> "The 'reason' is required to be given to the constable and the Court is required to make a finding as to its reasonableness."[12]

How, then, may the word "satisfactory" be defined? Hogarth J. in *Mills* v. *Brebner* makes the following definition:

> . . . the section is satisfied if a person in the position of the appellant gives a reason which is in fact true and lawful, even though it does not convince the constable who puts the question, and even if that constable is acting reasonably in remaining unconvinced. . . . I consider, furthermore, that a reason, to be 'satisfactory', must be not only true and lawful, but sufficiently particularized to have some real meaning . . . what is sufficiently particular in each case will be a question of fact. It is not necessary, however, that when a sufficiently particular answer has been given, the person asked should have to produce convincing arguments to support the reason given, even if he is aware of those arguments at the time."[13]

It is now clear that a conviction for a breach of section 18 of the Police Offences Act will not automatically follow merely because the reason given fails to satisfy the arresting officer, if that reason is both true and lawful and sufficiently particularized to have some real meaning.

12. *Wilson v. O'Sullivan* [1962] S.A.S.R. 194, 201.
13. [1962] S.A.S.R. 209, 213.

LACHES

Delay After Issue of Writ

A formidable body of case law has developed around the equitable doctrine of laches in its application to suits for specific performance but the unusual facts of the recent High Court case of *Lamshed* v. *Lamshed*[1] presented a problem rarely considered by the courts.

The respondents claimed that the appellant was in breach of an alleged contract for the sale by the appellant of a grazing property situated at Cunliffe in South Australia. The agreement was dated 25th September, 1956, and the appellant formally repudiated the agreement as a binding contract by two letters of 27th November, 1956. On 5th April, 1957 the respondents issued a writ claiming specific performance of the agreement and damages. The pleadings were completed by 1st August, 1957, but it was not until 26th March, 1962 that the action was set down for trial. In the meantime the appellant had agreed on 11th February, 1962, to sell the property to a third party.[2]

1. (1963) 37 A.L.J.R. 301.
2. The third party placed a caveat on the title on 24th January, 1962, and on 31st January, 1962, the respondents followed with another caveat. The appellant warned this second caveat and on 23rd March, 1962, the Master extended the time for removal of the caveat conditionally upon the respondents setting the action down for hearing.

Thus there was a lapse of about four years and eight months from the time when the action could have been set down to the actual setting down. The appellant denied the existence of a binding contract on grounds which are not relevant to our present purposes and pleaded further that even if there was a binding contract, nevertheless the respondents were estopped by laches and by acquiescence in the rejection by the appellant of the contract from enforcing the contract of sale.

The trial Judge (Hogarth J.) found that the respondents had proved their contract and that no ground had been made out to deprive them of an order for specific performance.[3] The High Court did not disturb the finding that there was in fact a binding contract but a majority of the High Court set aside the judgment of the trial Judge in so far as it declared that the agreement ought to be specifically performed and carried into execution.

The appellant did not contend that there was undue delay in commencing the action but he argued that the respondents did not *prosecute* their claim with due diligence and that this delay after the issue of the writ barred the right of the respondents to specific performance. In answer to this argument the respondents submitted that the equitable doctrine of laches had no application where delay occurred after the issue of the writ.

Although the question of delay is frequently considered by the courts, counsel on both sides were unable to cite to the trial Judge one case in which delay after the issue of the writ had operated to bar the right of specific performance. However, counsel for the appellant cited two leading authorities in support of the proposition.

Lord Justice Fry recognized the applicability of the defence of laches in such cases when he stated:

"But it is now clearly established that the delay of either party . . . in not diligently prosecuting his action when instituted, may constitute such laches as will disentitle him to the aid of the Court, and so amount, for the purpose of specific performance, to an abandonment on his part of the contract."[4]

The question is also discussed in Halsbury's Laws of England where it is stated:

"Delay by a party in performing his part of the contract, or in commencing *or prosecuting* the enforcement of his rights, may constitute such laches or acquiesence as will debar him from obtaining specific performance."[5]

Both authorities deal with the question in passing and both cite the case of *Moore* v. *Blake*[6] in support of their proposition. That case will be discussed in more detail at a later stage. It concerned a suit for specific performance of an agreement to grant a lease. The plaintiff commenced proceedings in 1782 and although the defendants filed an answer to the bill nothing further was done in

3. [1963] S.A.S.R. 154.
4. Fry on Specific Performance (6th Ed., 1921), 514.
5. Halsbury's Laws of England, 3rd Ed., Volume 36, p. 324.
6. 4 Dow 321; 3 E.R. 1147. The decision of Lord Manners reported in (1808) 1 Ball & Beatty 62 was reversed by the House of Lords.

the suit until 1801. In the final result of the case it was held that delay was not a defence on the facts before the Court, but the above-mentioned authorities cited the case because of the statement made by Lord Eldon when he came to discuss the issue of delay.

"Then we are to consider whether there is anything to bar the relief upon the authority of those cases—not of the cases which justify a dismissal on the ground of not commencing a suit in due time—but of *those cases which justify a dismissal on the ground that, though begun in due time it has not been prosecuted with due diligence.*"[7]

Hogarth J. accepted the proposition that in certain cases a plaintiff could be barred from equitable relief if he did not prosecute his claim with all the diligence which was reasonable in the circumstances, but he considered that "different considerations may well apply after the issue of a writ."[8]

His Honour stated that he would have had no hesitation in deciding against the respondents if they had delayed *issuing their writ* for the period under consideration, but as this was a case of delay after the issue of the writ it gave rise to the application of the "different considerations" referred to by His Honour.

If the cases are to be placed in different categories what then is the test to be applied in the cases where delay occurs after the issue of the writ? In His Honour's opinion the requirement as to due diligence in such a case would be satisfied if the following conditions were fulfilled:—

1. The plaintiff took the action to a stage where it was possible for the defendant himself to enter it for trial or apply to have it dismissed for want of prosecution.

2. The plaintiff had a sufficient reason for not proceeding further with his action over the relevant period, and

3. The defendant did not suffer any prejudice as a result of the delay.

Applying this test His Honour was unable to find actionable delay on the respondent's part. The first requirement had been satisfied when no reply was filed within seven days of the defence and the pleadings were thereby deemed closed.[9] Secondly, His Honour held that the respondents had sufficient reason for not proceeding. The parties were related and His Honour accepted the evidence that the respondents did not wish to bring the matter into open Court if that could be avoided. Furthermore the respondents had been advised that land prices in the area would fall and they believed that the appellant would "come good" if he found it difficult to sell to another purchaser at the same price as he had agreed to sell to the respondents. Finally the trial judge considered that the defendant had not suffered any prejudice as a result of the delay and His Honour's views on this point are discussed below where they are compared with the views of Kitto J.

On appeal to the High Court Kitto J., in a judgment in which Windeyer J. concurred, held that there was a binding contract but

7. 3 E.R. 1147 at 1151.
8. [1963] S.A.S.R. 154 at 168.
9. Rules of Court O. 23 r. 4.

that the delay in prosecuting the action operated as a bar to a decree of specific performance. McTiernan J. dissented from the majority view of laches and agreed in all respects with Hogarth J.'s judgment on that point.

Kitto J. accepted the appellant's contention that delay after action brought could afford a defence to a suit for specific performance. The defence was held not to apply in the case of *Moore* v. *Blake* because the defendant could have applied to dismiss the action for want of prosecution. But the facts of that case were very special. The agreement for the grant of the lease which the plaintiff claimed should be specifically performed was subject to the payment of a judgment debt owed by the plaintiff to the defendant. The landlord could refuse to execute the lease for as long as the debt remained unpaid and he was thus in the position of a mortgagee of the promised lease. Delay by the plaintiff in prosecuting the suit constituted delay in paying the mortgage debt and the defendant should have moved to dismiss the suit for want of prosecution *as a means of foreclosure*. But the importance of the case lies in the recognition by the Court that in the proper case delay after the issue of the writ may justify a dismissal of the suit.

But did the facts of the present case give rise to the application of the doctrine of laches? Kitto J. dealt briefly with the general principles involved in the doctrine. It was well settled that the degree of promptness required depended upon the circumstances of the particular case and it was dangerous to rely too heavily upon precedents when considering the period of delay sufficient to constitute the defence of laches. Furthermore mere delay was not enough and the defence would not be successful unless the delay was prejudicial to the defendant or a third party or was such as to constitute an abandonment of the contract by the plaintiff. But His Honour considered that this case went further than the bare fact of delay. The appellant had denied that he was bound by the contract and this placed the case in the category of "the typical case" for refusing specific performance by reason of a delay of even a few months. The case of *Fitzgerald* v. *Masters*[10] stressed the importance of promptness in such cases.

"It is natural and reasonable that this should be required of (the purchaser) for the vendor is not to be placed indefinitely in the position of not knowing whether he can safely deal with the property in question on the footing that the contract has ceased to exist."[11]

The basis for the conflicting views of the majority of the High Court on the one hand and Hogarth J. on the other is to be found in the differing approaches to the question of the appellant's uncertainty. The trial Judge could find no prejudice if the uncertainty could be terminated by the appellant himself. The pleadings had been closed and it was open to the appellant to apply to have the action struck out for want of prosecution or to set the matter down for trial.

"Where the plaintiff has a sufficient reason for not proceeding further with his action over a period, and, during that period, the defendant

10. (1956) 95 C.L.R. 420.

11. Ibid, at p. 433.

has the right to enter the action for trial if he wishes to do so, I consider that the plaintiff will not be debarred from his remedy unless the defendant is shown to be likely to suffer some prejudice as a result of the delay."[12]

While the trial judge conceded that delay after action brought could operate as a defence he seems to have qualified the principle to such an extent that it would be rare for a case to arise where His Honour would apply the principle. Certainly if the plaintiff had personal reasons for not prosecuting the action it is difficult to imagine a single instance which, on the trial Judge's reasoning, would attract the defence of laches.

Kitto J. considered that the ability of the appellant to end his uncertainty was a circumstance to be considered, but he was of the opinion that this factor was not decisive. His Honour referred to the quandary in which the appellant was placed.

"He might not let a sleeping dog lie or take the risk of waking it. . . . While by taking the offensive he might put an end to the uncertainty, he might lose the case. Perhaps better to let the litigation die of inanition."[13] His Honour stated that the quandary was the result of the respondent's inaction and the decision of the trial Judge meant that the respondents could have prolonged the position of uncertainty for many more months and then brought the matter into Court when it suited them.

Furthermore in this atmosphere of uncertainty the appellant had purported to transfer the land to a third party. Kitto J. agreed with the trial Judge in holding that a defendant could not put an end to the remedy of specific performance simply by entering into an agreement for sale with a third party who then placed a caveat on the title. But His Honour considered that the purported sale to the third party was a further circumstance distinguishing the case from one of mere delay.

"It is a case in which third parties, not shown to be in any way at fault and not being warned by any caveat on the title, have acquired interests which will be defeated if a decree for specific performance should now be made."[14]

In view of the sparsity of authority dealing with delay after the issue of a writ it is not likely that the precise point of law raised by the case will be the subject of frequent judicial consideration. However, the decision emphasises the obligations of a petitioner seeking equitable relief and stresses the right of the Court to say at any time

"vigilantibus, non dormientibus, iura subveniunt."

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12. [1963] S.A.S.R. 154 at 168.
13. (1963) 37 A.L.J.R. 301 at 306.
14. Ibid, at p. 307.