[HIGH COURT OF AUSTRALIA.]

CLIFTON . . . . . APPELLANT;
DEFENDANT,

AND

COFFEY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 13, 20.

Isaacs A.C.J. Gavan Duffy and Starke JJ.

Contract—Construction—Condition—Purchase of lease, licence, &c., of hotel—Property under mortgage—Purchaser to sign bill of sale to mortgagee—Refusal of mortgagee to advance money—Right of purchaser to recover deposit paid.

By a contract in writing for the sale of the lease, licence, goodwill and furniture of a hotel, the price agreed upon was £10,800, which was payable by a deposit of £300, £3,700 to be paid not later than a certain day and the balance, £6,800, "to be obtained by the purchaser and paid in cash, or a guarantee given for the same to the satisfaction of the vendor" on another day. The vendor agreed to pay off and obtain the discharge of any security which there might be on the lease, licence or furniture. The purchaser agreed "to sign a bill of sale and other usual securities for £6,800 about, part of the said purchase-money, which is to be advanced by" a certain company, "such securities to be signed . . . before transfer of licence."

Held, by *Isaacs* A.C.J. and *Gavan Duffy* J. (*Starke* J. dissenting), that the words "which is to be advanced by" the company were the statement of an essential circumstance on the faith of which, as a fundamental term and condition, the purchaser entered into the bargain, and that upon the failure of that term and condition, by reason of the refusal of the company to advance the £6,800, the purchaser was entitled to recover the deposit of £300 which he had paid.

Decision of the Supreme Court of New South Wales (Full Court): *Coffey* v. *Clifton*, (1924) 24 S.R. (N.S.W.) 168, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Thomas Coffey against Edward Charles Clifton to recover the sum of £300 paid by the plaintiff to the defendant as a deposit on the sale by the defendant to the plaintiff of the lease, licence, goodwill and furniture of the Brooklyn Hotel, George Street North, Sydney. By the contract, which was dated 11th May 1923, the defendant agreed to sell and the plaintiff to buy the lease, licence, goodwill and furniture at the price and upon the terms following (*inter alia*):—

"1. The purchase-money or price shall be £10,800 payable as follows, viz., a deposit of £300 to be paid forthwith to the vendor's agent, the balance of purchase-money, being the sum of £10,500, to be paid as follows, viz., £3,700 to be paid not later than the day before the transfer of licence is heard, such transfer to be heard, if possible, on or about the twenty-fourth inst. The balance of £6,800 to be obtained by the said purchaser and paid in cash, or a guarantee given for the same to the satisfaction of the vendor the day before transfer.

"2. Of the said sum of £10,800, the sum of £3,000 shall be the consideration for the furniture described in the schedule hereto, and the balance, being the sum of £7,800, the consideration for lease and licence and goodwill.

"3. The said purchaser agrees to take possession, and the vendor agrees to give up possession to the purchaser, on the above date, and to assign the said lease to him and to get the purchaser accepted as a tenant by the landlord, and to pay off and obtain the discharge of any security which may be upon the said lease, licence, or furniture."

"6. If the purchaser shall fail to comply with any of the above conditions, all moneys paid by him under this contract shall be absolutely forfeited to the vendor, who shall be at liberty to resell the property at such time and in such manner and subject to such conditions as he shall think fit, and any deficiency in price which may happen on and all expenses attending the sale shall immediately afterwards be paid by the purchaser to the vendor, and in case of non-payment shall be recoverable by the vendor as and for liquidated damages.

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"8. The purchaser agrees to sign a bill of sale and other usual securities for £6,800 about, part of the said purchase-money, which is to be advanced by Resch's Ltd., such securities to be signed and costs of same to be paid by purchaser before transfer of licence."

The action was tried before *Ralston* A.J. and a jury; and a verdict was found for the plaintiff for the amount claimed. A motion by the defendant to the Full Court to set aside the verdict and to enter a nonsuit or a verdict for the defendant was dismissed with costs: *Coffey* v. *Clifton* (1).

From that decision the defendant now appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Windeyer K.C. (with him *Rowland* and *Monahan*), for the appellant. Clause 8 of the agreement cannot be construed by itself, excluding the plain meaning of the earlier part of the agreement. Reading the whole contract together, the provision in clause 1 that the £6,800 is to be obtained by the purchaser and paid in cash remains effective, and clause 8 allows him an option to satisfy the payment by signing a bill of sale to Resch's Ltd., and so bring it about that the vendor shall get out of the hotel with £4,000 cash. If the advancing of the £6,800 by Resch's Ltd. was an event which both parties assumed would happen, then, as the event did not happen, the principle of the Coronation Cases applies, and both parties are relieved from further performance of the contract, but the contract is not void *ab initio*, and the purchaser has no right to recover money paid under the contract (*Krell* v. *Henry* (2); *Taylor* v. *Caldwell* (3)).

Broomfield K.C. (with him *Maxwell*), for the respondent. The words "which is to be advanced by Resch's Ltd." mean that it was a condition of the contract that Resch's Ltd. should advance the £6,800. As that condition failed, the respondent is entitled to recover the amount of deposit.

Windeyer K.C., in reply.

Cur. adv. vult.

(1) (1924) 24 S.R. (N.S.W.) 168.
(2) (1903) 2 K.B. 740.
(3) (1863) 3 B. & S. 826.

The following written judgments were delivered :—

ISAACS A.C.J. AND GAVAN DUFFY J. This action was brought by the respondent, Thomas Coffey, to recover back from the appellant, Edward Charles Clifton, the sum of £300, paid as deposit on the sale of the lease, licence, goodwill and furniture, of the Brooklyn Hotel, of which Clifton was then the lessee and licensee. The action was tried before *Ralston* A.J. and a jury. A verdict was found for the present respondent. The Full Court dismissed an application for a new trial, and this is an appeal from that decision.

There were two points contested at the trial. First, it was said for the defence that the deposit was not paid to the broker as the agent of the appellant. The jury found it was so paid, and that question is no longer in dispute. The other point is still relied on, and is that there was an absolute obligation to pay the deposit and other moneys and there was nothing in the contract or circumstances to qualify that obligation. On the other hand, the respondent contended, and now contends, that there was a fundamental assurance by the vendor that Resch's Ltd. would advance £6,800 to the purchaser to enable him to complete his purchase, and, since Resch's Ltd. has refused to do so, the whole bargain falls to the ground and the vendor, having failed to maintain his obligation, is bound by the terms of the contract, clause 6, to refund the deposit. The answer given by the appellant to this contention is that there was no such assurance—that the reference to Resch's Ltd. amounted merely to a statement of expectation or, at most, to a mere alternative method of payment which the vendor was willing to accept instead of cash.

The matter then resolves itself into the construction of the written contract. The oral evidence cannot affect this, except so far as it establishes the failure of a provision or the circumstances in which the parties stood, so as to enable the Court to place itself in their position. But when it does so, it must be clearly understood, that is not for the purpose of considering what the parties would probably have stipulated nor to construe their words by assuming what they reasonably would require. It is simply for the purpose of understanding, as such persons so situated would understand, the words and expressions actually used. The fact is established that

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Resch's Ltd. did refuse to make the advance of £6,800 to the purchaser. Then we have to determine what an hotelkeeper and an intending hotelkeeper would, as business men, mutually understand by the expressions we find in the contract. The document consists of a printed form of contract for the sale of an hotel lease, licence, goodwill and furniture. Blanks were left for the date, the names and addresses of the parties, the duration of the lease sold, the name of the hotel, the amounts respectively of the purchase-money, of the deposit, of the first portion of the balance and of the remainder of the balance of the purchase-money, the allocation of the purchase-money between consideration for the furniture and consideration for lease, licence and goodwill, the amount of the purchase-money to be advanced, and the name of the person who was to advance it. These were all filled in. The bargain then is clearly one connected scheme. The relative effect of any portion of that scheme on the rest depends upon its true construction with reference to the whole. It was said by Lord *Moulton* (then *Moulton* L.J.), in *In re a Debtor* (1), that "the Court in interpreting a contract will consider what its language would connote in the understanding of business men of the time."

The subject matter of the purchase is stated to be "the existing lease about ten years and five months, licence, goodwill and furniture . . . of the hotel known as Brooklyn Hotel." With reference to the questions we have to determine, the construction of the contract we take to be as follows:—By clause 1, the total purchase-money is fixed at £10,800, payable partly by deposit of £300, leaving a balance of £10,500. That balance of £10,500 is payable in two portions, namely, £3,700 on or before the day preceding the application for transfer of the licence, and £6,800 on the day before the actual transfer. Clause 1 contains a most significant statement as to the £6,800, namely, that it is "to be obtained by the said purchaser and paid in cash, or a guarantee given for the same to the satisfaction of the vendor," the day before the transfer. This indicates a fact on which both parties proceed, that the purchaser in that contract fixes the sum he cannot pay without "obtaining" it somewhere, next that he will "obtain" it, and lastly, that when

(1) (1912) 1 K.B. 53, at p. 60.

obtained it will either be " paid in cash " or " a guarantee given " and in either case a day before the transfer. How it is to be obtained appears by a later clause, to which the provision just quoted is preparatory. Then the vendor, being probably under loan secured upon the property sold, undertakes to pay off and discharge the security on " the above date," that is, as we think, the date of final payment. That leaves clause 8 to be construed, which is in these terms :—" The purchaser agrees to sign a bill of sale and other usual securities for £6,800 about, part of the said purchase-money which is to be advanced by Resch's Ltd., such securities to be signed and costs of same to be paid by purchaser before transfer of licence." The expression " £6,800 about " is in writing to fill in a blank in the printed clause. It means therefore " £6,800 approximately." Reading this clause with clause 1, and with the eyes of the business men concerned, it seems very plain both as to its literal force and its practical operation. Clause 1, having announced that the purchaser needed to " obtain " the balance in order to be in a position to carry out the terms of payment, and that he was to obtain it, clause 8 provides a means by which, unless he obtains it otherwise, he will " obtain " that sum " about." The very word " about " shows that the parties were contracting by clause 8, and were careful to delimit their obligations. The vendor obtained from the purchaser an agreement to sign a bill of sale and other usual securities for the sum named, and to pay the costs of the same. On the other hand, it was distinctly affirmed by the clause that that sum " is to be advanced by Resch's Ltd.," and, further, that the securities are to be signed and costs paid " before transfer of licence." It is important that the sum of £6,800 about is described by clause 8, as " part of the said purchase-money." Reading clause 8, with clause 1, the proper construction to put upon the words used appears to be this :—The purchaser having, by clause 1, announced his need of obtaining £6,800 in order to embark on the purchase, and having undertaken to " obtain " it, clause 8 makes a provision which may perhaps be best described as an agreed method by which the purchaser, if need be, may and must obtain it. It is obvious that the purchaser, without such a provision, would be paying away £4,000, probably for nothing, because within a day, if unable to " obtain " the £6,800,

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he would forfeit under clause 6 what he had paid. And, on the other hand, the vendor may have had reasons for preferring to get the £6,800 paid rather than rely simply on the forfeiture clause, and, therefore, required a promise to execute securities for the purpose. The fact that " before transfer " of licence—which involves before transfer of anything—the purchaser binds himself to sign the securities to Resch's Ltd. indicates that it is to be a tripartite arrangement, because the agreed course would be useless unless the vendor joined in the transaction. That draws with it the practical solution of the provision at the end of clause 1. Having " obtained " the advance, it could either be handed in cash by Resch's Ltd. to Coffey, and by Coffey " paid " in cash to Clifton, and then paid by Clifton to Resch's Ltd. in discharge of his own liability—the transaction being simultaneous, or, alternatively, Resch's Ltd. might guarantee Clifton the sum, and set it off against his liability.

By either method Resch's Ltd. would be paid Clifton's debt, Clifton would be paid Coffey's debt, Clifton would fulfil his obligation under clause 3, to discharge his liability, and Coffey would perform his obligation under clause 8, as to giving the securities. But it is plain that the advance by Resch's Ltd. is the pivot on which the transaction turns, and without which it might and probably would fail. We therefore read the words " which is to be advanced by Resch's Ltd." as the statement of an essential circumstance on the faith of which as a fundamental term and condition the purchaser entered into the bargain. This fundamental term and condition having failed, not only does the transaction end, but justice requires the return of what the vendor has in the meantime received.

The judgment appealed from should therefore, in our opinion, be affirmed, and the appeal dismissed.

STARKE J. Despite the weight of judicial opinion to the contrary, I venture the view that Coffey, the purchaser, ought not to recover the deposit he made upon his purchase from Clifton of the Brooklyn Hotel. The terms of the contract have been sufficiently set out in the preceding opinions. The parties, it seems to me, contemplated that the balance of the purchase-money (£6,800) might be (1) paid in cash—the words are " to be obtained by the said purchaser and

paid in cash"; (2) guaranteed, to the satisfaction of the vendor; (3) financed, that is, raised by means of a bill of sale and other usual securities. Clause 3 of the contract stipulates that the vendor will "pay off and obtain the discharge of any security which may be upon the lease, licence, or furniture." This shows, I think, that the parties had in mind a payment of cash to the vendor which would enable him to discharge the security over the property, quite apart from the method of finance mentioned in clause 8. Again, the guarantee provision also shows that the finance clause was not the foundation of the contract, but simply one of several methods whereby the purchaser could discharge, wholly or for the time being, his obligation to pay the purchase-money. Then, what is the effect of this finance clause, as I have called it?

Resch's Ltd. was a brewery company, and the hotel was, as I gathered from statements at the Bar, tied to that company. The parties, as it seems to me, were stipulating that in case the purchaser required to raise the purchase-money, then he would go to Resch's Ltd. for the purpose. That is the reason and the meaning of the words "which is to be advanced by Resch's Ltd." The vendor is not promising that Resch's Ltd. will advance the money, nor is either party stipulating that an advance by Resch's Ltd. is the foundation and basis of the contract. It was quite open to, and indeed, in my opinion, obligatory upon the purchaser to pay his purchase-money in cash, or to have it guaranteed, even if Resch's Ltd. refused an advance. Further, I should think that the purchaser would be quite entitled to raise money elsewhere if Resch's Ltd. refused to lend it and take the securities mentioned in the finance clause.

Appeal dismissed with costs.

Solicitors for the appellant, *Harold T. Morgan & Morgan.*
Solicitors for the respondent, *Chas. O. Smithers & Co.*

B. L.