[HIGH COURT OF AUSTRALIA.]

OCKERBY & CO. LTD. . . . . APPELLANTS;
DEFENDANTS,

AND

WATSON . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1918.

PERTH, *Oct.* 16, 17.

Barton, Gavan Duffy and Rich JJ.

Contract—Agent—Employment of sub-agent—Impossibility of performance—Condition precedent—Warranty—Evidence.

A company, which expected to be appointed agents for the Government of Western Australia in connection with the wheat scheme, agreed to employ W. as sub-agent. The company failed to secure the appointment, and consequently terminated W.'s employment.

Held, on the evidence, that the company warranted that they would be appointed Government agents, and that they were therefore liable to W. for damages for breach of contract.

Decision of the Supreme Court of Western Australia (*McMillan* C.J.) affirmed.

APPEAL from the Supreme Court of Western Australia.

Ockerby & Co. Ltd. had acted as agents for the Government of Western Australia for the season 1915-1916 for the purpose of acquiring wheat in connection with the wheat scheme under the *Wheat Marketing Act* 1916 (W.A.), and George Knight Watson had acted as one of their sub-agents for that year. Watson having previously received a letter from the Company, dated 29th September 1916, informing him that the Company had been asked to again acquire wheat for the coming season, an interview took place about 11th October between him and the managing director of the Company, at which an agreement for the employment of Watson

H. C. OF A. 1918.

OCKERBY & CO. LTD. v. WATSON.

in connection with the 1916-1917 harvest was entered into. The Company, having failed to secure such appointment, terminated Watson's employment on 14th December 1916, and he brought an action against them in the Supreme Court for damages for breach of contract. The action was tried before *McMillan* C.J. without a jury. There was a conflict of evidence at the trial as to whether the agreement was subject to a condition that the Company should be appointed agents for the Government to acquire wheat during the season 1916-1917 in connection with the scheme. His Honor held that the agreement was not subject to a condition, and judgment was entered for the plaintiff with damages to be ascertained.

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

Draper K.C. (with him *Boultbee*), for the appellants.

Sir W. James K.C. (with him *Abbott*), for the respondent.

During argument the following were referred to : *Krell* v. *Henry* (1) ; *Berthoud* v. *Schweder & Co.* (2) ; *Horlock* v. *Beal* (3) ; *Halsbury's Laws of England*, vol. VII., p. 429, art. 880 ; *Wheat Marketing Act* 1916 (W.A.).

Cur. adv. vult.

Oct. 17.

The judgment of the COURT, which was delivered by BARTON J., was as follows :—

In our opinion the learned Chief Justice found, and rightly found, that the defendants agreed with the plaintiff to appoint him a sub-agent for the purpose of acquiring and handling 1916-1917 wheat, and warranted that as Government agents they would be able to do so. Had there been no such warranty the defendants might have successfully argued that their promise to appoint the plaintiff must have been understood by the parties as being conditional on the defendants themselves being appointed Government agents, but that argument will not relieve them from liability on their warranty. The effect of such a warranty is clearly stated by *Vaughan Williams* L.J. in *Krell* v. *Henry* (4). He says :—" The real question in this case

(1) (1903) 2 K.B., 740.
(2) 31 T.L.R., 404.
(3) (1916) 1 A.C., 486.
(4) (1903) 2 K.B., at pp. 747 *et seq.*

is the extent of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions, and notably in the case of *Taylor* v. *Caldwell* (1). That case at least makes it clear that 'where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.'" The learned Lord Justice goes on to say (2): "I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject matter of the contract or of some condition or state of things expressly specified as a condition of it." But the liability still exists where there is present a warranty that the thing shall exist. On the evidence, especially that furnished by the plaintiff as to the interview of 11th October following upon the letter of 29th September, we think the defendants gave such a warranty.

Appeal dismissed with costs.

Solicitor for appellants, *G. F. Boultbee.*

Solicitor for the respondent, *A. F. Abbott* for *H. Wilson*, Geraldton.

N. McT.

(1) 3 B. & S., 826.

(2) (1903) 2 K.B., at p. 749.