owner:

James & Pauline WATSON.

Real Property Description:

Subdivision 1 of Resubdivision A of
Subdivision 1 of Portion 126.
County of Churchill, Parish of North.
Certificate of Title Volume 4865, Folio 142.

Subdivision 2 of Resubdivision A of
Subdivision 1 of Portion 126.
County of Churchill, Parish of North.
Certificate of Title Volume 4865, Folio 144.

Area:

27.334 hectares.

Local Authority:

Esk Shire Council.

Land:

The property comprises all Brisbane River
flats, which are broken by gullies which
are shown on the attached plan. The whole
of the property has been developed to
cultivation. Of the total area available
to cultivation of 20.5 hectares, an area
of only approximately 11 hectares was being
worked at the date of inspection with the
balance being used for grazing only.
Although no irrigation licence attaches
to the property it is assumed that if the
property changed hands that water rights
would be readily available to a new
purchaser. An underground main which
services the property has not been considered
in this valuation. The property is
presently being used in conjunction with
other property for dairying purposes and
crops presently grown include lucerne and
clover, and rye.

Exhibits

Land: (continued)

Soil type is black in nature in line with blue gum river flats, rather than the alluvial type black soil. Water to the property is provided from the Brisbane River which is permanent, and from a 5000 gallon concrete tank with concrete trough for the watering of cattle.

Roads and Access:

Easy access from the Fernvale-Lowood Road which is bitumen sealed.

Services and Amenities:

Electricity and telephone are available.

Improvements:

The property is stock fenced, but is not structurally improved in any way.

Use and Potential:

The property is used for agricultural purposes in conjunction with dairy farming, and in my opinion, is not suited to subdivision, basically due to its broken nature.

Comments:

It is difficult to find sales evidence along the river, the only sale that I am aware of being as follows:-

Sale No. 1 - Resubdivison A of Subdivision 1 of Portion 135, Parish of North.
Sold on 8th March, 1981 for \$36,000.
Area - 6.923 hectares.
Vendor: Marvin H. Lewis
Purchaser: Walter J. Browning & Christina V. Perry-Keene.

This property is similar to the subject being on the Brisbane River, on Fernvale Road, and is in close proximity to the subject property.

Valuation:

Land (Cleared, fenced, cultivated, as is)

1977 - 27.334 ha. @ \$1800	\$59,200
Adopt	\$59,000
	<hr/>
February, 1982 - 27.334 ha. @ \$4,000	\$109,335
Adopt	\$109,000
	<hr/>
22nd July, 1983 - 27.334 ha. @ \$4,500	\$123,000
	<hr/>



Elwyn C. Denman, A.A.I.V.,
Registered Valuer. No. 711.

Exhibits

DENMAN MACAULAY VALUERS
ELWYN C. DENMAN, A.A.I.V.

A-MARC REAL ESTATE
Auctioneers - Real Estate Agents

Registered Rural
and Urban Valuers

152 Brisbane Road, Booval, 4304
P.O. Box 203, Booval
Phones: Office - 282 4100
A.Hrs. 281 9098

CERTIFICATE OF VALUATION

Purpose of Valuation:

To Determine the Market Value of the
subject property as at December, 1977,
February, 1982 and as at the present time.

Date:

22nd July, 1983.

Property Situation:

Vernon Road, Fernvale.

Name of Client:

Allan Mitchell,
Solicitor,
P.O. Box 163,
Ipswich.

Name of Owner:

James & Pauline WATSON.

Real Property Description:

Subdivision 1 of Resubdivision C of
Subdivision 1 of Portion 126 on
Registered Plan 45048.
County of Churchill, Parish of North.
Certificate of Title Volume 4865, Folio 143.

Area:

4.125 hectares.

Local Authority:

Esk Shire Council.

Land:

The whole of the property comprises
cleared scrub and forest, is watered by
a dam and is fully stock fenced. The
whole of the property drains to a gully which
is situated in the western section of the
property as is shown on the attached map.
Part of the property was flooded in 1974.

Roads and Access:

Easy access is available from the Vernon
Road which is gravel formed.

Services and Amenities:

Electricity and telephone are available
with water being available in the near
future.

Improvements:

The property is stock fenced and is watered
by a small dam but is not otherwise
structurally improved.

Exhibits

Use and Potential:

The property is used in conjunction with adjacent lands for dairy farming pursuits. The property, in its own right, would be suited to rural residential homesite purposes.

Comments:

The following sales were used for comparison purposes in assessing the market value of the subject land.

Sale No. 1. Lot 1 on Registered Plan No. 136558, Parish of North
Sold on the 20th August, 1980 for \$16,500.00
Area 6.455 hectares
Vendor: R.K. & J.V. Preston
Purchaser: R.E. White

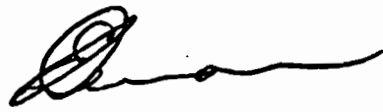
Sale No. 2. Lot 5 on Registered Plan No. 136558, Parish of North
Sold on the 4th February, 1981 for \$12,250.00
Area 4.054 hectares
Vendor: J.W. Hunt
Purchaser: R.E. & J.M. Schimke

Sale No. 3. Lot 6 on Registered Plan No. 136558, Parish of North
Sold on the 16th February, 1981 for \$16,000.00
Area 4.054 hectares
Vendor: K.E.V. & D.M. Ryder
Purchaser: M.W. & M.L. Colman

All three sales are situated in a gravel serviced road adjacent to the subject property, and are all somewhat superior to the subject property.

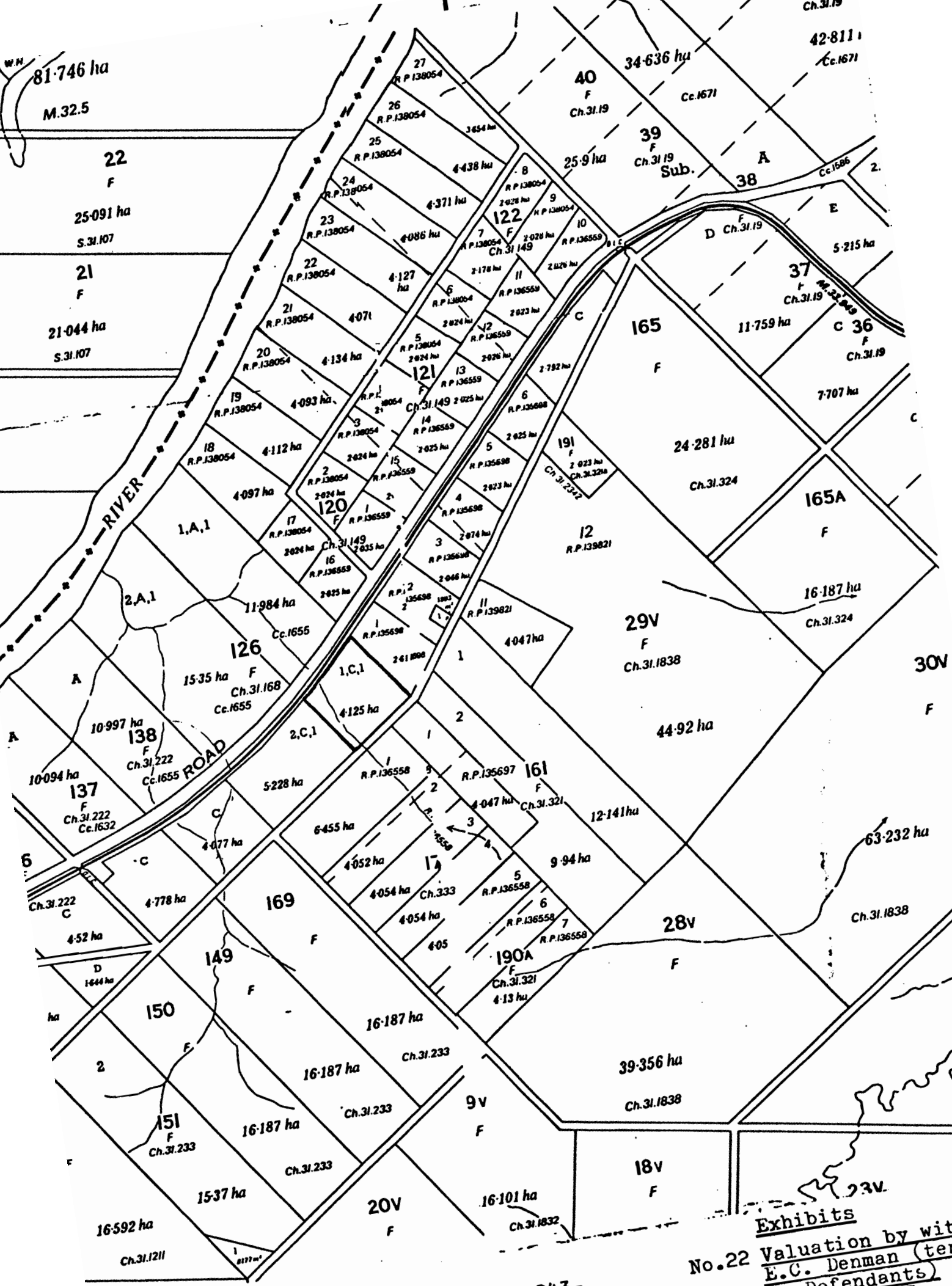
Valuation:

December 1977	\$ 8,000.00
February 1982	\$20,000.00
July 1983	\$22,500.00



.....
Elwyn C. Denman A.A.I.V.
REGISTERED VALUER NO. 711.

Exhibits



I, WARREN HAROLD PALFREY of 66 Arcoonah Street, Sunnybank
in the State of Queensland, solicitor, do say that:-

1. I am a solicitor of the Supreme Court of Queensland presently employed by Messrs. J.B. Stevenson & Company, Moorooka.
2. I know the defendant, James Joseph Watson. I acted for Mr. Watson in late 1977 whilst I was in the employ of Messrs. Richard Zande & Associates, solicitors, Ipswich.
3. Although I have little recollection of my dealings with Mr. Watson, I have been able to refresh my memory about the matter from certain notes which are attached to this statement.
4. It is my practice to take written instructions from a client. I followed that practice on this occasion. It does appear from my notes that Mr. Watson intended to sell a 30 acre property at Fernvale to Mr. Phipps for \$39,500-00. It appears that there was in addition to the sale to be a lease on what I have described as the bottom paddock for a period of five years with an option to purchase.
5. The notes prepared by me were prepared for my own purposes in carrying out instructions and in using the word "option" I would not have used that word in other than the legal sense meaning "legally enforceable option".
6. Attached to this statement is a letter that I forwarded to the solicitors acting on behalf of Mr. Phipps on 19th December, 1977. In using the word option to purchase in that letter I again intended to use the word in the sense and to convey the meaning of "legally enforceable option".

Exhibits

2.

7. I refer to the agreement for lease prepared between Mr. and Mrs. Watson as lessors and Mr. Phipps as lessee. I drafted that lease. Pursuant to the instruction notes I consider that I intended to incorporate a legally enforceable option to purchase in favour of Mr. Phipps in clause 3(a) of the lease.

8. I have in recent times examined clause 3(a) of the lease and I now acknowledge that that clause does not create any legally enforceable option. It was intended to do so. My failure to create a legally enforceable option in that clause was a mistake.

DATED at Brisbane this twentyfifth day of July, 1983.

W. H. Palfrey
Solicitor

W. H. Palfrey

John's property

1. Deed to SO Coalfields Consideration \$25000.

only - property to be paid out

\$17500 difference

R.P. Deeds

R1 S1 SP93 Parcel 1/2000.

Contact dep

Friday 17th Feb 1983

lease

5 yrs option to purchase
rental \$200 / week mth.

defini property

equipment to go with the lease
maintenance & repairs on equipment up to standard.

property to be used for farming farming

notes to be paid by lease.

Exhibits

No.11 Statement by witness
W.H. Palfrey with
attachments (tendered
by Plaintiff)
25 July 1983

~~14500~~

90

0

13400
26400
25100

12

known for 5 yrs

for

30

EXHIBITS

No.11 Statement by witness
W.H. Palfrey with
attachments (tendered
by Plaintiff)
25 July 1983

RICHARD ZANDE & ASSOCIATES

RICHARD ZANDE
SOLICITOR SUPREME CT. QLD.
HIGH CT. AUST.
BARRISTER & SOLICITOR A.C.T.
COMMISSIONER FOR AFFIDAVITS
(N.S.W., Vic., S.A., W.A.)
NOTARY PUBLIC

SOLICITORS
REGISTERED TAXATION AGENTS
PHONE: OFFICE 281 1833
PRIVATE: 281 1838

P.O. BOX 42, IPSWICH, 4305
49 Ellenborough Street,
Ipswich, Qld., 4305

OUR REF. WP:RH

YOUR REF. Mr Bloxom

19th December, 1977

Messrs Dale & Fallu,
Solicitors,
Brisbane Street,
IPSWICH...4305

Dear Sirs,

Re: Watson sale to Phipps

We enclose herewith Contract for Sale in duplicate for signature by your client and return to our office at your earliest convenience.

We understand from our clients' instructions that your client will have the option to purchase certain other lands during the currency of a lease yet to be prepared and that such option shall be contained in the said lease.

We await receipt of your further advices herein at your earliest convenience.

Yours faithfully,

RICHARD ZANDE & ASSOCIATES

per: *J. C. Zander*

Exhibits

No.11 Statement by witness
W.H. Palfrey with
attachments (tendered
by Plaintiff)
25 July 1983

John's property

1. DeLore SO. Coalfields. Consider \$25000.

note - property to be paid out

\$15000 liferen

R.P. DeLore

R1 S1 SP93 Parcel DeLore

Contact dep

Fridy 17th Feb due date

Exhibits

No. 12 Handwritten notes made
by witness W.H. Halfrey
(original of attachment
to Exhibit No. 11)
(tendered by Plaintiff)
Undated

lease

5 yrs option to purchase
rental \$220 / col in mth.

define property

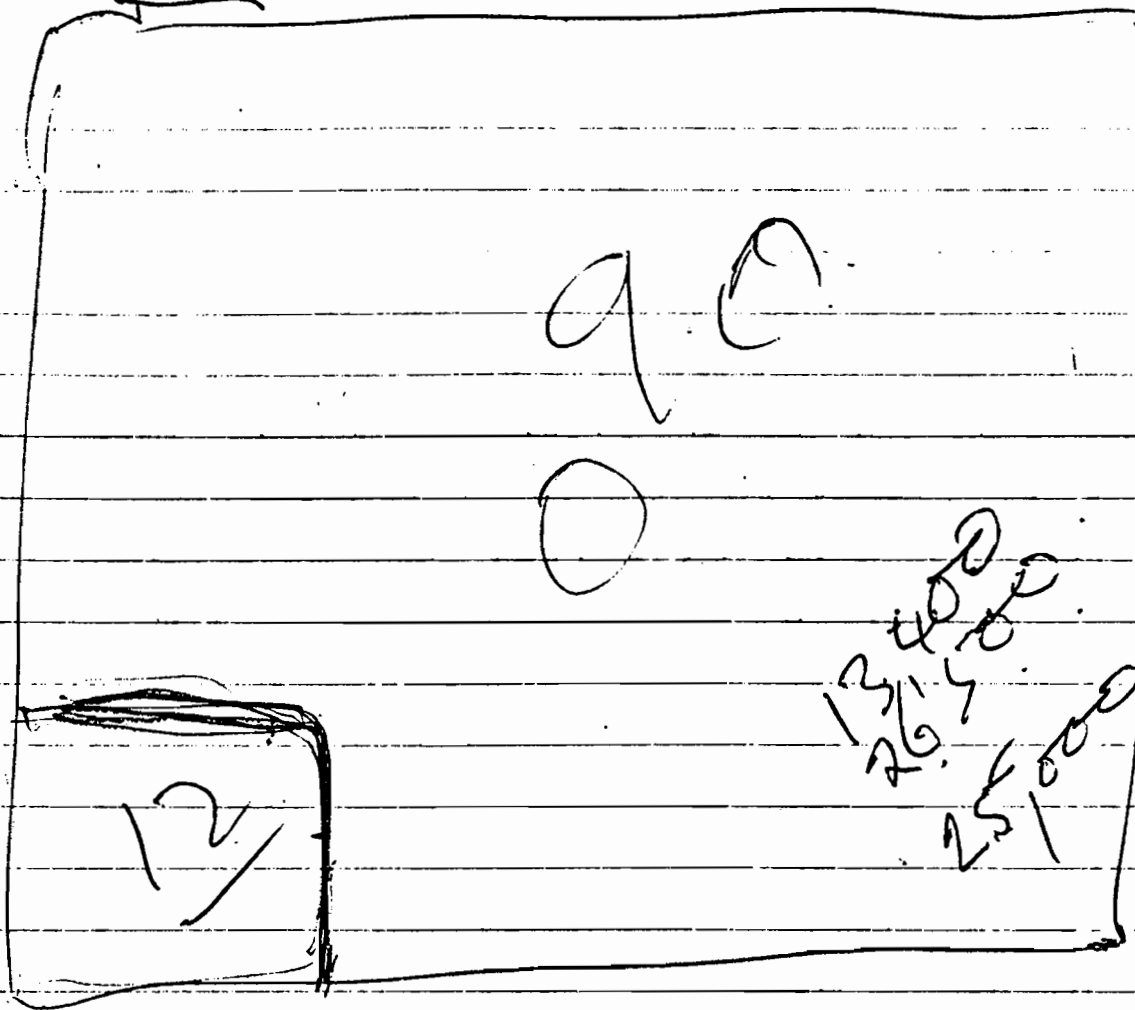
equipment to go with the lease
maintenance & repairs on equipment up to standard.

property to be used for farming farming

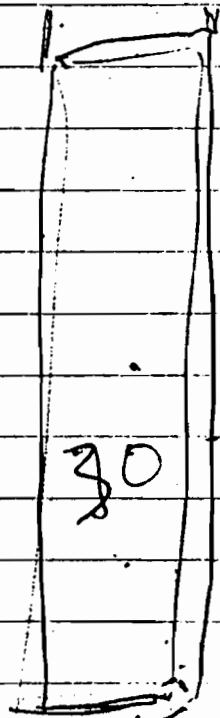
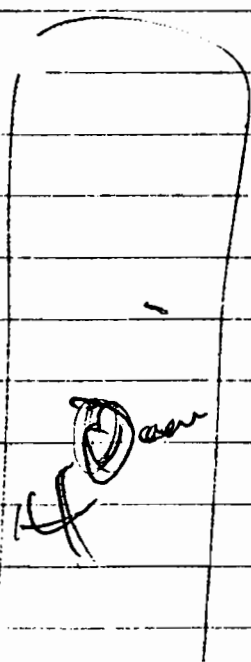
notes to be paid by lessor.

Exhibits

No. 12 Handwritten notes made
by witness W.H. Falfrey
(original of attachment
to Exhibit No. 11)
(tendered by Plaintiff)
Undated



known for 5 yrs



Exhibits.

No. 12 Handwritten notes made
by witness W.H. Falfrey
(original of attachment
to Exhibit No. 11)
(tendered by Plaintiff)
 Undated

The House

no furniture should be put in

Low

open to public to be at \$1000 / week

I am to pay water
to well pay electricity
rental \$220.00

Admin the House of
P.P.O. Description

Statement of Warren Palfrey of Sunnybank in the state of Queensland, Solicitor.

I am a solicitor admitted to practice in Queensland and am presently employed by J.B. Stevenson at Moorooka. I know the defendant, James Watson and am able to recall the name of the plaintiff, Glenn Phipps, although I would not recognise him. I have had the opportunity to peruse hand written notes made by me when I was employed by Richard Zande and acting on Mr Watson's behalf. Whilst I have some recollection of some of the events connected with this matter I am unable to remember any precise details of the terms of the documents I drafted or the nature of my instructions.

I can recall Mr Watson, Mr Phipps and his mother coming to my office in Ellenborough St, Ipswich to discuss the preparation of a lease. I recall being irritated at their coming without an appointment and that they seemed unable to give me precise details of the description of the area to be leased. The lease was to be in respect of only part of a dairy farm owned by Watson and which covered several title deeds.

I recall that Watson was at the time in some financial difficulties and was having trouble meeting repayments to the 2nd mortgagee who was the original vendor. I believe that his leasing part of the property was to gain some cash.

I recall Phipps as being about 19 or 20 years of age and can recall him saying words to the effect of "I don't want to work for a boss any longer, I want to be my own boss." I have the impression that the farming life appealed to him. Mrs Phipps I recall as being the financial backing for the exercise and

played a part in the discussions.

At the time of the interview the handwritten notes were made. I was directed by one of the persons present to prepare a lease and send it to Mr Bloxom at Dale and Fallu. I subsequently prepared the lease which I have recently read. I am unable to recall any of the details and feel sure that I only know of the existence of the clause in dispute because it has been drawn to my attention by solicitors involved in the action

I am unable , even after reading my notes, to say what the intention of the parties was. I agree that the clause is ~~badly drawn and that~~ in it's present form does not constitute an absolute option to purchase.

It has been suggested to me that the drafting of such a clause would have to contain an element of fraud or deceit. I know of no such instance.



.....

IN THE PRIVY COUNCIL
ON APPEAL

No. of 1985

FROM THE FULL COURT OF THE SUPREME COURT
OF QUEENSLAND (No. 4554 of 1981)

BETWEEN:

JAMES JOSEPH WATSON and PAULINE ELAINE WATSON

Appellants

AND:

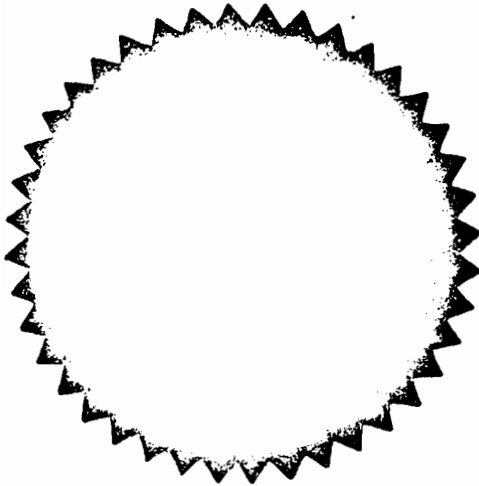
GLEN ROBERT PHIPPS

Respondent

CERTIFICATE OF THE REGISTRAR OF THE SUPREME
COURT OF QUEENSLAND AT BRISBANE CERTIFYING
THE TRANSCRIPT OF THE RECORD OF PROCEEDINGS

I, ROBERT HORE, Registrar of the Supreme Court of Queensland at Brisbane DO HEREBY CERTIFY that this Record contains a true copy of all pleadings proceedings evidence exhibits judgments and orders had or made in this action so far as the same have relation to the matter of an Appeal to Her Majesty in Council in which JAMES JOSEPH WATSON and PAULINE ELAINE WATSON are the Appellants and GLEN ROBERT PHIPPS is the Respondent from the Judgment of the Full Court of the Supreme Court of Queensland pronounced in this Action on the Twenty-first day of December, 1984 and an Index of Reference of all papers, documents and exhibits in the said Action (except documents of a merely formal character or otherwise immaterial for the purposes of the said Appeal) and a list of the said formal and immaterial documents which have been omitted.

No.23 Certificate of Registrar
of Supreme Court of
Queensland certifying
the Transcript of
Proceedings



I have hereunto affixed my
Seal of Office and also the
Seal of the Supreme Court of
Queensland in the State of
Queensland this *Tenth*
day of *April*
One thousand nine hundred and
eighty-five.

REGISTRAR