[HIGH COURT OF AUSTRALIA.]

DIXSON TRUST LIMITED . . . . APPELLANTS;
DEFENDANTS,

AND

BEARD WATSON LIMITED . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1915.

SYDNEY, *March* 30, 31.

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

Practice—Demurrer—Action on covenant—Plea alleging implied condition—Language of deed not set out—Postponement of hearing of demurrer until issues of fact decided.

In an action upon a covenant the declaration did not set out the actual language of the covenant but the pleader's construction of it, and a plea to it alleged that a condition should be implied from the deed, but did not set out the language of the deed. A demurrer to the plea having been allowed by the Supreme Court of New South Wales, on appeal to the High Court,

Held, that the order allowing the demurrer should be discharged, and the hearing of the demurrer postponed until after the trial of the issues of fact, with liberty to either party to amend.

Decision of the Supreme Court of New South Wales: *Beard Watson* v. *Dixson Trust*, 14 S.R. (N.S.W.), 133, in part set aside.

APPEAL from the Supreme Court of New South Wales.

In an action in the Supreme Court brought by Beard Watson Limited against the Dixson Trust Limited the first count of the declaration alleged that "at and before the time of the agreement hereinafter mentioned the plaintiffs were tenants of the defendants of certain premises situated in George Street, Sydney, in

H. C. OF A. 1915.

DIXSON TRUST LIMITED v. BEARD WATSON LIMITED.

the State of New South Wales, and were carrying on business therein as merchants and suppliers of furniture, and the plaintiffs were desirous that certain alterations should be made to the said premises by the defendants; whereupon the defendants by deed covenanted amongst other things with the plaintiffs to effect the said alterations as soon as conveniently might be in accordance with plans and specifications to be prepared by one John Reid of Sydney, architect, should such plans and specifications be approved of in writing by the defendants—provided that the said alterations should be so executed as to admit of the said premises being at any time restored to their condition at the time of the said alterations without injury, and so that meanwhile the upper storey of the said building should be adequately supported: and the plaintiffs say that plans and specifications were prepared as aforesaid and that the said plans and specifications were approved of in writing by the defendants, and the defendants proceeded to effect the said alterations, yet the said alterations were not effected as soon as conveniently might be or in accordance with the said plans and specifications or so that meanwhile the upper storey of the said building was adequately supported, but were so effected that during the progress of the said alterations the upper storey of the said building was not adequately supported and collapsed; and by reason of the premises large quantities of the goods, merchandise, fixtures and trade fittings of the plaintiffs then being on the said premises were destroyed and damaged," and the plaintiffs incurred certain expense and loss and suffered other damage.

The second count repeated the prefatory averments in the first count down to and including the words "should be made to the said premises by the defendants;" and continued: "whereupon the defendants by deed covenanted amongst other things with the plaintiffs to effect the said alterations in accordance with plans and specifications to be prepared by John Reid of Sydney, architect, should such plans and specifications be approved of in writing by the defendants, and that such alterations should comprise amongst other things enlargement of the shop situated on the ground floor of the said premises so as to extend over the area occupied by the lane, yard or passage by the removal of so

much of the walls then dividing the said shop from the said lane, yard or passage as extended in height from the ground to the ceiling of the said shop and by the execution of the necessary work for the support of the remainder of such walls and floors above such shop and the proper enclosure as enlarged to the extent aforesaid including the extension of the width of the said lane or passage to the front window of the said shop: and the plaintiffs say that the said plans and specifications were prepared as aforesaid and were approved of in writing by the defendants, and the defendants proceeded to effect the said alterations and removed the said walls as aforesaid, yet the defendants did not effect the said alterations in accordance with the said plans and specifications or execute the necessary work for the support of the remainder of the said walls and floors above the said shop and the proper enclosure as aforesaid, whereby the said walls and floors above the said shop collapsed and the plaintiffs suffered the damage in the first count mentioned."

The third count repeated the prefatory averments in the first count down to and including the words "should be made to the said premises by the defendants;" and continued: "whereupon the defendants by deed covenanted amongst other things with the plaintiffs to effect the said alterations in accordance with plans and specifications to be prepared by John Reid of Sydney, architect, should such plans and specifications be approved of in writing by the defendants, and that such alterations should comprise amongst other things the removal of the wall then dividing the said shop into two compartments to an extent in height equal to the height of the said shop and the execution by the defendants of the work necessary for the support of the remainder of such wall; and the plaintiffs say that plans and specifications were prepared as aforesaid and approved in writing by the defendants, and the defendants proceeded to effect the said alterations and removed the said wall as aforesaid, yet the defendants did not effect the said alterations in accordance with the said plans and specifications or execute the work necessary for the support of the remainder of the said wall, whereby the same collapsed and the plaintiffs suffered the damage in the first count alleged."

H. C. OF A. 1915.

DIXSON TRUST LIMITED v. BEARD WATSON LIMITED.

By their second plea the defendants alleged "that it was a condition of the said deed that the defendants should employ a certain architect then agreed upon by the plaintiffs and defendants to prepare plans and specifications of the said alterations, and that the said architect should have the sole control and management of the said alterations and the sole discretion and authority to determine what works were necessary for the purpose of adequately supporting the said upper storey floor and walls during the carrying out of the said alterations, and the sole control and management of such works, and thereupon the defendants employed the said architect to prepare the said plans and specifications and gave the said architect sole control, management, discretion and authority as aforesaid, and the said alleged breaches (if any) are the acts or omissions of the said architect in the exercise by him of the said control, management, discretion and authority and not otherwise."

The other pleas are not material to this report.

The plaintiffs demurred to the second and two other pleas, and the Full Court allowed the demurrer: *Beard Watson* v. *Dixson Trust* (1).

From that decision, so far as it allowed the demurrer to the second plea, the defendants now, by leave, appealed to the High Court.

J. L. Campbell K.C. and *Brissenden*, for the appellants.

Knox K.C., *Shand* K.C. and *Harry Stephen*, for the respondents.

The judgment of the Court was delivered by

GRIFFITH C.J. This action is in form an action for breach of covenant, the covenants alleged being set out in the first three counts of the declaration according to the pleader's construction of the language of the deed. Upon the first count an interesting question of construction is raised as to the meaning of the covenant as pleaded. We are therefore called upon to construe, not the language of the deed, which is not before us, but the language of the pleader. Upon one construction, the count assigns three

(1) 14 S.R. (N.S.W.), 133.

breaches of covenant, upon another construction one breach only, and it is contended alternatively that either the whole of the count is bad in substance or that each breach is ill assigned. If that contention were sustained the defendants would be entitled to judgment *pro tanto* on the declaration without regard to the plea.

With respect to the other counts, the plea demurred to alleges a condition in the deed which as alleged might be construed as showing that the covenants alleged in the declaration were not absolute but conditional, and the Court is invited to construe the condition as so alleged. It is admitted that the plea does not set out any actual language of the deed, and that the condition alleged is sought to be inferred from a proper construction of the whole of the deed. If a decision were given under the present circumstances it would be a decision, not upon the construction of any actual instrument, but merely of the language of the pleader, which may or may not truly represent the meaning of the deed. That would be a very unsatisfactory, and might be an idle, proceeding. The Court should not be called upon to determine anything but the real questions in controversy between the parties, which depend not on the language of the pleader but on the language of the deed.

The Court therefore thought it right to put themselves in the position of the Supreme Court on the argument of the demurrer, and, doing so, suggested that it might have been desirable to adjourn the determination of the issues of law until after the determination of the issues of fact. It may be that the actual facts are not as alleged in the pleadings. It may turn out that one party or the other is entitled to judgment on the construction of the actual deed. Putting ourselves, then, in the position of the Supreme Court, we think that the best course to adopt is to postpone the determination of the issue of law until the issues of fact have been decided. Without, therefore, expressing any opinion as to the correctness of the view of the Supreme Court, but putting ourselves in their position when called upon to exercise a discretion as to whether the questions of law or the questions of fact shall be determined first, we think that the

H. C. OF A. 1915.

DIXSON TRUST LIMITED v. BEARD WATSON LIMITED.

proper order to make is to discharge the order of the Supreme Court so far as it allows the demurrer, and to direct that the hearing of the issue of law be postponed until after the trial of the issues of fact. That will be accompanied by an addition, which the Supreme Court would certainly have made, that either party is to be at liberty to amend as they may be advised, and I think that the giving of such liberty should be understood as an admonition to the parties to amend.

Order appealed from allowing the demurrer to the second plea discharged. Order that the hearing of such demurrer be postponed until after the trial of the issues of fact in the action. Costs of the demurrer to abide the event of the issue of law. Either party to be at liberty to amend as they may be advised. By consent the costs of this appeal will abide the event of the action.

Solicitors, for the appellants, *Minter, Simpson & Co.*
Solicitor, for the respondents, *W. G. Parish.*

B. L.