[HIGH COURT OF AUSTRALIA.]

WALDON . . . . . APPELLANT;
PLAINTIFF,

AND

THE ROSTREVOR ESTATE LIMITED (IN LIQUIDATION) AND OTHERS . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept.* 23.

Knox C.J., Isaacs and Starke JJ.

Vendor and Purchaser—Contract of sale—Specific performance—Damages for breach of contract—Condition for resale on non-payment of balance of purchase-money without prejudice to other remedies—Judgment recovered for amount of balance—Execution unsatisfied—Subsequent resale—Validity of resale—Unreasonable delay.

By an agreement in writing the appellant agreed to purchase from the respondent company certain land, the balance of the purchase-money being payable on a fixed day. One of the conditions of the contract was that if the balance of the purchase-money was not paid on the due date, the company might, without prejudice to any other remedy it might have, resell the land and either recover any deficiency from the appellant or retain any surplus, as the case might be. The appellant having failed to pay the balance of purchase-money on the due date, the company sued the appellant and recovered judgment against him for the amount due. Execution issued on the judgment was returned unsatisfied. Five months after the judgment was recovered the company resold the land. In an action by the appellant for specific performance of the agreement or in the alternative for damages for breach thereof,

Held, by *Knox* C.J., *Isaacs* and *Starke* JJ., that the appellant was not entitled to succeed:

By *Knox* C.J., on the ground that the delay by the appellant after the judgment against him was so unreasonable as to disentitle him to relief;

By *Isaacs* and *Starke* JJ., on the ground that the resale was within the authority conferred on the company by the condition for resale.

Decision of the Supreme Court of South Australia (*Napier* J.): *Waldon* v. *Rostrevor Estate Ltd. (In Liquidation)*, (1926) S.A.S.R. 98, affirmed.

APPEAL from the Supreme Court of South Australia.

On 18th and 29th January 1919 respectively the Rostrevor Estate Ltd., by two agreements in writing, agreed to sell two allotments of land to Alexander Newton Waldon, and on 2nd October 1920 agreed to sell two other allotments to the same purchaser. Under each contract 10 per cent of the purchase-money was agreed to be paid upon the signing of the contract, and 15 per cent within a limited time; and these payments were made. The balance of the purchase-money became payable, according to the tenor of the three contracts, upon 18th February 1922, 29th January 1921 and 2nd November 1922 respectively, and interest was payable half-yearly at 5 per cent on the balance for the time being remaining unpaid. One of the conditions of the contract of 18th January 1919 was the following: "(12) If any purchaser shall fail to pay his purchase-money or any part thereof as hereinbefore provided . . . then the amount paid by him on account of his purchase-money shall be absolutely forfeited to the vendor who shall be at liberty without prejudice to any other remedies he may have . . . to proceed to another sale . . . with or without notice to the purchaser at the present sale and any deficiency on such sale together with all attendant expenses shall forthwith be made good by the defaulter at the present sale and in case of non-payment on the sale the whole shall be recoverable by the vendor as and for liquidated and ascertained damages and it shall not be necessary to tender a transfer or other assurance and should there be any increase or such resale the vendor shall be entitled to retain the same." One of the conditions of the other two contracts was as follows:—"(9) If these conditions are not complied with by the purchaser and the remainder of the purchase-money paid at the time before mentioned . . . the money deposited shall be forfeited to the vendor and the vendor shall be at liberty to resell the premises with or without notice at its discretion . . . and any deficiency on such resale shall be made good by the purchaser at this day's sale together with all attendant expenses; and in case of

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non-payment thereof the same shall be recoverable by the vendor from the defaulter as and for liquidated and ascertained damages; and it shall not be necessary previously to tender a transfer to such defaulter; and any increase on such resale shall be retained by the vendor. This condition shall be without prejudice to the vendor's right to sue for and recover any purchase-money or interest due as aforesaid." The last payment of the 15 per cent instalment was made on 29th November 1920; and after that date no payment was made under any of the contracts. Waldon entered into possession of and fenced the two allotments purchased in 1919. On 3rd August 1923 the company wrote to Waldon demanding payment of the balance then owing. On 2nd November 1923 the company instituted an action in the Local Court of Adelaide against Waldon, claiming the balance of purchase-money on the four allotments, £123 7s. 6d.; interest at 5 per cent to 1st November 1923, £18 19s. 3d.; and land tax, 8s. 4d.: a total amount of £142 15s. 1d. On 29th November 1923, in that action, a default judgment was entered for the company and execution thereon was issued for £149 8s. 11d. The execution was returned unsatisfied. On 28th March 1924 the company resolved to cancel the sales to Waldon and, on 2nd April 1924, sent a notice to Waldon (which, however, did not reach him) stating the company's intention to resell the allotments. On 1st May 1924 the company entered into a contract to sell two of the allotments to Mary Elizabeth Nicholls, and into a contract to sell the other two allotments to her son, William Percival Nicholls. A transfer to Mrs. Nicholls was executed on 12th June 1924 and was registered. On 29th March Waldon lodged a caveat against all dealings with the estate or interest of the company or Mrs. Nicholls in the four allotments. On 19th February 1925 Waldon, by his solicitor, wrote to the liquidators of the company (which had then gone into liquidation) offering to satisfy the judgment obtained by the company in the Local Court, and asking for an appointment, when Waldon would pay the amount of the company's claim on receipt of a duly executed transfer.

By writ issued on 1st March 1925 Waldon instituted an action in the Supreme Court against the company, its liquidators (Alexander Melrose and William Brokenshire Wilkinson) and Mrs. Nicholls, the plaintiff claiming (*inter alia*) declarations that he was entitled to

an estate in fee simple in the allotments and that Mrs. Nicholls took the transfer to her with notice of the plaintiff's title and interest and not bona fide and/or for valuable consideration, and orders that the certificate of title to Mrs. Nicholls be cancelled and that the company and its liquidators execute a transfer of the land to the plaintiff; alternatively the plaintiff claimed against the company damages for breach of the three agreements of 18th and 29th January 1919 and 2nd October 1920, and in the further alternative claimed an account of the sums which but for the default of the company would have been realized on the sale of the land.

The action was heard by *Napier* J., who dismissed it with costs: *Waldon* v. *Rostrevor Estate Ltd. (In Liquidation)* (1).

In the course of his judgment the learned Judge said (2):—

"At the trial the plaintiff's claim was formulated in this way. It was said that the contracts and judgment had the effect of vesting the equitable fee simple in the plaintiff, subject only to the vendor's lien for the unpaid purchase-money, which is now represented by the judgment debt. The sales to Mrs. Nicholls and her son were thus in breach of trust, and against Mrs. Nicholls I was asked to find that her Real Property Act title was ineffective upon the ground of collusion and fraud; but to avoid the necessity for disposing of the title of the son in his absence, it was agreed between the parties that the claim in respect of the lots sold to him should be confined to the alternative of damages for the breach of trust. . . .

"I . . . pass to the claim against the defendant company, and the first question to be considered is the effect of the Local Court judgment for the purchase-money upon the rights and obligations of the parties under the contract for sale. The action was brought for the purchase-money, as for a debt due, which it might have been if the contract made it so. The plaintiff is, therefore, estopped from denying the liability, as from 29th November 1923, to pay the amount of the judgment, irrespective of conveyance. The defendant company is likewise estopped from denying that the contract was then subsisting. In my opinion the judgment must necessarily modify the rights and obligations of the parties. I must assume that the obligation to pay the purchase-

(1) (1926) S.A.S.R. 98. (2) (1926) S.A.S.R., at pp. 103 *et seqq.*

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money was a simple contract debt which merged in, and was extinguished by, the debt of record, which the judgment created in its stead. From thenceforward the obligation of the debtor required him to seek out and pay his creditor. If the debtor's right to enforce the contract by an action for damages for any breach of the contract continued, as I suppose it did, it would be subject to the condition precedent of satisfying the judgment within a reasonable time. The debtor was in default from the entry of the judgment, and therefore disentitled to damages for breach of contract unless he can bring himself within the principles upon which 'a Court of equity will . . . relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract. . . . This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract' (per Lord *Cairns* L.J. in *Tilley* v. *Thomas* (1)), and it is to this extent, and no further, that the *Supreme Court Act* 1878, sec. 6, sub-sec. vii., enlarges the common law action for damages (see *Stickney* v. *Keeble* (2), per Lord *Parker* of Waddington). It comes to this, that so long as a Court of equity would have decreed specific performance of the contract, notwithstanding the delay and default of the plaintiff, he remained entitled to the performance of his contract. If it was broken under those circumstances he is entitled to sue for damages for the breach. But when a Court of equity would refuse to relieve against the delay (that is, by a decree in the nature of specific performance), although it might assist the plaintiff in some other way, as, for instance, by an injunction to restrain proceedings on the judgment, then the contract must cease to bind at law as well as in equity, and there could be no breach for which damages could be recovered.

"But in argument the plaintiff made no claim to common law damages for breach of contract. The claim was to equitable damages for an alleged breach of trust, upon the hypothesis that the vendor company was in the position of a trustee for the plaintiff, when the property was resold; and this requires me to examine the supposed fiduciary relation.

"In *Central Trust and Safe Deposit Co.* v. *Snider* (3) the principle of equity which is said to give rise to this relation was considered

(1) (1867) L.R. 3 Ch. 61, at p. 67.
(2) (1915) A.C. 386, at p. 417.
(3) (1916) 1 A.C. 266, at p. 272.

by the Privy Council, and explained in this way :—'It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser. . . . But it must not be forgotten that . . . it is tacitly assumed that the contract would in a Court of equity be enforced specifically. If for some reason equity would not enforce specific performance, or if the right to specific performance has been lost by the subsequent conduct of the party, in whose favour specific performance might originally have been granted, the vendor . . . either never was, or has ceased to be, a trustee in any sense at all. Their Lordships had to consider this point in the case of *Howard* v. *Miller* (1) in connection with the law as to the registration of titles in the Province of British Columbia, and came to the conclusion that, though the purchaser of real estate might before conveyance have an equitable interest capable of registration, such interest was in every case commensurate only with what would be decreed to him by a Court of equity in specifically performing the contract, and could only be defined by reference to the relief which the Court would give by way of specific performance.'

"Now, whether the breach be alleged as one of contract or of trust, it is the same act which is complained of, namely, the resale on 1st May 1924, and from the authorities referred to it would seem that the determining factor is the same in either event, namely, whether at that time the plaintiff had been guilty of such delay as to make it inequitable to 'relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract.'

"For this purpose the Local Court judgment is the starting-point. It amounted to a clear affirmance of the contract, waiving any antecedent delay, and if the subsequent delay was not unreasonable, the plaintiff is entitled to have the vendor company held to its obligation under the contract. But in estimating the period which should be allowed for this purpose, I have to look to the whole of the circumstances (*Stickney* v. *Keeble* (2)). The demand of August 1923 supervened upon a delay of, approximately, nine months. When the judgment was obtained a settlement had been overdue for upwards of a year, and, although the effect of

(1) (1915) A.C. 318.

(2) (1915) A.C. 386.

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suing was to waive delay, and to allow a further opportunity for payment, it would be unreasonable to disregard the purpose, which was to secure immediate payment. The plaintiff may or may not have known of the attempt to issue execution; but in the absence of any other explanation for his silence until in February 1925 he became aware of the resale, I accept the obvious explanation. I think he had no desire, or was unable, to satisfy the judgment. On the contrary, his desire must have been to avoid attempts to compel him to meet his obligation. I think that the company might reasonably infer, and did infer, that he had no intention of satisfying the judgment voluntarily, and was keeping out of the way to avoid compulsory process. I think, further, that the company might reasonably regard the notice of April 1924 as a final effort to bring the plaintiff up to the mark, and when it failed I am not surprised that the company should have felt that the time had come to realize upon the security of the land. The letter failed to reach the plaintiff, but that was not the fault of the company: it was due to the conduct of the plaintiff in utterly ignoring the obligation under the judgment, which required him to find and pay his creditor. In my opinion the conduct of the plaintiff prior to May 1924 had led, and might reasonably lead, the company to think that he had no intention, or no prospect, of completing the contract by finding the purchase-money, either out of his own resources, or by an authorized sale of the land on his account. It is true that the resale was effected in reliance upon the special provision in the agreement; but the company must have been largely influenced by this real, or apparent, disposition of the plaintiff towards his contract, and to that extent the conduct of the plaintiff led, as it might reasonably lead, the company to alter its position by disposing of its assumed absolute ownership of the land. I think that the delay of the plaintiff in and after March 1924 was unreasonable. That would allow three months as a reasonable time within which to pay; but it seems to me that, when the resale was effected on 1st May 1924, it would have been essentially unfair to grant the plaintiff relief against his failure to perform his contract, and, that being so, he could have obtained no assistance from a Court of equity.

"There is no claim for relief against the forfeiture, or for the return of the deposits, or of the instalments, and I cannot regard the prayer for general relief as raising anything of the kind (*Brickles* v. *Snell* (1)), but the defendant company may consider whether it is justified in retaining the instalment of 15 per cent without bringing it into account."

From the decision of *Napier* J. the plaintiff now appealed to the High Court.

Kerr (with him *Sutherland*), for the appellant. When the company instituted proceedings in the Local Court it had a duty to elect what remedy it would take. It might either in reliance on the conditions rescind the contracts and forfeit the deposits, or affirm the contracts and sue for specific performance or for damages. Having chosen the latter remedy and sued for the balance of purchase-money in the Local Court, which had no jurisdiction as to specific performance, the debt owing under the contracts merged in the judgment which the company obtained. Thereafter all that remained for the company to do was to give transfers of the land upon payment of the balance of the purchase-money. It could not then pursue the inconsistent remedy of rescinding the contracts and reselling the land. Upon judgment being obtained the purchase-money was no longer unpaid within the meaning of clauses 9 and 12 of the conditions (*Ex parte Fewings*; *In re Sneyd* (2)). [Counsel also referred to *Motor Carriage Supply Co.* v. *British and Colonial Motor Co.* (3); *Mayson* v. *Clouet* (4); *Cornwall* v. *Henson* (5).]

[ISAACS J. referred to *Economic Life Assurance Society* v. *Usborne* (6).]

Cleland K.C. and *Hicks*, for the respondent company, and *Treloar*, for the respondent Mrs. Nicholls, were not called upon.

KNOX C.J. In my opinion this appeal should be dismissed. I have nothing to add to the reasons given by *Napier* J.

(1) 1916) 2 A.C. 599, at p. 604.
(2) (1883) 25 Ch. D. 338, at p. 353.
(3) (1901) 45 Sol. J. 672.
(4) (1924) A.C. 980.
(5) (1900) 2 Ch. 298.
(6) (1902) A.C. 147.

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Isaacs J.

ISAACS J. I agree that the appeal should be dismissed. Apart from the special provisions of clause 12 of the one set of conditions and clause 9 of the other, I should feel considerable difficulty, in view of what has taken place, in entirely absolving the respondent company. Apart from those special provisions the governing circumstances are these :—The company sued for the whole of the balance of the purchase-money and recovered judgment for the amount with interest and land tax. That was a distinct affirmance of the contract, and, so far as its effect went, was specifically insisting on the performance of the contract. That judgment is still in existence and operative. But clause 12 and clause 9, which I think are substantially identical in this respect, appear to me to constitute a special provision for self-protection on the part of the company against loss arising from non-performance of the contract by the original purchaser. That special contractual provision is to the effect that if the company cannot get the money contracted to be paid by the original purchaser from him, then, without prejudice to any other remedy which might otherwise have been open to it, the company may resell the land and endeavour to get the money from someone else. If the company is successful in that attempt and actually receives the purchase-money, the original purchaser has nothing more to pay. If the company is not successful in obtaining the amount originally agreed to be paid, the original purchaser is liable for the deficiency, and, if the company obtains more than the amount of the original purchase-money, the company is entitled to keep the surplus. That being so, the appellant having failed to perform his original contractual obligation to pay the purchase price, thereupon the condition came into existence upon which the company could exercise its power of self-protection, and the company did exercise that power. The inevitable result of exercising the power is that the appellant could not have the land. That entirely affords an answer to his claim for specific performance. And, since it was under his authority that this course was taken, his claim for damages must fail. Upon the merits and applying the case of *Economic Life Assurance Society* v. *Usborne* (1), those

(1) (1902) A.C. 147.

two clauses afford a complete answer to the appellant's claim, even if he be at liberty now to press for common law damages.

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STARKE J. I agree that the resale by the company was justified by clauses 9 and 12 of the conditions.

Appeal dismissed with costs.

Solicitor for the appellant, *A. J. L. Sutherland.*

Solicitors for the respondents, *Robert Homburg*; *J. L. S. Treloar.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LIMITED (IN LIQUIDATION) . . . . . APPELLANT;

THE COMMISSIONER OF TAXES FOR SOUTH AUSTRALIA . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Income Tax (S.A.)—Assessment—Power to alter assessment—Duty of Commissioner of Taxes —Right of taxpayer—Mandamus—Taxation Acts 1915-1918 (S.A.) (*No.* 1200—*No.* 1337), *secs.* 50, 70, 101.

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Knox C.J., Isaacs and Gavan Duffy JJ.

Sec. 70 of the *Taxation Acts* 1915 to 1918 (S.A.) provides that "it shall be lawful for the Commissioner in any case, whether notice of appeal has been given or not, to alter or reduce any assessment . . . and to order a refund of any excess of tax that has been paid in respect thereof."

Held, that the section imposes no duty upon the Commissioner, and confers no right upon a taxpayer, which can be enforced by the taxpayer by way of mandamus.

Decision of the Supreme Court of South Australia (Full Court) affirmed.