[HIGH COURT OF AUSTRALIA.]

DOWSETT . . . . . APPELLANT;
DEFENDANT,

AND

REID . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 30, 31; *Nov.* 1, 5.

Griffith C.J., Barton and Higgins JJ.

Contract—Agreement for lease with option of purchase—Repudiation by lessor—Total ignorance of contract — Fiduciary relationship — Unfair and unconscionable bargain—Specific performance—Rescission—Damages.

On an appeal from a judgment granting specific performance of a contract, as to which the defendant had set up a counterclaim for rescission of the contract on the grounds—(1) that he was totally ignorant of the contract; (2) that the plaintiff stood in a fiduciary relationship towards him; and (3) that the contract was unfair and unconscionable:

Held, as to (1), that on the question of fact, the determination of which depended upon the credibility of witnesses, the finding of the primary Judge would not be interfered with.

Held, by *Griffith* C.J. and *Barton* J. (*Higgins* J. dissenting), as to (2), that on the facts in this case no fiduciary relationship existed between the parties.

But *held*, by the Court, as to (3), that on the facts in this case specific performance of the contract should not be ordered, as (*per Griffith* C.J. and *Barton* J.) the Court was not bound to enforce a bargain which would work great hardship upon the defendant.

Held, by *Griffith* C.J. and *Barton* J. (*Higgins* J. dissenting), that the defendant was not entitled to rescission of the contract, and that the plaintiff was entitled to judgment for such damages as she had sustained by reason of the defendant's non-performance of the contract.

Judgment of Supreme Court of Western Australia: *Dowsett* v. *Reid*, 14 W.A.L.R., 104, varied by substituting, in lieu of the decree for specific performance, a declaration that plaintiff is entitled to damages.

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APPEAL from the Supreme Court of Western Australia.

In an action brought by the respondent against the appellant, the respondent claimed specific performance of an agreement, dated 13th August 1911, made between her and the appellant, and the appellant set up a counterclaim for rescission on the grounds (1) that he was totally ignorant of the terms of the contract; (2) that the plaintiff stood in a fiduciary relationship towards him; and (3) that the contract was unfair and unconscionable.

By the agreement in question, the appellant agreed to lease to the respondent, at an annual rental of £500, about 5,000 acres of land, in course of acquisition from the Crown, together with stock valued at £512, farming implements valued at £112, and an hotel, which was under lease and was bringing in a rental of £3 15s. per week. The respondent was to have an option of purchase for £8,000, but the appellant was to pay all future instalments of the purchase money to the Crown amounting to £1,327, and was to defray the cost of the improvements necessary under the Act for obtaining the freehold; which would together amount to about £1,100. He had also to clear fit for the plough about 300 acres, which would cost about £300, and ringbark 2,389 acres, at a cost of about £100. He was also to pay all rates, taxes and outgoings.

The respondent's husband, Robert John Reid, who in fact was the real plaintiff, was an auctioneer and commission agent, and was asked in March 1911 by the appellant, who then owned the properties above referred to in partnership with his brother, to arrange a loan of £2,500 on his properties to buy his brother out. Reid went into figures, and said there would be no difficulty in doing so. A couple of days afterwards, the appellant and his brother fixed up for themselves the terms of the dissolution of their partnership, and requested Reid to write the agreement relating thereto for them as they were illiterate. He did so without remuneration. The land and chattels referred to in the agreement dated 13th August are the share which the appellant took under the dissolution of partnership. On 24th July, Reid wrote to the appellant that he expected that certain transfers relating to some of the land would be fixed during the week, and

that, as soon as they were, he would come out and fix up everything; and on 31st July (when the loan was arranged by Reid), he wrote to the appellant's brother that he anticipated the transfers of the land to the appellant would be fixed up during the week, and that he would want to inspect the partnership pass-book on behalf of the appellant, and would also want the lease of the hotel. In his evidence Reid stated that he did not act as the appellant's agent in the dissolution, nor was he the appellant's adviser, but was acting for him in connection with the loan, and at the final settlement of partnership affairs on 14th August he drew certain cheques for the appellant which were signed by the appellant's brother in the partnership name. According to Reid's evidence, about two months after instructing him to arrange the loan, that is about May, the appellant expressed a desire to sell or lease the properties, and they discussed the matter then, and also on other occasions prior to 8th August—Reid, on the appellant's behalf, having in the meanwhile submitted the properties to various persons without being able to do any business. The appellant, in his evidence, denied that Reid was his agent either to let or to sell the properties. Reid did not ask, nor did he receive, any payment except commission on procuring the loan. About 8th August, in consequence of a conversation between the appellant and Reid, the latter drew up rough notes of an agreement between them with regard to the properties; and subsequently, from these rough notes, the agreement in question was drawn up by Reid's solicitor. The appellant, who could not read, had the agreement read over to him by the local postmaster, expressed himself as satisfied with it, and signed it. The appellant subsequently wholly repudiated the agreement. Other material facts sufficiently appear from the judgments set out hereunder.

The case was tried before *McMillan* J., who found in favour of the respondent and decreed specific performance.

From this decision Dowsett appealed to the Full Court, which, by a majority judgment, affirmed it: *Dowsett* v. *Reid* (1).

Dowsett now appealed to the High Court from the judgment of the Full Court.

(1) 14 W.A.L.R., 104.

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Northmore K.C. and *Keall*, for the appellant. The nominal plaintiff is a married woman, but the real party to the suit is her husband, who is a land, estate and commission agent. The appellant wished to lease or sell his land, but in the event of it being leased he wanted £500 per annum clear in rent, or in the event of it being sold £8,000 clear—not these amounts less cost of improvements, &c. The appellant was an ignorant and illiterate man, and did not understand from the agreement that he was to be liable for all these outgoings. If the respondent had exercised the option and given the appellant six months to complete, the appellant would only have received £2,817.

The evidence shows that Reid had been representing the appellant and acting for him in the capacity of a *quasi*-solicitor, and therefore stood in a fiduciary relationship towards him. The appellant's position is supported by the case of *Rhodes* v. *Bate* (1). This was a very improvident agreement, and such a one that, had the appellant had any competent advice, he would never have entered into it. The appellant would not have received anything for four years if it had been carried out as a leasing proposition. If it had been purchased under the option, he would only have received a little over £2,000 instead of £8,000, and he would also have been handing over the stock just as the wool was ready to come off the sheeps' backs, and the crops just as they were ready to reap. He was also handing over the hotel, which was bringing in a rental of £3 15s. per week.

Lohrmann and *McDonald*, for the respondent. The defendant made no case on his counterclaim. At the conclusion of his case we raised this objection, and *McMillan* J. reserved the point, and we are now entitled to raise it here: *Mummery* v. *Paul* (2); *Atkinson* v. *Pocock* (3).

As to fiduciary relationship, the appellant himself denies that Reid was his agent, and there is not one tittle of evidence to show that any confidential relationship ever existed. Drunkenness was the chief defence before the primary Judge, and the evidence on this point failed in every instance.

[GRIFFITH C.J.—Specific performance is discretionary.]

(1) L.R. 1 Ch., 252. (2) 1 C.B., 316. (3) 1 Ex., 796.

It is plain that there was no fiduciary relationship: *Jones* v. *Boufjier* (1).

On the figures the appellant was getting an excellent bargain, and he was certainly doing much better for himself under this agreement, for he admits that for years before he had not made a penny out of the land. Specific performance ought to be decreed: *Lightfoot* v. *Heron* (2).

Northmore, in reply.

Cur. adv. vult.

November 5.

GRIFFITH C.J. This is an action for specific performance of an agreement, dated 13th August 1911, for a lease for ten years, with the option of purchase, of about 5,000 acres of country land in course of acquisition from the Crown, also a roadside inn or hotel, then under a short lease at a rental of £3 15s. per week, together with stock valued by the parties at £512, some farming implements valued at £112, and some furniture in the hotel.

By the terms of the agreement possession was to be given from 1st September following, the rent was to be £500 per year, payable annually on 1st March, the first instalment being £250 for a half-year's rent, payable on 1st March 1912. On default of payment of the rent continuing for three months, there was to be a right of re-entry.

The lessee was to have an option of purchase for £8,000, but the lessor was to pay all future instalments of the purchase money to the Crown, which amounted to £1,327, and defray the cost of all the improvements prescribed by the *Land Act* for the acquisition of the freehold, which would amount to about £1,000. The property was mortgaged for £2,500. The lessor was, within twelve months from the date of the agreement, to clear fit for the plough a further area of 300 acres to be indicated by the lessee, which would cost about £300. He was also to pay all rates, taxes and outgoings in respect of the property; and to erect a substantial shed and stable, and put the homestead in good and substantial repair. Further, he was to ringbark forthwith—say in eighteen months—a portion of the property containing 2,389

(1) 12 C.L.R., 579. (2) 3 Y. & C., 586.

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acres, and the estimated cost of this work was about £100. The lessor was to insure the property against fire, and re-instate any property destroyed by fire, storm, or tempest, with a suspension of rent until he did so. The lessee was to have all growing crops and all increase of stock and wool from the sheep, and these two items were estimated by the defendant in his evidence to be worth £211 and £335 respectively. Probably that estimate was very much exaggerated.

Those were substantially the terms of the agreement.

On the pleadings the agreement was admitted, and the defence was a counterclaim for rescission, substantially on two grounds—the first, total ignorance of the contract, the defendant's case being that he was drunk when he signed it and knew nothing at all about it, and the second that there was a fiduciary relationship existing between him and the lessee. There was a third ground, that the contract was unfair and unconscionable, which I will deal with later.

As to the ground of ignorance, the circumstances surrounding the making of the contract are briefly these. The lessor, the appellant, was an illiterate man, in so far that he could not read or write, though he could sign his name and draw cheques. But in other respects he was, in the opinion of the learned Judge who tried the case, a shrewd man of business. A week before the contract was signed the plaintiff's husband visited the defendant on the property and asked him whether he would sell to him—the defendant at that time being desirous of leasing or selling it. The defendant said he had no objection if terms could be arranged. Thereupon a discussion took place, terms were arranged, and a memorandum was written out by the plaintiff's husband containing a note of the terms then agreed upon. It was not a complete memorandum, for, as might be supposed in an agreement for a lease with the option of purchase, many things might be left to be afterwards put into the formal agreement. It was arranged that the parties should take time to consider the matter. A week later the plaintiff's husband went back to the defendant. In the meantime he had had a draft form of agreement prepared by his solicitor, which he took with him, and he says that he read it carefully to the defendant, who appeared to understand it; but

the plaintiff's husband suggested that it had better be read over to him by some independent person, and they accordingly went into a neighbouring township, where they saw the postmaster, Mr. Watts, who read the document carefully over to the defendant, who appeared to understand it. Watts occasionally asked him if he would like parts of it read over again. The defendant expressed himself as perfectly satisfied with the terms of the draft, and the agreement was thereupon signed. The defendant's case is that he was drunk on both occasions, and knew nothing at all about the transaction. Watts and plaintiff's husband contradicted this story. The learned Judge did not believe it, and found as a fact that the defendant, whom he thought a shrewd man of business, fully understood the contract, in the sense that he understood the full meaning of the words that he used. It appeared also by independent evidence that after the contract was signed the defendant had expressed his satisfaction with the bargain that he had made. The question is one of credibility of witnesses. The learned Judge, who had an opportunity of seeing the witnesses and observing their demeanour, attached a great deal of importance to the defendant's demeanour in the box. He said that the defendant had apparently intentionally left any wits which he possessed outside the Court. He came to the conclusion that the defendant's story was untrue, and that the plaintiff's version of the facts was the true one. Under these circumstances it is impossible for a Court of Appeal to differ from the learned Judge. The onus was on the defendant to establish his case, and he has failed to do so. The agreement cannot be rescinded on that ground. It is quite possible that the defendant did not appreciate or was under a mistake as to the full effect of the obligations he was undertaking by the words he used, but that is not sufficient ground for setting aside an agreement. This ground therefore fails.

I now come to the next ground, the alleged fiduciary relationship, which is set up in this way. Shortly before this transaction, defendant and his brother, who had owned these properties in partnership, had agreed to dissolve the partnership. The terms of the dissolution were arranged between the brothers themselves, and the plaintiff's husband was asked to do some necessary

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clerical work in connection with it, and did it without remuneration, but there is no suggestion that any trust was reposed in him in respect of that negotiation. One of the consequences of the agreement for dissolution was that the defendant was obliged to raise a sum of £2,500 on mortgage of his property, partly to pay off an existing mortgage, and partly to raise a sum of £600 which he had to pay to his brother under the terms of the dissolution. It appears that the loan was negotiated, and that besides the £600 to his brother and £1,700 his amount of the old mortgage, he also paid two other sums of money amounting to £104, leaving him apparently a small balance to his credit at his bank, which was the mortgagee. In that transaction I can see no ground for any suggestion of a fiduciary relationship existing between the defendant and Reid, and even if there were, it is entirely irrelevant to a subsequent sale of the property when the defendant had acquired it entirely for himself.

Then, that failing, it is suggested that the fiduciary relationship arose in another way. After the dissolution, the defendant had expressed his willingness to sell or lease the property, and asked Reid if he thought he could find a purchaser. Reid says that he made some inquiries, but could not find one; other persons also had offered it for sale and could not find a purchaser, and finally Reid asked the defendant if he would lease the property to him. The defendant said, "Yes, as soon as to anybody." Thereupon the negotiations took place which resulted in an agreement, as I have stated. On those facts, it is said, there was an agency to sell, which created a fiduciary relation. There are two answers, it appears to me, to the argument. The first is, that the defendant himself denies the agency. It is true that in his pleadings he alleged the fiduciary relationship, but in his evidence at the trial, when he had to make his case on the counterclaim, he denied the existence of any agency. Now, in my opinion, a party who, in his case made at the trial, sets up one set of facts, cannot afterwards be allowed to spell out from the evidence of the opposite party a different and inconsistent case upon which, if he had put it forward, he might have been entitled to some relief. The plaintiff must succeed *secundum allegata et probata*. Any other rule would operate most unfairly.

A party is called upon to answer the case that is made against him, and addresses his mind to it and offers such evidence as is relevant to it. The fragments of evidence that are afterwards spelled out and relied upon might, if the matter had been really in issue, have been supplemented by other relevant facts which would put a different complexion on the isolated facts picked out and relied upon. This Court has had occasion in two or three instances lately to apply that rule. In one case we held that a man cannot, in proceedings in the Bankruptcy Court, in which he is accused of one offence, be convicted of another of which it is said that he has convicted himself out of his own mouth in his evidence upon the charge put forward at a time when he did not know that any such charge as that afterwards alleged was made against him. I think that that is of itself a complete answer to the claim for relief on the ground of the alleged fiduciary relationship.

But there is another answer upon the facts, which is equally conclusive. There is a good deal of misunderstanding, I am afraid, about what is called "fiduciary relationship." In a very recent case, *Coomber* v. *Coomber* (1). *Fletcher Moulton* L.J. and *Buckley* L.J. made some observations which I think are very pertinent. *Fletcher Moulton* L.J. said (2):—"This illustrates in a most striking form the danger of trusting to verbal formulæ. Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary rela-

(1) (1911) 1 Ch., 723.

(2) (1911) 1 Ch., 723, at p. 728.

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tion must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them." *Buckley* L.J. said (1):—"It is not every fiduciary relation that calls this doctrine of equity into action. Between master and servant, between employer and bailiff or steward, there subsists, of course, a fiduciary relation; but there is no authority for the proposition that by reason of the existence of relations such as those a deed of gift from the one to the other can be set aside. This doctrine of equity does not rest upon the existence of a fiduciary relationship whatever be its nature. It rests upon the existence of such a fiduciary relationship as will lead the Court to infer undue influence, or knowledge in the one party concealed from the other, or other circumstances into which I need not go." That is the latest case on the subject. I will only refer to one other case, a much older one, *Andrews* v. *Mowbray* (2). That was a case of agency. Sir *William Grant* M.R., after considering the question whether the defendant as agent had communicated to his principal all the information he had, and holding that he had done so, said (3):—"If so, he has by acting fairly, placed himself in the situation of an ordinary purchaser, because from the moment he has discharged all the obligations attached to the character of an agent, he stands just in the same situation as any other purchaser, and is entitled to all the advantage that he may eventually derive from the bargain; and the consequence is that he is not to be deprived of the bargain even supposing it to be proved that the estate was worth at that time more than he contracted to give for it, provided the vendor had the fair opportunity of exercising his own judgment upon full information with regard to all the particulars of the estate, and deciding for himself without misrepresentation or suppression, that it was expedient to let the estate go at the price offered for it."

In the present case the learned Judge at the trial, and the

(1) (1911) 1 Ch., 723, at p. 730. (2) Wils. Ex. Eq., 71.
(3) Wils. Ex. Eq., 71, at p. 87.

Supreme Court found upon the facts that there was no fiduciary relationship. I agree. Upon the evidence I think it clear that there was in fact not any confidence reposed by the defendant in Reid; the information which they had of the property was equal, except that probably the defendant knew more about it than Reid; they were dealing at arm's length. In my opinion, therefore, that is not a ground for setting the contract aside.

I now come to the third defence, that it was a hard and unconscionable bargain. That is an appeal to the discretion of the Court, and it raises more difficulty. Some recent cases seem to have gone so far as to suggest that in every case where there is a valid contract the Court is bound to grant specific performance; but that is not the old doctrine of the Court, nor do I think it is the present doctrine. In *Fry* on *Specific Performance*, 3rd ed., p. 152, sec. 334, it is said: "'Nothing is more established in this Court,' said Lord *Hardwicke*, speaking of contracts which the Court will enforce, 'than that every agreement of this kind ought to be certain, fair, and just in all its parts. If any of those ingredients are wanting in the case, this Court will not decree a specific performance.' 'I lay it down as a general proposition,' said Lord *Rosslyn*, 'to which I know no limitation, that all agreements, in order to be executed in this Court, must be certain and defined: secondly, they must be equal and fair; for this Court, unless they are fair, will not execute them.'" At page 194, sec. 417, the doctrine is thus stated:—"It is a well established doctrine that the Court will not enforce the specific performance of a contract the result of which would be to impose great hardship on either of the parties to it; and this although the party seeking specific performance may be free from the least impropriety of conduct." In the case of *Lamare* v. *Dixon* (1), Lord *Chelmsford* said:—"The exercise of the jurisdiction of equity as to enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court—not an arbitrary or capricious discretion, but one to be governed as far as possible by fixed rules and principles." In *Tamplin* v. *James* (2), *Cotton* L.J. said:—"It has been urged that if specific performance is refused the action must simply be

(1) L.R. 6 H.L., 414, at p. 423. (2) 15 Ch. D., 215, at p. 222.

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dismissed. But in my judgment—and I believe the Lord Justice *James* is of the same opinion—as both legal and equitable remedies are now given by the same Court, and this is a case where, under the old practice, the bill, if dismissed, would have been dismissed without prejudice to an action, we should, if we were to refuse specific performance, be bound to consider the question of damages." *James* L.J. expressed his concurrence in that view.

In my judgment the old doctrine is still the doctrine of the Court. The Court is not bound to enforce a bargain which would work great hardship upon either party. Applying that doctrine, it is necessary to consider the nature and effect of this transaction. The defendant has made a bargain from which he cannot escape. But what is the nature of it? What is the result of it? It appears from the evidence that the defendant had hoped to get out of the transaction an income of £5 per week. Let us see what is the result. First of all, he stripped himself of all his property except a balance of something under £100 which he perhaps had in the bank out of the mortgage money. The only income he was to get, unless and until the option of purchase was exercised, was £250 at the end of six months, and after that £500 per year at intervals of twelve months. So, until eighteen months had expired he would only receive £250 cash, although at the end of eighteen months, or within three months afterwards, he would get another £500. Now, the obligations which he had incurred were to pay interest on the mortgage which, if we estimate it at 6 per cent.—we do not know the rate—would be £150 per year; the Crown rents he was bound to pay amounted to about £90 per year more; and the rates and taxes may be put down, at a moderate estimate, at £20. That is, he had fixed outgoings, irreducible, of £260 per year. During the first twelve months he had also to pay in money or money's worth £300 for preparing land for the plough; further, he had to spend forthwith, say within eighteen months, another £100 for ringbarking, and whatever was necessary for putting up new sheds and doing repairs, which may be taken at £50. The result is that during these eighteen months he would have to find £840, as against £750, his total income. On the other hand, the plaintiff would,

during the same period, have received the crops, the increase of the stock, and the wool for two years, and eighteen months' rent of the hotel at the rate of £195 per annum.

I do not pursue the inquiry further, as to what would happen after the first eighteen months, because it appears to me on these facts that the bargain is one which the Court ought not, in its discretion, to enforce upon the lessor; but as the plaintiff cannot get it set aside I think the Court ought to follow the rule stated by Lords Justices *Cotton* and *James*, and give him such damages as he can prove that he has sustained. I should think that, on the case made by the plaintiff himself at the trial, when he tried to set up that the bargain was a very fair one, the damages would not be very large. I think, therefore, that the judgment of the Court should be varied to the extent of substituting a declaration that the plaintiff is entitled to damages for the claim for specific performance.

BARTON J. read the following judgment:—I am of the same opinion, and do not desire to add anything, except that I fear we are apt to give too much force to designations in considering the question of fiduciary relationship.

Where a man desires to sell or let a house or a property, for example, a farm, and tells a person who does business as a house, or estate, or commission agent, that he is prepared to let or sell that property, giving the usual particulars with regard to its nature and qualities, and stating the terms he is prepared to accept, the owner's relations with such a person are not, under these circumstances, necessarily relations of trust and confidence, so as to place the one party in what is called a fiduciary position as regards the other. To establish such a relationship there must either be, as in the case of a solicitor or a trustee, something in the relation itself which necessarily implies such trust and confidence, or there must be some evidence of its actual existence between the parties. In the present case the existence of trust and confidence is not necessarily to be inferred from the mere placing by A. of a property in B.'s hands to sell or let, and his occasional receipt from B. of a report as to the progress of his efforts to bring about a letting or a sale. It may be that there,

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even a little evidence would be enough to establish the relation. But I think some evidence is necessary. In such a case as that of a solicitor or a trustee, on the other hand, the relationship being necessarily suggested by the position of the parties, its influence on the particular transaction is in like manner to be inferred unless there is positive and convincing evidence to show that the transaction was actually and entirely uninfluenced by the relationship. In the present case I do not think that the evidence establishes the existence of trust and confidence. If it existed, however, it was, I think, at an end when the terms of the 8th August were arrived at.

Though the counterclaim for rescission must fail, yet I think the contract is a hard bargain.

As the circumstances justify the Court, as I think, in exercising its discretion to refuse specific performance, and nevertheless in granting an inquiry as to damages, the order proposed seems to me to be the proper one.

HIGGINS J. read the following judgment:—The figures, which have been stated by the Chief Justice, speak for themselves. It is a mistake to say that the purchase money under the agreement is £8,000 for the properties "as freehold." To make them freehold (in fee simple), the Crown rents and the mortgage money have to be paid, and the statutory improvements made, and the amounts ought fairly to be deducted from the £8,000. But, in addition, Dowsett is, *inter alia*, to clear 300 acres fit for the plough, wherever Reid shall indicate; he is to erect on Coranning a substantial shed and stables, and he is to put the homestead in repair. It is also a mistake to say that the rent is £500. For (*inter alia*) Reid is to receive the £195 per annum for the hotel, and the net rent which he pays is thus only £305. He is also to receive the wool from the shearing immediately at hand. The learned Judge of first instance says—as, indeed, the counsel for Reid admit—that Dowsett has made a bad bargain. The agreement was drawn up by Reid's solicitor, and contains provisions in Reid's interest which were not even in the rough notes of the agreement drawn up by Reid when the parties were contemplating a bargain. For Reid is under the agreement to

select which 300 acres are to be cleared fit for the plough; Dowsett is to pay all rates, taxes and outgoings; he is to effect all statutory improvements; he is to re-instate in case of fire, &c., and the rent is to be suspended in the meantime. The agreement is long and complicated; Dowsett was illiterate; he had no independent advice—his adviser was Reid; and, even accepting the finding of *McMillan* J. that Dowsett entered into the contract "knowing very well what he was about," the full and final result of the agreement in money cannot be ascertained without intricate calculations and adjustments. I concur absolutely with the view that it is not for a Court of Appeal, not having seen or heard Dowsett, to do otherwise than to accept the findings of the learned Judge as to the credibility and the low cunning of Dowsett. I take it that Dowsett was an expert in the value of land and of stock; but it does not follow that he could fully realize the consequences of this elaborate agreement. Dowsett thought, according to Reid and his witnesses, that he was to get £5 per week clear after paying interest on the mortgage (about £150 per annum), and rents (over £88 per annum); but he was not to get it. He is practically to get nothing for himself to live on for two or three years; and he is liable to be called on at any time, by six months' notice, to pay up the balance of Crown rents and to convey the property free of all encumbrances.

What is the result of these facts? Personally, I am of opinion not only that specific performance should be refused, but that the counterclaim for rescission should be granted. For at the time of the contract, 13th August, Reid was in a fiduciary position towards Dowsett. It was a fiduciary relation affecting the very subject matter of the contract and the power of Dowsett to deal with it. Reid is a local auctioneer and financial agent, and had, as he says, "several times" done writing for Dowsett, as the latter could not write; and he was acting for Dowsett in arranging a loan to buy Dowsett's partner out. As often happens in such cases in Australia, the financial agent collected the documents and the particulars, and arranged the transaction as if he were a solicitor. By a letter to the partner dated 31st July 1911, Reid asked "on behalf of your brother G. Dowsett" for inspection of the partnership pass book, and of the lease of the hotel.

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Reid was paid his commission as financial agent, and did everything that was necessary to wind up the partnership. Reid himself says, "I assisted at final settlement of partnership affairs on 14th August," when the cheques were signed. The agreement impugned was signed on the 13th August; and if Reid had, before the 13th August, abandoned all action on behalf of Dowsett, Dowsett would have been seriously embarrassed and delayed in getting rid of his partner, and in getting the land under his sole control. Reid says that he was Dowsett's "agent to find a purchaser or lessee," and that the business "was never taken out of" his "hands." The suggestion that Reid should be the lessee came from Reid himself. When Reid drew up the rough notes about the 6th August, he said he would take a week to think it over, and that if he decided to go on with the transaction he would get the agreement drawn up. Reid never suggested that Dowsett should have an independent solicitor; and Dowsett trusted Reid that the agreement would be properly drawn up. Looking at the date of the agreement, 13th August, on that day Reid's fiduciary relations towards Dowsett had not come to an end—as agent to effect the dissolution and to finance it, as agent to find a lessee or purchaser, as agent to get the agreement drawn up. The obligations of the fiduciary relation had not been discharged. Nothing was said or done, before the signing of the agreement, to terminate the relations, or to put the parties at arm's length; and the "disqualification must continue so long as the reasons upon which it is founded continue to operate" (*Carter* v. *Palmer* (1)). If some other person had come along with a better offer, it was Reid's duty—until the contract was signed—to give Dowsett the benefit of the offer. The duty of Reid was to get as high a price and as good conditions for Dowsett as he could; the interest of Reid was to get as low a price and as bad conditions for Dowsett as he could. His interest and his duty conflicted; and, on grounds of public policy, even if the bargain would be fair as between two parties who are mere vendor and purchaser (as in *Harrison* v. *Guest* (2)), the bargain cannot stand and should be set aside: *Gibson* v. *Jeyes* (3). As

(1) 8 C. & F., 657, at p. 705. (2) 6 D.M. & G., 424.
(3) 6 Ves., 266.

Lord *Eldon* said in *Gibson* v. *Jeyes* (1), the rule does not depend on proved impropriety in the bargaining. As he says:—"From the general danger the Court must hold, that if the attorney does mix himself with the character of vendor he must show to demonstration, for that must not be left in doubt, that no industry he was bound to exert would have got a better bargain. Therefore, without imputing fraud, a general principle of public policy makes it impossible, that this bargain can stand" (2). "He might contract: but then he should have said, if he was to deal with her for this, she must get another attorney to advise her as to the value: or, if she would not, then out of that state of circumstances this clear duty results from the rule of this Court, and throws upon him the whole onus of the case; that, if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest, that he has given her all that reasonable advice against himself, that he would have given her against a third person" (3). According to Mr. *Lewin's* book on *Trusts*, 12th ed., p. 572, the mere fact of inadequacy of consideration is sufficient ground for setting aside a sale made by the person who trusts to the person who is trusted; but in this case there are additional facts, such as that Dowsett had no independent advice, was illiterate, and that Reid did not take due precautions to have him duly protected in making the bargain. As Lord *Cranworth* said, in cases where a fiduciary relation is established the purchaser has to show that the seller had due protection afforded him: *Harrison* v. *Guest* (4); the burden of proof is on the person who sets up the transaction; and in this case that burden has not been satisfied.

The peculiarity of this case is that, if the plaintiff had not produced evidence in rebuttal of the defendant's case, some material facts on which the Court relies for finding surprise and a snatched bargain, making it improper to order specific performance, would not have been proved; and the fiduciary relation would not have been proved in all its phases. The signing of the agreement, and the refusal to carry it into effect, were admitted by the defence. But the defence alleged that Dowsett gave no

(1) 6 Ves., 266.
(2) 6 Ves., 266, at p 271.
(3) 6 Ves., 256, at p. 278.
(4) 6 D.M. & G., 424, at p. 432.

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instructions to draw up the agreement, was unaware of its contents or effect, and that Dowsett was under the influence of liquor. The defence also alleged that Reid occupied a fiduciary relation towards Dowsett, that Dowsett had no independent advice, and that the agreement was procured by undue influence. Under these circumstances, the evidence for Dowsett was first taken; and he took the extraordinary position, of denying that he ever asked Reid to let the property for him, of recollecting nothing about the agreement, and of saying that the signature to the agreement was too good to be his. When Dowsett's evidence closed, Reid's counsel urged that he had no case to meet—in other words, that the facts alleged in the defence were not proved. The Court reserved "the benefit of any non-suit point," and Reid's counsel elected to go into evidence. Reid, by his own evidence, and the evidence of others, showed that the agreement was read out to Dowsett by the postmaster Watts, and that Dowsett asked for no explanations, but said he understood the contract thoroughly. Reid's evidence also made it clear that Dowsett had put the property in his hands to find a lessee or purchaser, and had consented to Reid taking the lease. The defence does not raise the case that Reid was in financial difficulties, and that therefore the agreement was taken in the name of his wife, who is alleged not to have any separate property. It is our duty now to look at all the facts in evidence, with the assistance of the findings of the learned Judge, and to say what should be the judgment—as to specific performance and as to rescission. A party must succeed according to what is alleged and proved; but in seeing what is proved he is entitled to have all the evidence, and not merely the evidence given by his own witnesses, taken into consideration. Although Dowsett succeeds at last in resisting specific performance, he suffers considerably in costs, and it serves him right; for any miscarriages in the legal proceedings are to be attributed to his attitude in the witness-box. He has prejudiced a good case by attempting to support a bad one.

Judgment of Full Court discharged.
Judgment of McMillan J. varied by omitting directions as to specific perform-

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ance and consequent thereon, and substituting a declaration that the plaintiff is entitled to damages for breach of the contract in the pleadings mentioned, and limiting the order for costs to the costs up to and including the costs of the trial.

Cause remitted to Supreme Court.

Solicitors, for the appellant, *James & Darbyshire*, Perth.

Solicitors, for the respondent, *Lohrmann & McDonald*, Perth.

N. McG.

[HIGH COURT OF AUSTRALIA.]

McDONALD AND ANOTHER . . . APPELLANTS;

AND

THE COMMISSIONER OF PATENTS . . RESPONDENT.

ON APPEAL FROM THE COMMISSIONER OF PATENTS.

H. C. OF A. 1913.

MELBOURNE, *Feb.* 27, 28,

Griffith C.J., Barton, Isaacs and Gavan Duffy JJ.

Patent—Application—Refusal to accept application and specification—Appeal to High Court from Commissioner of Patents—Costs—Patents Act 1903-1909 (*No.* 21 *of* 1903—*No.* 17 *of* 1909), *sec.* 46.

Where an application for a patent, accompanied by a specification, has been duly lodged with the Patents Office, and there is no objection to the specification on the ground that the invention is already patented, or is the subject of a prior application for a patent, the Commissioner should not refuse to accept the application and specification unless it is clear and obvious that a patent cannot be granted.

Therefore, where there was evidence that the device for which a patent was sought was new, useful, effective and convenient in use, and involved some substantial exercise of the inventive faculty: