sustaining the burden he has undertaken, and there must be judgment for the defendant.

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WHITTON v. FALKINER.

Appeal allowed. Judgment appealed from discharged. Judgment for the defendant with costs. Respondent to pay costs of appeal.

Solicitor, for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for the respondent, *Weigall & Crowther.*

B. L.

[HIGH COURT OF AUSTRALIA.]

W. & J. SHARP . . . . . APPELLANTS;
PLAINTIFFS,

AND

THOMSON AND ANOTHER. . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Contract—Sale of goods—Sale by description—Sale by sample—Evidence—Production of specimen—Sale of Goods Act 1896 (*Vict.*) (*No.* 1422), *sec.* 20.

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MELBOURNE, *June* 9.

Griffith C.J. Isaacs and Powers JJ.

In a written contract for the sale of goods, the goods were described by words and letters which were unintelligible to an ordinary person with an ordinary knowledge of the English language. There was no mention in the contract of any sample, but at the time when the contract was made specimens of the goods were exhibited to the purchasers.

By *Griffith* C.J.—The evidence of the exhibitions of the specimens was admissible to show the kind of things denoted by the words of description used by the parties.

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By *Isaacs* J.—Such evidence would only be admissible in a case where the specimen was fraudulently exhibited to deceive the purchaser, and the buyer had been induced to buy goods which turned out to be of greatly inferior quality and value.

In an action on such a contract by the purchasers for non-delivery and refusal to deliver,

Held, on the evidence, that the goods tendered by the sellers were not in accordance with the description, and, therefore, that the purchasers were justified in refusing to accept them.

Decision of the Supreme Court of Victoria reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the County Court at Melbourne by the firm of W. & J. Sharp against Martha Bain Thomson and James Hugh Brake, trading as Thomson, Brake & Co., for damages for breach of a contract dated 31st October 1911 for the delivery of certain goods, the breach alleged being the non-delivery and refusal to deliver such goods. The defences were a denial of the contract and a denial of the breach alleged. The learned Judge of the County Court gave judgment for the plaintiffs for £125.

On appeal by the defendants the Full Court set aside the judgment of the County Court, and ordered that judgment should be entered for the defendants with costs.

From that decision the plaintiffs now, by special leave, appealed to the High Court.

The material facts are stated in the judgments hereunder.

Pigott (with him *Latham*), for the appellants.

McArthur K.C. (with him *Braham*), for the respondents.

During argument reference was made to *Syers* v. *Jonas* (1); *O'Neill* v. *Bell* (2); *Braithwaite* v. *Foreign Hardwood Co.* (3); *Chalmers' Sale of Goods*, 7th ed., p. 49; *Sale of Goods Act* 1896 (Vict.), sec. 20.

(1) 2 Ex., 111.
(2) I.R. 2 C.L., 68.
(3) (1905) 2 K.B., 543.

GRIFFITH C.J. Some curious questions have been raised in argument, but the case seems tolerably clear when the relevant facts are properly apprehended. The defendants' traveller obtained an order from the plaintiffs for a quantity of crockery which was described as "50 crates Wedgwood Seconds in Pearl White and C. C. as per list" to be delivered in instalments of 5 crates each. The goods were to be stamped "Wedgwood." It appeared from the evidence that the crates were to be imported by the defendants from England, and I infer that the goods were to be delivered in the crates as imported. Accompanying the order was a list described as "approximate assortment and estimated cost," which specified approximately the kinds of articles required, with their prices, and the number of each kind to be contained in each crate. The order also stated that certain things in the list were to be omitted and others added in their place, so that the value of each crate was to be about £15. When the defendants' traveller was soliciting the order, he exhibited specimens—in the evidence spoken of as "samples"—of the kind of things which he was offering for sale, and which he had obtained from the defendants' manager for that purpose. Those specimens bore the name "Wedgwood & Co. Ltd." burnt into the ware.

The great conflict in the case was as to the meaning of the words "Wedgwood Seconds in Pearl White and C. C." A question was raised and discussed in the Supreme Court as to whether the sale was a sale by sample, and, on that point, whether certain evidence given was admissible to show that by the usage of trade it is an implied term upon such sales of crockery-ware that the sale is a sale by sample. In my opinion the sale now in question was not a sale by sample, properly so called, but a sale of goods by description. The words used to describe the things agreed to be sold are unintelligible to an ordinary person with a mere ordinary knowledge of the English language, and in my opinion the evidence of the exhibition of the specimens was admissible, not to identify samples by which a sale by sample was made, but to show the kind of thing denoted by the words of description used by the parties. One of the plaintiffs, W. Sharp, says that what he understood by them was goods of the

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kind shown to him by the traveller. The traveller was not called as a witness. The defendants alleged that the term "Wedgwood Seconds" means in the trade crockery-ware made by the firm of Josiah Wedgwood & Son, and does not include crockery made by another firm called Wedgwood & Co. Ltd., and evidence was given in support of that contention. This evidence was of a singular character. It was to the effect that a person buying a crate of "Wedgwood Seconds" buys a crate containing a miscellaneous collection of all sorts of articles of crockery cast aside at the kiln as of inferior character, and mixed up together promiscuously, so that he does not know what articles or how many of each he is to get—that, in fact, he buys what the defendants' manager called "a pig in a poke."

On the other hand, evidence was given for the plaintiffs showing that Wedgwood & Co. Ltd., as well as the firm of Josiah Wedgwood & Son, sell goods which they call "seconds," and that they also sell a class of goods called "thirds." Upon this evidence it would be difficult, if not impossible, to say that in Victoria the term "Wedgwood Seconds" bears a definite meaning known to everyone in the trade, namely, crates containing a miscellaneous collection of ware packed by Josiah Wedgwood & Son, and nothing else.

The first question to be now determined is: What did the plaintiff W. Sharp and the defendants' manager mean when they used the term? Whatever else they meant, they also meant that the goods were to be "Pearl White and C. C." and were to be assorted in accordance with the list that accompanied the order. For the plaintiffs evidence was given to the effect that the word "Pearl" as used in the trade is a word by itself, not relating to colour, and means crockery-ware having a raised border of knobs like small pearls. The specimens shown by the defendants' traveller to the plaintiff W. Sharp were ware of that kind. Further evidence was given to the effect that the word "White" is not connected with the word "Pearl," and simply denotes white as a colour, and that the letters "C. C." mean "common clay." This evidence was accepted by the learned Judge of the County Court, and it is impossible to say that his finding of fact was not warranted.

When the first instalment of crates arrived from England, the plaintiff W. Sharp found that their contents were of an entirely different character from the specimens shown to him. They were roughly stamped (not printed) with the word "Wedgwood." Few, if any, of them were pearl-patterned, they were not white, and with them was mixed up a large proportion of articles not only of different quality, but of different kinds, from those mentioned in the list. They were, in fact, such a miscellaneous collection of articles as the defendants describe as "Wedgwood Seconds."

Under these circumstances, the plaintiffs refused to accept delivery of the crates offered to them and brought this action. What is the defendants' answer? The first answer is that the contract did not, as regards the terms "Pearl White and C. C.," mean what the learned Judge found as a fact that it did mean. That answer fails. This of itself is sufficient to dispose of the case, if there was any contract at all.

The next point made was that the term "Wedgwood Seconds" means the inferior articles packed in crates by Josiah Wedgwood & Son, as I have described. The learned Judges of the Supreme Court appear to have thought, principally on the ground that the word "Wedgwood" is registered as the trade mark of Josiah Wedgwood & Son in Australia, that the term "Wedgwood Seconds" must have meant goods manufactured by that firm. There is, however, the very strongest reason for thinking that it was not the intention of either of the parties to the contract that it should mean crates of assorted rubbish, for when the goods arrived from England the defendants' manager himself said that they were not what he expected. It appears, therefore, that the goods which they offered to the plaintiffs were not such as the defendants intended to sell to him. Under these circumstances, it is clear that, if there was a contract, it was broken.

It was, however, contended that there was no contract at all because the parties were not *ad idem*. If it appeared that the plaintiff W. Sharp thought that he was buying goods of some value, and corresponding in kind to the specimens shown to him, while the defendants intended to sell to the plaintiffs crates of such assorted rubbish as was tendered, then the parties would

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not have been *ad idem*. But the defendants' manager himself says that that was not his intention. What, then, did he mean? I cannot find any ground for holding that their agent, by whom the order was obtained, meant anything else than what the plaintiff W. Sharp says he himself understood by the written order—that is, goods of the same kind as the specimens shown to him. The defendants ratified their agent's action by finally accepting the order. In my opinion there was a valid contract, and a breach of it, and the ordinary consequences must follow.

The learned Judge fixed the damages at 15 per cent. on £750, the contract price. That amounts to £112 10s. only, so that the damages must be reduced to that sum.

The appeal should be allowed, and the judgment should be restored with that variation.

ISAACS J. I agree that the appeal should be allowed and the judgment restored, and will only add a very few words. The word "Wedgwood" was used in the contract. If it could have been shown that by reason of there being two "Wedgwoods" the parties were not at one as to what they respectively meant by the word "Wedgwood," so as to show a want of *consensus ad idem*, the case might have been brought under the principle of the well-known authority of *Raffles* v. *Wichelhaus* (1). But it appears, upon the facts, that the plaintiff W. Sharp had no distinct intention to apply that term to either of the Wedgwood firms. I also think that there is some reason for saying that the defendants' manager was not quite sure what the word meant. But, at all events, it was not shown as it was in *Raffles* v. *Wichelhaus* that there was a difference of intention—a mistake—as to the subject matter of the contract. Apart from that, there is no reason for supposing that there was not a concluded bargain.

It becomes, therefore, a question of interpretation. It appears that the word "Wedgwood" applies to the production of either of the two firms, and that the word "Seconds" is applied to either of them. Then the word "Pearl" is a subject of doubt upon the evidence, and it is a question of fact upon which the

(1) 2 H. & C., 906.

learned Judge of the County Court found that it meant a pattern. It is true that he may have come to that conclusion by introducing a feature which was not permissible, namely, the sample. But, looking at the facts for myself, I come to the same conclusion. The same may be said of the letters "C. C.," as to which I concur with him. The weight of the evidence establishes their meaning to be "common clay." If that is so, there has been a breach of the contract.

The next subject for consideration is the point raised by Mr. *McArthur* on the case of *Braithwaite* v. *Foreign Hardwood Co.* (1). It is sufficient to say that that case is not analogous to the present. In that case there was a total repudiation of the main contract. The defendants, before any breach had occurred on the part of the plaintiff, declined to carry out the contract, even though it should be properly performed by the plaintiff, and they declined to carry it out because of an extraneous circumstance, namely, a breach of an alleged collateral contract. Their refusal continued throughout. That collateral contract was found not to exist, and, therefore they had repudiated wrongfully *in toto*. Consequently, it was held that they could not insist, as a defence in bar, on the plaintiff not being ready and willing to carry out his contract—they had absolved the plaintiff from performance of it. In the present case, the plaintiffs did nothing to repudiate the contract or dispense with its performance. They were insisting, after breach, on their right to have had the contract carried out; and the fact that some of their objections to the way in which it was carried out were ill founded could not destroy a legitimate and well-founded objection which they raised to the performance of the contract.

I have only a word or two to add about the sample. In this case it is a written contract containing a description of the goods, and there is no mention in the written contract of a sample. The fact that the goods were sold by description, and not generally, I think makes the case of *Syers* v. *Jonas* (2) inapplicable, and brings into relevancy other cases such as *Tye* v. *Fynmore* (3). The head-note to the latter case states that "where goods are sold by a written contract, which contains a description of their quality, without referring to any sample, if the goods do not

(1) (1905) 2 K.B., 543. (2) 2 Ex., 111. (3) 3 Camp., 462.

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correspond with that description, it is not material for the vendor to show that they correspond with a sample exhibited at the time of sale to the purchaser, who was well skilled in the commodity, this not being a sale by sample, but by the description in the written contract." Lord *Ellenborough* referred to what was produced in that case as a "specimen" in the same way as the learned Chief Justice has done.

Another case is *Gardiner* v. *Gray* (1), the side-note to which states that "where before or at the time of sale a specimen of the goods is exhibited to the buyer, if there be a written contract which merely describes the goods as of a particular denomination,—this is not a sale by sample; but there is an implied warranty that they shall be of a merchantable quality of the denomination mentioned in the contract." If there has been in connection with a contract a sample produced and there has been fraud in connection with the production of that sample, then the case of *Meyer* v. *Everth* (2) would apply. There Lord *Ellenborough* says that if at the time of the sale a sample was fraudulently exhibited to deceive the buyer whereby he has been induced to purchase the commodity which turned out to be of greatly inferior quality and value, that evidence ought to be admitted. But when the sale note was silent as to a sample he did not permit it to be incorporated in the contract.

I leave open the question whether the circumstances in a given case might not raise an estoppel.

For these reasons I agree that the appeal should be allowed.

POWERS J. I agree.

Appeal allowed. Judgment appealed from discharged and appeal to Supreme Court dismissed with costs. Judgment of County Court restored with reduction of damages to £112 10*s*. *Respondents to pay costs of appeal.*

Solicitors, for the appellants, *àBeckett & Chomley.*

Solicitors, for the respondents, *Snowball & Kaufmann.*

B. L.

(1) 4 Camp., 144.

(2) 4 Camp., 22.