[HIGH COURT OF AUSTRALIA.]

TAYLOR AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

REID . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *Oct.* 22; *Nov.* 4.

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

Company—Transfer of shares—Guarantee by directors of certain dividend—Year closing in July, dividend declared in November—Sale of shares between July and November—No dividend declared—Whether guarantors liable for amount of dividend—Breach of warranty—Meaning of "dividends on shares."

The appellants, who were the directors of a company in which they held a controlling interest, appointed the respondent as trading manager of the business and in addition to his salary agreed to transfer to him 26,000 fully paid ordinary shares in the company. By such agreement the appellants jointly and severally guaranteed to the respondent dividends on the said 26,000 shares at the rate of at least 6½ per cent per annum for each of the three financial years of the company ending 31st July 1927, 1928 and 1929 respectively. It had been the practice of the company, as the respondent knew, to declare all dividends in November in each year for the financial year ending on the previous 31st July. In September 1928 the appellants and the respondent agreed to sell all the ordinary shares including the above-mentioned 26,000 shares to another company. The respondent claimed to be entitled to payment of an amount equal to a dividend at the rate of 6½ per cent for the year ending 31st July 1928 under the terms of the guarantee, no dividend having been declared between that date and September 1928, when the shares were sold.

Held, that the respondent was not entitled to succeed:

By *Knox* C.J., *Gavan Duffy*, *Rich* and *Dixon* JJ., on the ground that the basis of the warranty or guarantee of dividends at the rate of at least 6½ per

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cent per annum was the respondent's continued ownership of the shares; that the use of the word "guarantee" showed that the liability of the appellants was to arise only in the event of the respondent not receiving a dividend on his shares at the rate mentioned; that the expression "dividends on shares" imported a payment by the company to a person who held shares in the company at the date when the dividend was, or ought in the ordinary course to have been, declared, as a company could not lawfully pay a "dividend" to a person who was not a member of the company at the date when the dividend was declared;

By *Isaacs* J., on the ground that, though strictly speaking there was a breach of the warranty as the sale of the shares did not prevent the company from declaring a dividend on the shares, the respondent had suffered no damage.

Decision of the Supreme Court of South Australia (*Richards* J.) reversed.

APPEAL from the Supreme Court of South Australia.

On 28th April 1927 the respondent, Donald Reid, was appointed trading manager of James Marshall & Co. Ltd. for six years from 1st August 1926. At that time the appellants, Arthur Roy Taylor, James Allan Carlyle Marshall and Frederick Windmill Porter, were directors of the Company and held the controlling interest therein. On the same 28th April 1927 the appellants (called in the agreement "the vendors") entered into an agreement with the respondent (called in such agreement "the purchaser") the material terms of which were substantially as follows:—

(1) The vendors agree to sell to the purchaser, who agrees to purchase from them as on and at 26th November 1926, the 26,000 fully paid ordinary shares of £1 each belonging to the vendors in the capital of the Company for the price or sum of £26,000.

(2) The said sale and purchase shall be completed on 28th April 1927, when the purchaser shall pay to the vendors the said sum of £26,000 together with interest thereon at the rate of 6 per cent per annum computed from the said 26th November 1926 up to the time of the payment of the said sum of £26,000, and the vendors shall thereupon execute and deliver to the purchaser a transfer of the said 26,000 ordinary shares and hand to him the share certificate or certificates in respect thereof.

(3) In the event of the purchaser dying at any time prior to 26th November 1932 and the vendors not having prior thereto exercised the option in that behalf contained in par. 4 hereof, the vendors hereby covenant to purchase and the purchaser hereby

covenants with them that his executors or administrators will sell to the vendors forthwith thereafter the said 26,000 ordinary shares at the price or sum of 20s. per share.

(4) In the event of the purchaser at any time prior to 26th November 1932 ceasing to be trading manager of the Company otherwise than by death, (a) the said Arthur Roy Taylor, if for the time being living, shall have the option, to be exercised at any time within six calendar months after the time of the purchaser so ceasing to be such trading manager, of purchasing and acquiring from the purchaser, his executors or administrators one equal third or such lesser number as the said Arthur Roy Taylor shall think fit of the said 26,000 shares at the respective prices or sums hereinafter set forth in this present paragraph hereof. (Clauses (b) and (c) gave similar rights to James Allan Carlyle Marshall and to Frederick Windmill Porter respectively, the price to be so paid for the shares being fixed according to the date at which the respondent should cease to be trading manager.)

(5) In the event of the purchaser at any time prior to the said 26th November 1932 becoming or being adjudicated insolvent or bankrupt or taking the benefit of any Act or Acts for the relief of insolvent or bankrupt debtors or assigning or attempting to assign his estate for the benefit of his creditors or calling a meeting for the benefit of his creditors, the vendors shall have the option, to be exercised at any time within six calendar months after the happening of any such event, of purchasing the said 26,000 ordinary shares or such number thereof as the vendors shall so determine at the price or sum of 20s. per share.

6. Subject to the provisions aforesaid the vendors jointly and severally guarantee to the purchaser dividends on the said 26,000 ordinary shares at the rate of at least $6\frac{1}{2}$ per cent per annum for the three financial years of the Company ending 31st July 1927, 31st July 1928 and 31st July 1929 respectively.

(7) The purchaser shall cause the said transfer to be forthwith registered, and shall forthwith deliver to the vendors the new share certificate or certificates in the name of the purchaser in respect of the said 26,000 shares, and such new share certificate or certificates when so delivered to the vendors shall thereafter be held by the

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vendors during the continuance of this agreement; and the purchaser agrees with the vendors and each of them that the purchaser, his executors or administrators shall not nor will during the continuance of this agreement transfer, mortgage, charge or encumber the said 26,000 shares or any of them without the consent in writing of the vendors in each instance first had and obtained.

(8) If at any time during the continuance of both these presents and the service agreement the vendors shall sell to any person or persons or company (hereinafter called "the purchasing party") all the ordinary shares in the Company belonging to the vendors, or such a proportion thereof as will thereby occasion their loss of their present controlling interest therein, and the purchaser shall have duly observed and performed all the agreements and provisions on the part of the purchaser contained in these presents and in the service agreement respectively, the vendors shall obtain for the purchaser the option (such option to be exercised by the purchaser within four days of the same being notified to the purchaser) of selling to the purchasing party—at the same price per share as the vendors shall be so selling to the purchasing party—a number of the said 26,000 shares bearing the same proportion to the total number of shares so being sold by the vendors to the purchasing party as the said 26,000 shares bear to the total number of ordinary shares held by the vendors and the purchaser at the time of such sale to the purchasing party. If the vendors shall so sell as aforesaid to the purchasing party during such continuance as last aforesaid, then and in such case and subject to any prior exercise of any of the rights of the vendors respectively under the provisions of these presents the provisions of pars. 3, 4, 5 and 7 respectively hereof shall thereupon cease and determine.

The service agreement dated 28th April 1927 provided (*inter alia*) for the appointment of the respondent as manager for the term of six years from 1st August 1926.

Pursuant to the provisions of the purchasing agreement the appellants duly transferred 26,000 fully paid ordinary shares to the respondent, who was elected a director of the Company on 12th October 1924 and acted as such until after 21st September 1928. On 21st September 1928, at a meeting of the directors of James

Marshall & Co. Ltd. at which the respondent and the appellants were present, it was unanimously agreed by all the directors of the Company that they would sell to the Myer Emporium (Melbourne) Ltd. all the ordinary shares in James Marshall & Co. Ltd., all of which were held by the directors, and on the same day they sold to the Myer Emporium (Melbourne) Ltd. all the ordinary shares held by them. On 24th September 1928 the respondent executed a transfer of his ordinary shares to the Myer Emporium (Melbourne) Ltd. and handed the purchaser the scrip therefor and received payment for the shares from the purchaser.

It had been the practice of James Marshall & Co. Ltd., as the respondent knew, to declare all dividends (if any) payable on the ordinary shares of the Company at the annual meeting of the Company held in the month of November in each year for the financial year ending on the previous 31st July, and to pay all dividends (if any) on such ordinary shares in the said month of November in each and every year. For the year ending 31st July 1927 the Company declared and paid a dividend at the rate of 5½ per cent on ordinary shares and the appellants, pursuant to their guarantee expressed in par. 6 of the purchasing agreement, made up the amount payable to the plaintiff so as to be equivalent to a dividend of 6½ per cent on the said ordinary shares and paid such amount to the plaintiff. No dividend had been declared prior to or at 21st September 1928 on the ordinary shares of James Marshall & Co. Ltd. for the year ending 31st July 1928. The respondent did not at any time prior to or at the sale of the shares to the Myer Emporium (Melbourne) Ltd. demand from the appellants or any of them any dividend on the ordinary shares held by him in James Marshall & Co. Ltd. for the year ending 31st July 1928. Shortly after the said sale the respondent informed one of the appellants that he would require payment of an amount equivalent to a dividend of 6½ per cent on his ordinary shares for the year ending 31st July 1928. By the said sale of the ordinary shares in James Marshall & Co. Ltd. the appellants lost their controlling interest in that Company.

The respondent then took out an originating summons in which he was plaintiff and the appellants were defendants for the determination

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of the question, substantially, whether the guarantee contained in clause 6 of the agreement dated 28th April 1927 was operative, effective and legally binding on the defendants in respect of the financial year of James Marshall & Co. Ltd. ending 31st July 1928; and for a declaration, substantially, that the plaintiff was entitled to payment by the defendants under the terms of such guarantee of a dividend at the rate of 6½ per cent per annum for the financial year of James Marshall & Co. Ltd. ending 31st July 1928 on the 26,000 ordinary shares in that Company then held by the plaintiff. The summons was heard by *Richards* J., who answered the question in the affirmative and made the declaration sought.

In the course of his judgment his Honor said:—"Dealing first merely with the question of construction, the meaning of the clause in question seems to me to be clear enough. The defendants could not, in fact, insure that the Company itself would for any year declare and pay dividends on its shares at any particular rate, or at all, and they did not so express themselves in the agreement. All they could do was to promise the plaintiff that his holding the shares would be worth to him the equivalent of dividends of a certain amount; and although they purported to 'guarantee . . . dividends on the . . . shares' at a certain rate for certain years, what it really means is that if for any of those years the Company did not pay dividends up to that rate, they would make up the difference, and that if for any of those years no dividend was paid, they would pay the whole amount. I agree that continued ownership of the shares until the end of a year may be regarded as an implied condition of the plaintiff's right in respect of that year. Such a construction is, I think, in accordance with the principle stated by Lord *Esher* M.R. in *Hamlyn & Co.* v. *Wood & Co.* (1). But I do not think there is sufficient ground for going further and holding that, applying the test stated by *Scrutton* L.J. in *In re Comptoir Commercial Anversois* v. *Power, Son & Co.* (2), there is a necessity to imply that it was a further condition that the plaintiff was to be still the owner of the shares when that right came to be enforced. It appears to me that the intention was to insure to the plaintiff,

(1) (1891) 2 Q.B. 488, at p. 491.

(2) (1920) 1 K.B. 868, at p. 902.

in respect of each of the three years for which he continued to be the owner of the shares, dividends at the rate mentioned, or the equivalent thereof. The result was that on each 31st July, provided he was then still the owner of the shares, his right for that year matured, though the extent of the defendants' indebtedness (if any) would not be ascertained until the dividend for that year was declared or it was decided to declare no dividend for the year; provided that his right could not be defeated by the directors' failure to deal with the question within a reasonable time. It cannot have been intended that the defendants would be able, by use of their controlling power of delaying or refraining from declaring dividends, to say to the plaintiff 'You cannot enforce your guarantee because you cannot prove the extent of our liability.'" His Honor also was of opinion that the plaintiff had not, by his conduct in joining with the defendants in the sale to the Myer Emporium (Melbourne) Ltd., estopped himself from enforcing his guarantee in respect of the year in question.

From this decision the defendants now appealed to the High Court.

E. E. Cleland K.C. (with him *C. L. Jessop*), for the appellants. The whole question turns on the construction of clause 6 of the agreement, which should be read as a guarantee that the Company will pay "out of its profits" the dividend specified. There is no promise by the appellants in clause 6 to pay anything to the respondent, but they may become liable to him for breach of the agreement in that clause. No breach of the guarantee arose before November, when the dividend would normally have been declared, and by that time the respondent had disentitled himself to the dividend by reason of his having disposed of the shares. The Company could only pay the dividend out of profits. The contract is not absolute but conditional. It is a contract of insurance, and the condition on which the liability arises is the Company's failure to pay its dividend. The right of the shareholder arose only when the dividend was declared and when it became payable, and not before. The right does not mature until the date of payment. The sale of the shares in September destroyed the whole basis on which this agreement was made. The basic fact of this agreement is the continued holding

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by the respondent of these shares. [Counsel referred to *Stirling* v. *Maitland* (1), *Hamlyn & Co.* v. *Wood & Co.* (2) and *Hirji Mulji* v. *Cheong Yue Steamship Co.* (3).]

F. Villeneuve Smith K.C. (with him *H. G. Alderman*), for the respondent. The agreement exhibits an intention that the dividend should be paid notwithstanding that shares have been parted with by the respondent. Clause 6 is an agreement by the appellants to pay the respondent a sum equivalent to a dividend of 6½ per cent whether he was a shareholder or not at the date when the dividend was or ought to have been declared, provided that he was a shareholder on 31st July. In July there arises a liability to pay to the respondent in November. Until 31st July there is no right, but after 31st July the right accrues and is disposable, and if the Company does not thereafter pay the respondent 6½ per cent the appellants must do so.

Cur. adv. vult.

Nov. 4.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY, RICH AND DIXON JJ. On 28th April 1927 the respondent was appointed trading manager of James Marshall & Co. Ltd. for six years from 1st August 1926. At that time the appellants were directors of the Company and held the controlling interest therein. On the same 28th April 1927 the appellants by agreement in writing agreed to sell to the respondent 26,000 ordinary shares in the Company. By clause 4 of this agreement it was provided that if the respondent should at any time before 26th November 1932 cease to be trading manager of the Company otherwise than by death the appellants should have the option of purchasing all or part of the said 26,000 shares at the price thereby fixed. By clause 3 it was provided that if the respondent should die before 26th November 1932 and the appellants should not prior thereto have exercised the option given them by clause 4, the shares in question should be purchased by the appellants from the respondent's executors. By clause 5 the appellants were

(1) (1864) 5 B. & S. 840. (2) (1891) 2 Q.B., at pp. 494-495.
(3) (1926) A.C. 497, at pp. 505-509.

given the option of buying the said shares in the event of the bankruptcy of the respondent before 26th November 1932. By clause 6 the appellants jointly and severally guaranteed to the respondent dividends on the said shares at the rate of at least 6½ per cent per annum for the three financial years of the Company ending 31st July 1927, 1928 and 1929 respectively. By clause 7 it was provided that the share certificates for the said shares should be held by the appellants during the continuance of the agreement and that the respondent should not transfer the shares without the consent in writing of the appellants. Clause 8 provided that if at any time during the continuance of that agreement and the service agreement the appellants should sell all their ordinary shares in the Company, or such a proportion thereof as would deprive them of their controlling interest therein, they should obtain for the respondent the option of selling his shares or a corresponding proportion of them to their purchaser at the same price, and that on such a sale by the appellants the provisions of clauses 3, 4, 5 and 7 of the agreement should cease and determine.

The purchase-money for the shares was paid and the shares were transferred by the appellants to the respondent in accordance with the agreement. At the time of entering into the agreement all parties knew that it was the practice of the Company to declare dividends (if any) at the annual meeting of the Company held in the month of November in each year for the financial year of the Company ending on the preceding 31st July and to pay all dividends (if any) in the said month of November in each year.

On 21st September 1928 the appellants and the respondent agreed to sell and sold to the Myer Emporium (Melbourne) Ltd. all the ordinary shares in the Company, including the said 26,000 shares, and such shares were thereupon transferred to the purchaser. No dividend had been declared on or before the said 21st September on the ordinary shares of the Company for the year ending 31st July 1928, nor was any dividend thereafter declared on such shares for that year. The respondent seeks in these proceedings a declaration that he is entitled to receive from the appellants an amount equal to a dividend at the rate of 6½ per cent per annum on the said 26,000 shares for the year ending 31st July 1928. In the

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Supreme Court *Richards* J. held that he was entitled to receive the amount claimed, and from that decision this appeal is brought.

In our opinion the appellants are entitled to succeed. The obligation undertaken by the appellants was to " guarantee to the purchaser dividends on the said 26,000 ordinary shares at the rate of at least $6\frac{1}{2}$ per cent per annum for " each of the three years. The use of the word " guarantee " shows that the liability of the appellants was to arise only in the event of the respondent not receiving a dividend on his shares at the rate mentioned. The expression " dividends on shares " imports a payment by a company to a person who holds shares in the company at the date when the dividend is, or ought in the ordinary course to be, declared. For a company cannot lawfully pay " dividend " to a person who is not a member of the company at the date when the dividend is declared. The options given by clause 4 to each of the vendors to repurchase a proportion of the shares in the event of the respondent ceasing before 26th November 1932 to be trading manager necessitated his retention of the shares until that date unless the vendors consented to their sale or the operation of clause 4 terminated earlier. Clause 7 refers apparently to this provision when it speaks of the continuance of this agreement as a period during which the respondent may not transfer. It is, therefore, quite clear that the basis of the warranty or guarantee of dividends at the rate of at least $6\frac{1}{2}$ per cent per annum was his continued ownership of the shares.

The express discharge of the obligation of clauses 3, 4, 5 and 7 in the event of the vendors parting with a controlling interest does not, when properly understood, weaken this inference, because the reason for this discharge of these provisions is that they would in that event no longer be required to maintain the vendors' control of the Company and would become a useless burden and restriction. If by virtue of clause 4 or of clause 8 the respondent sold and transferred some of his shares, it is evident that the guarantee would operate only in relation to those which he retained. In the case of a transfer pursuant to clause 4 one or more of the vendors would become the transferees, and the agreement could scarcely mean that dividends were guaranteed upon the shares which the guarantors had reacquired. Indeed, it was not disputed that the guarantee

did not apply to shares transferred by the respondent before 31st July of the relevant year. The contention was, however, that upon that date the right to a 6½ per cent dividend at least, became absolute. But all parties to the agreement knew that the practice of the Company was to declare the dividend (if any) in November in respect of the financial year ending on 31st July next preceding. The promise by the appellants appears to us to have been that if the Company should not in the ordinary course pay to the respondent *as holder of the* 26,000 *shares* a dividend at the rate of 6½ per cent in respect of the financial year of the Company ending on 31st July 1928, the appellants would make good the deficiency. It is only as holder that the respondent could receive a dividend in exoneration of the guarantors. To regard 31st July as a date at which he became entitled in respect of the shares to a definite minimum income for the year, is to look at the transaction from the respondent's point of view to the exclusion of that of the guarantors. They relied on their control of the Company, and it would be only at the annual meeting that they could use this to determine on the rate of dividend which would operate in relief of their personal liability. Dividends could not be declared by the Company in favour of shareholders ascertained as at a past date. An interval must elapse between the closing date of the accounting period and the declaration of the dividend which fixed the guarantors' liability. It may be true that the respondent looked to the guarantee to secure to him a minimum annual return from the shares, but he was content to rely upon receiving it in the character of a shareholder at a later period than 31st July, namely, at the time of the annual meeting. In this view the promise imposed no obligation on the appellants unless the respondent was, at the time when according to the ordinary practice of the Company the dividend (if any) would be declared, the holder of the 26,000 shares or some of them, so that he might be in a position to receive from the Company the amount of any dividend which might be declared. The respondent having transferred all these shares in September 1928 was no longer in a position to receive from the Company a dividend in respect of the financial year ending 31st July 1928 which had not then been declared and would not in the ordinary course of events be declared before November 1928, and it follows,

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in our opinion, that the appellants incurred no liability under their guarantee in respect of that financial year.

The appeal should be allowed.

ISAACS J. The guarantee contained in clause 6 of the purchasing agreement is a warranty that the Company will declare and pay dividends in respect of the specifically numbered shares sold to Reid, at the rate and for the financial years mentioned. The warranty is in terms, but for one qualification, absolute, and I am unable to introduce any of the suggested interpolations and additions. The qualification I refer to is expressed by the introductory words "Subject to the provisions aforesaid," which I read as subject only to those provisions: *Expressum facit cessare tacitum.* Suppose during 1928 the vendors had under clause 7 simply consented to Reid selling 1,000 shares. Surely he could have sold them with a guarantee to his purchaser that a dividend of at least 6½ per cent would be paid for the year ending 31st July 1929. There is not a word to prevent him, and a Court does not imply words of exception that are not necessary. But if that could have been done in reliance on clause 6, it shows that the suggested limitation to Reid's ownership is not legitimate. These "provisions" are found in clauses 3, 4 and 5, and they are provisions under which the appellants have rights in various events to repurchase the shares. The effect, then, of the words "subject to the provisions aforesaid" is to make the period of operation of the warranty conterminous with the period during which the appellants have the rights of purchase under clauses 3, 4 and 5. Clause 8 makes a contractual provision for the termination of such rights. It is when the appellants sell sufficient of their ordinary shares to occasion the loss of their controlling interest in the Company, and this whether the respondent exercises his option under clause 8 or not. If he does not, then as in such a case clause 7 is gone, as well as clauses 3, 4 and 5, he is free to deal with his shares. In that event, the warranty, which is subject only to the provisions of clauses 3, 4 and 5, is ended. The shares being no longer locked up, the respondent must make his own arrangements as to their investment as an ordinary shareholder.

But in the event of his accepting the option and disposing of his proportion of his shares—in this case, the whole—the warranty, because clauses 3, 4 and 5 are gone, also ceases, and it ceases a fortiori.

Then comes the more difficult question : What is the legal result of the warranty ceasing as it did in September 1928 ? No doubt, having regard to the known practice of the Company, a breach could not have been assigned before November. But that only fixes the earliest moment for performance of the guarantee, and it then still remained unfulfilled. If Reid had died in August 1928, clause 3 would have operated; and why not clause 6 up to that time ? Strictly speaking, I think there was a breach of the warranty, for the sale of the shares did not prevent the Company from declaring a dividend on the shares. But what damages did Reid sustain ? None. (*Black* v. *Homersham* (1).) It is not suggested that the respondent, when he sold his shares in September, retained any claim to a dividend for the past financial year. I do not think clause 8 in any case contemplates such a retention, for the price is to be that which the appellants may receive. Therefore, whether there was a breach or not, the result is the same in substance, and the answers to the questions submitted should be in the negative.

Appeal allowed. Order of Richards J. discharged. Declare that the respondent is not entitled to payment by the appellants under the terms of the guarantee contained in clause 6 *of the above-mentioned memorandum of agreement of a dividend at the rate of* 6½ *per cent per annum for the financial year of James Marshall & Co. Ltd. ending on* 31*st July* 1928 *on the* 26,000 *shares in the said Company then held by the said Donald Reid. Order that the costs of the application to the Supreme Court and of this appeal be paid by the respondent Donald Reid.*

Solicitors for the appellants, *Edmunds, Jessop & Ward.*
Solicitors for the respondent, *Alderman, Reid & Brazel.*

H. D. W.

(1) (1878) 4 Ex. D. 24.