[HIGH COURT OF AUSTRALIA.]

LUNA PARK (N.S.W.) LIMITED . . . APPELLANT;
DEFENDANT,

AND

TRAMWAYS ADVERTISING PROPRIETARY LIMITED . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 22-24: *Dec.* 23.

Latham C.J., Rich, Dixon and McTiernan JJ.

Contract—Construction—"At least eight hours per day"—Whether actual or average period of eight hours—Breach of condition—Remuneration.

A, a company which carried on the business of an advertising agent, agreed with B, a company which conducted an amusement enterprise in Sydney, that in consideration of a weekly sum of £20 payable monthly, it would for fifty-two weeks, distributed over the three summer seasons beginning in December 1935 and ending in the earlier part of 1938, cause fifty-three roof boards advertising B's amusements to be displayed upon tram-cars running upon certain routes in Sydney. The agreement consisted of a letter and a contract note. The letter, which had been written and forwarded by A to B, contained the statement that "the average time that each car is on the track is eight hours per day," and was indorsed on behalf of A: "we guarantee that these boards will be on the tracks at least eight hours per day throughout your season." During the first two seasons, the average period of display exceeded eight hours per roof board per day, but each and every roof board was not displayed for at least eight hours on each and every day.

Held, by *Latham* C.J., *Rich* and *McTiernan* JJ. (*Dixon* J. dissenting), that upon the true construction of the contract A's undertaking was that each and every roof board would be displayed for at least eight hours on each and every day; that this undertaking was a condition of the contract; and that, by

reason either of the breach of the condition, or of A's renunciation of the contract in that it was prepared to continue performance only on the basis of the erroneous construction that an average display of eight hours per roof board per day was all that was required, B was entitled to determine the contract.

Held, further, that in the absence of proof of the extent of the breach of contract committed by A or of evidence of actual damage, B could recover no more than nominal damages in respect of such breach.

Decision of the Supreme Court of New South Wales (Full Court): *Tramways Advertising Pty. Ltd.* v. *Luna Park (N.S.W.) Ltd.*, (1938) 38 S.R. (N.S.W.) 632; 55 W.N. (N.S.W.) 228, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the District Court of New South Wales by Tramways Advertising Pty. Co. Ltd. against Luna Park (N.S.W.) Ltd. for the recovery of the sum of £86 13s. 4d. for work done and materials provided by the plaintiff for the defendant at its request. The action was defended.

The material facts were as follows:—On 7th December 1935 the plaintiff caused to be sent to the defendant a letter in the following terms:—"We will be prepared to accept a contract from you for roof boards on Sydney trams, under the following conditions:—(i) quantity: 50—16 ft. boards; 3—38 ft. boards; (ii) we to supply boards with exception of 10—16 ft. and 3—38 ft. boards already supplied by you. All painting, erection and maintenance of boards to be carried out by us; (iii) contract to operate for the duration of two or three seasons. The average time that each car is on the track is eight hours per day, and we would recommend all routes serving the industrial suburbs. A list of depots and areas served will be found detailed on the back of the contract." The language of the letter suggested that a copy of a printed form of a contract note was also supplied.

At some stage a Mr. Caton on behalf of the plaintiff wrote at the bottom of the letter the sentence: "We guarantee that these boards will be on the tracks at least eight hours per day throughout your season."

On 10th December 1935 a contract note in a printed form with manuscript and typewritten additions was signed on behalf of the defendant, which was described as having the business of an amusement park at an address at Milson's Point. A memorandum agreeing to the contract was signed on behalf of the plaintiff by its secretary.

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The printed form was addressed to the plaintiff. It was applicable to a contract for advertising by means of both inside posters and outside roof boards. In the present case the contract entered into was for roof boards only. It was in the following form, the portions of the printed matter relating exclusively to inside posters being omitted, although they were not struck out in the original: "On and subject to the conditions herein contained, please supply me/us with twelve months' service consisting of the following over three full seasons with a minimum of 52 weeks. Preparation and display in the Sydney metropolitan tramways system of 53 roof boards measuring 50 at 16 ft., 3 at 38 ft. Depots from which roof boards are to be routed—all industrial routes. A list of Sydney metropolitan tram depots from which the various districts are served is printed on the back hereof. This contract provides for routing by depot only, not by individual lines and districts. Every endeavour will be made by the contractor to meet the routing needs of the advertiser, but departure from such routing shall not be deemed a breach of this contract. All material provided in connection with this contract remains the absolute property of the contractor. The contract cannot be cancelled without the consent of the contractor in writing, except upon payment of the full amount of the completed contract. In the event of any payment being in arrears more than one month, the same shall thereupon become due as a separate debt and be recoverable accordingly. The contract is not binding on the contractor unless and until received and ratified by indorsement thereon in writing by one of the directors or the secretary. I/We agree to pay for such service at the rate of £20 per week from the date of the first appearance of complete number of boards, 53 in all, payable monthly. This contract automatically cancels any previous contract."

On the back of the form was a list of the Sydney metropolitan tram depots, and the districts served therefrom.

There was written on to the side of the letter of 7th December 1935, apparently at or about the time when the contract note was signed by the plaintiff's salesman, a memorandum signed by him and by Mr. Phillips on behalf of the defendant, in the following terms: "This letter is part and parcel of the contract."

It was admitted by both parties that the contract between them was made up of the contract form as supplemented by the letter.

This action was commenced in February 1938 to recover a sum of £83 13s. 4d. claimed to be due for displaying the roof boards from 6th January to 5th February 1938, a period of one month, at the rate of £20 per week.

The defences raised by the particulars of defence were :—1. (*a*) That it was a condition of the agreement under which the money was claimed that each of the 53 roof boards attached to 53 tram-cars should be displayed for eight hours on each day throughout the period of 52 weeks, that the plaintiff did not so display each (that the moneys sought to be recovered were alleged to be due for pretended performance of the agreement and notwithstanding the aforesaid non-performance of the condition, and that the defendant prior to 6th January 1938 refused to be bound by the agreement by reason of such non-performance); (*b*) (a defence of non-assumpsit which was struck out); 2. A cross-action alleging a promise by the plaintiff that each of the 53 roof boards would be displayed for eight hours in each day throughout the period of 52 weeks, but that each of them was not displayed for eight hours in each day throughout the said period of 52 weeks, whereby the defendant lost the benefit of the plaintiff's said promise and the moneys paid by it to the plaintiff pursuant to the agreement and the profits which it otherwise could and would have made as a result of the display of the said advertising matter as aforesaid and whereby the defendant was otherwise damnified, and claiming £400 damages.

It appeared from a letter written by the plaintiff's solicitor on 27th May 1938 that the defendant's solicitor desired to raise amended grounds of defence, because in that letter it was stated that the amended grounds were not objected to, although a right to argue that terms should be imposed as to costs was reserved. Of the amended grounds, ground 1 (*c*) was the same as 1 (*a*), except that it alleged that the condition broken was a condition that the 53 roof boards should be displayed daily throughout the period of 52 weeks instead of that each of them should be displayed for eight hours each day throughout the period; and ground 3 was the same as ground 2 with a similar alteration. The trial judge directed that

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the portion of ground of defence 1 (*a*), which is shown above enclosed in parentheses, be struck out; but no such direction was given with respect to the corresponding portion of ground 1 (*c*). The defendant was granted leave to add a defence of "never indebted" on the ground of non-performance of conditions precedent.

In the District Court, except in cases where a default summons has been issued, it is not necessary for the defendant to file any grounds of defence, unless he desires to set up one of the special defences specified in sec. 75 of the *District Courts Act* 1912 (N.S.W.). Apart from this, it is sufficient for him to state what his defences are when the case is called on (sec. 84 and rule 236). If, however, a default summons has been issued, verified grounds of defence must be filed (sec. 66). A default summons was issued in the present case, so that the defendant was restricted to the grounds of defence which it had filed, subject to any amendments allowed at the trial.

Counsel for the defendant stated at the hearing of the action that he abandoned technical defences, as his client wanted to have the contract construed; and he raised no objection to the plaintiff putting in evidence two letters dated 16th April 1936 and 10th March 1937 respectively, giving summarized information as to the running of trams bearing the boards. From the first of these letters it appeared that the boards were on fifty-three trams, and that during the month of March 1936 the fifty-three trams had run a total mileage of 117,607 miles, a gross average of seventy-eight miles per day per tram. The average miles run per hour was 9.5, showing that each car had run 8.2 hours per day on a gross average. In the letter of 10th March 1937 similar figures were given as supplied by the Department of Road Transport and Tramways for the period October 1936 to January 1937, showing a gross average of eight hours twenty-four minutes per day per car. In the earlier letter it had been stated that thirty-six of the trams bearing boards had even numbers and seventeen had odd numbers. In the later letter it was stated that odd and even numbered cars were out on alternate days assisted by even and odd numbered cars at peak periods, each car being thus the same time on the track except in cases of overhaul and repair, the average time lost for overhaul and repair being one and one-half days per car per month.

Counsel for the plaintiff made the admission that each board was not on the road for eight hours each day.

It appeared from the evidence that the defendant's first season was from 21st January 1936 to 22nd April 1936, and its second season from 15th October 1936 to 11th March 1937 ; and that early in September 1937, when the third season was approaching, a representative of the defendant told the representative of the plaintiff that unless it could give better service than in the past the defendant would not continue, to which the plaintiff's representative replied that it would not be possible for the plaintiff to give better service than had been given in the past; the defendant's representative retorted : " If that is so, your best is not good enough." On 16th November 1937 the defendant, by letter, alleged that under the contract fifty-three boards should be on the road at least eight hours per day throughout the season ; that it was quite clear that nothing like this service had been given ; and that for this reason it did not regard itself as bound by the contract any further. The plaintiff offered to discuss making any desired alterations to the form of the advertisements, but the defendant refused to discuss the matter. The plaintiff then proceeded to display the boards when the defendant's third season began. The defendant protested against the boards being displayed at all, and, in particular, objected that some of the advertising matter had become misleading ; but it refused to give any instructions for alterations, with the result that the plaintiff continued the display and sued to recover the amount provided for by the contract after the lapse of one month.

It was proved in evidence that in respect of the first season the defendant paid sums totalling £280 on dates between 9th March and 28th April 1936, and in respect of the second season the defendant paid sums totalling £420 on dates between 26th November 1936 and 23rd March 1937.

The trial judge held that the contract imposed on the plaintiff the obligation of causing each board to be displayed for eight hours each and every day, and that since it was admitted that this had not been done there must be a verdict for the defendant in the action. His Honour also ruled that in any event, assuming the plaintiff to be entitled otherwise to succeed, it could not recover in the present

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action. His Honour ruled further that he could not amend the particulars of claim so as to introduce a claim for unliquidated damages, on the ground that there was no jurisdiction to entertain a claim for unliquidated damages in an action in which a default summons had issued. In the defendant's cross-action, his Honour found for the defendant, and assessed the damages at £300.

The Full Court of the Supreme Court of New South Wales, by majority, allowed an appeal by the plaintiff, set aside the verdict and judgment for the defendant in the action and cross-action, and entered a verdict for the plaintiff in the action for the amount claimed and also for the plaintiff in the cross-action. As regards the power of amendment of the District-Court judge all the members of the Full Court agreed that not only did the trial judge have power to amend the proceedings so as to admit of a claim for unliquidated damages, but, if such an amendment were necessary for determining the real question in controversy between the parties, it was his statutory duty, under sec. 96 of the *District Courts Act* 1912 (N.S.W.), to make it, subject to the imposition of such terms as it might be reasonable to impose: *Tramways Advertising Pty. Ltd.* v. *Luna Park (N.S.W.) Ltd.* (1).

From that decision the defendant appealed to the High Court.

Windeyer K.C. (with him *R. Lindsay Taylor*), for the appellant. The agreement properly construed means that each board should be displayed either (*a*) every day for at least eight hours, or (*b*) for some part of every day averaging eight hours. The use of the words "per day" shows that it was not intended to have an average performance, but, on the contrary, that there should be a daily performance, that is, that there should not be a comparatively sporadic display but a massed display of fifty-three boards each day. The principle as to repudiation was considered by the court in *Bowes* v. *Chaleyer* (2) and *Hochster* v. *De La Tour* (3). This is a contract for service and the implication is that the appellant should give instructions as to the subject matter of the advertisements.

(1) (1938) 38 S.R. (N.S.W.) 632; 55 W.N. (N.S.W.) 228.
(2) (1923) 32 C.L.R. 159.
(3) (1853) 2 E. & B. 678; 118 E.R. 922.

[DIXON J. referred to *Ripley* v. *M'Clure* (1) and *Wilkinson* v. *Verity* (2).]

If repudiation be communicated to the other party that party may accept it immediately. He then has a right in damages. When there is an unaccepted repudiation the contract remains on foot.

[DIXON J. referred to *Aerial Advertising Co.* v. *Batchelors Peas Ltd.* (3).]

The conduct of the respondent was not set up by the appellant as repudiation of the contract; it was set up as a breach of a term of the contract. The evidence shows that there was a very substantial breach of the contractual obligation. The words "per day" mean "each day" (*Taylor* v. *Laird* (4)), and the meaning of the words "day" and "daily" was dealt with in *London County Council* v. *South Metropolitan Gas Co.* (5). The words used should be given their natural and literal meaning (*Bowes* v. *Chaleyer* (6)). A test is: What would business men understand by the words used in the contract (*Clifton* v. *Coffey* (7); *Hillas & Co. Ltd.* v. *Arcos Ltd.* (8))? The appellant regarded as valuable a massed display over a wide area as required under the contract; greater patronage, doubtless, would have resulted from such a display. This obligation was not fulfilled by the respondent, therefore the appellant is entitled to substantial damages for such non-performance, and this is so even though the *quantum* of damage suffered may be difficult to ascertain (*Chaplin* v. *Hicks* (9); *Tolnay* v. *Criterion Film Productions Ltd.* (10); *Marbe* v. *George Edwardes* (*Daly's Theatre*) *Ltd.* (11); *Herbert Clayton and Jack Waller Ltd.* v. *Oliver* (12); *Simpson* v. *London and North Western Railway Co.* (13); *Howe* v. *Teefy* (14)).

[RICH J. referred to *Withers* v. *General Theatre Corporation Ltd.* (15).]

(1) (1849) 4 Ex. 345; 154 E.R. 1245.
(2) (1871) L.R. 6 C.P. 206, at pp. 209 et seq.
(3) (1938) 2 All E.R. 788.
(4) (1856) 1 H. & N. 266, at p. 273; 156 E.R. 1203, at p. 1206.
(5) (1903) 2 Ch. 532.
(6) (1923) 32 C.L.R., at p. 167.
(7) (1924) 34 C.L.R. 434, at pp. 437, 438.
(8) (1932) 147 L.T. 503, at p. 511.
(9) (1911) 2 K.B. 786.
(10) (1936) 2 All E.R. 1625.
(11) (1928) 1 K.B. 269, at p. 281.
(12) (1930) A.C. 209.
(13) (1876) 1 Q.B.D. 274.
(14) (1927) 27 S.R. (N.S.W.) 301, at p. 306; 44 W.N. (N.S.W.) 102, at p. 104.
(15) (1933) 2 K.B. 536.

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The performance or otherwise of conditions precedent, and waiver and repudiation by parties were dealt with in *Bentsen* v. *Taylor, Sons & Co. (No. 2)* (1); *Mersey Steel and Iron Co. Ltd.* v. *Naylor, Benzon & Co.* (2), and *Fullers' Theatres Ltd.* v. *Musgrove* (3). Here there has not been a waiver.

E. M. Mitchell K.C. (with him *Snelling*), for the respondent. The contract should be construed in the light of the general knowledge as to the way in which the tramway system is operated, and the greater or lesser number of cars used having regard to the greater or lesser demand therefor during certain periods of each day. In the circumstances under which the contract was made the conditions relating to posters are, so far as they are capable of being applied, also applicable to roof boards. It was the obvious intention of the parties, which are business concerns familiar with commercial contracts, that the contract was not to be a rigid and inflexible one, and that failure strictly to comply with some of its terms was not to be a ground for cancelling the contract. As the appellant well knew, the respondent was merely a licensee and, as such, had no control over the running of the cars in general or of any particular cars or car. Thus it follows that the periods of display were intended to be, and must have been accepted by the appellant as, average and not precise. The intention was that each car upon which a board was displayed should during a period be used for transport purposes for an average of eight hours per day, that is, some days more and some days less, and not that each such car should be so used for not less than eight hours each day. This practice was followed from the outset and the fact that despite its knowledge of this practice the appellant continued for a long time to make payments under the contract constitutes a waiver of any supposed breach in this respect. The contract was so performed during a period of two years without complaint on the part of the appellant (*Watcham* v. *East African Protectorate* (4); *Van Diemen's Land Co.* v. *Table Cape Marine Board* (5); *Bacchus Marsh Concentrated Milk Co.*

(1) (1893) 2 Q.B. 274.
(2) (1884) 9 App. Cas. 434.
(3) (1923) 31 C.L.R. 524.
(4) (1919) A.C. 533.
(5) (1906) A.C. 92, at p. 98.

Ltd. (*in Liquidation*) v. *Joseph Nathan & Co. Ltd.* (1); *Farmer* v. *Honan and Dunne* (2)).

[DIXON J. referred to *Forbes* v. *Watt* (3).]

The evidence shows that the display per car, that is, per board, averaged an excess of eight hours per day. In construing two contemporaneous documents the court should adopt a construction which will reconcile them rather than one which will render them inconsistent (*In re Phoenix Bessemer Steel Co. Ltd.* (4); *Halsbury's Laws of England*, 2nd ed., vol. 7, pp. 330, 331). The respondent was entitled to continue the performance on its part of the contract notwithstanding that the appellant purported to repudiate it (*Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia* v. *Estate and Trust Agencies* (1927) *Ltd.* (5); *Mayne* on *Damages*, 10th ed. (1927), p. 123). The appellant did not put on a defence that there had not been performance according to the appellant's construction of the contract. On the question of the proceedings, the pleadings, the right to an amendment and the jurisdiction of the District Court, see the *District Courts Act* 1912 (N.S.W.), secs. 41-46, 62, 64, 84, 96; *Spencer, Whatley & Underhill* v. *Forster & Co.* (6); *O'Brien* v. *Smith* (7); *Farmer* v. *Upton* (8). Sec. 96 does not go to jurisdiction. Default summons and procedure thereon is merely an alternative method of procedure in respect of liquidated claims.

[DIXON J. referred to *Best* v. *Best* (9), and *Charlton* v. *Opie* (10).]

In the circumstances the appellant is not entitled to rely upon the non-performance of which it complains. Reasonable notice of the purported cancellation of the contract was not given (*Panoutsos* v. *Raymond Hadley Corporation of New York* (11)). In a claim for damages the onus is upon the claimant to prove the *quantum* of damages suffered. The appellant has not proved the extent of the alleged breach. Assuming that the respondent gave a guarantee in the sense contended for by the appellant that is not a term which went to the root of the contract, but is merely a warranty which

(1) (1919) 26 C.L.R. 410, at pp. 433, 436.
(2) (1919) 26 C.L.R. 183, at p. 197.
(3) (1872) L.R. 2 Sc. & Div. 214.
(4) (1875) 44 L.J. Ch. 683.
(5) (1938) A.C. 624, at p. 639.
(6) (1905) 1 K.B. 434, at p. 438.
(7) (1931) 48 W.N. (N.S.W.) 96.
(8) (1930) 46 T.L.R. 252.
(9) (1908) V.L.R. 1; 29 A.L.T. 82.
(10) (1916) 37 A.L.T. 215.
(11) (1917) 2 K.B. 473, at pp. 478, 479.

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would be the subject of damages in so far as the appellant could prove it had suffered any damage by a breach.

R. Lindsay Taylor, in reply. The method of calculating an average was discussed in *Doyle* v. *Sydney Steel Co. Ltd.* (1). Decisions dealing with documents partly printed and partly written are collected in *Smith's Leading Cases*, 13th ed. (1929), vol. 2, p. 491.

Cur. adv. vult.

Dec. 23.

The following written judgments were delivered :—

LATHAM C.J. The appellant, Luna Park (N.S.W.) Ltd., is a company which conducts an amusement enterprise in Sydney. The nature of the business of the respondent, Tramways Advertising Pty. Ltd., is shown by its name. On 10th December 1935 the two companies made an agreement for advertising the Luna Park entertainments in Sydney by means of fifty-three boards to be displayed on the roofs of tram-cars. The contract was to operate for three seasons ; a season begins about October and ends about March. One of the terms of the contract was as follows : "We guarantee that these boards will be on the tracks at least eight hours per day throughout your season."

After the second season the Luna Park Co. objected that the display contracted for was not being provided. The company contended that the provision quoted meant that each of the fifty-three boards would be on the tracks for at least eight hours on every day during three seasons. It is admitted that this service was not given. The advertising company, on the other hand, contended that the obligation imposed by the clause was performed if during each season each board was displayed for an average time of at least eight hours per day. According to this view of the meaning of the provision there would be no breach if no boards at all or only a small number of boards were shown on some days, provided that the display on other days was such as to bring the average for each board over a season to at least eight hours per day. It is admitted that if the provision bears this meaning the advertising company has performed its contract.

(1) (1936) 56 C.L.R. 545, at pp. 552, 562.

On 16th November 1937 the Luna Park Co. wrote a letter to the advertising company which stated:—"We have on a number of occasions pointed out to you that we have never had the service for which we contracted. It was intended, and is a term of the contract, that the fifty-three boards should be on the road at least eight hours per day throughout the season. From checks we have made from time to time and from the information contained in several of your letters it is quite clear that this service is not being given or anything like it, and as you have failed to carry out the contract we have to inform you that we do not consider ourselves bound by it any further."

The advertising company, however, on 6th January 1938, informed the Luna Park Co. that on that day the display of the full fifty-three boards had been completed, and that payment would be required for them. The Luna Park Co. immediately replied stating that the boards were being displayed "without our authority and notwithstanding the cancellation of the contract," and complained also that the information on the boards was incorrect.

The advertising company, after displaying the fifty-three boards for a month, sued the Luna Park Co. for £86 13s. 4d. upon a default summons in the District Court in respect of the period 6th January 1938 to 5th February 1938. The Luna Park Co. gave notice of defence, in which it was alleged that it was a term and condition of the contract that advertising matter should be displayed on fifty-three roof boards and that each of the said roof boards should be displayed for eight hours on each day throughout the contract period. The defendant also by way of cross-action claimed damages for breach of the contract. The learned District-Court judge agreed with the defendant upon the construction of the contract, dismissed the plaintiff's claim and gave judgment for £300 for the defendant on the cross-action. The plaintiff appealed to the Full Court which, by a majority (*Jordan* C.J. and *Davidson* J., *Nicholas* J. dissenting) (1), ordered that judgment be entered for the plaintiff for the amount claimed and that the cross-action be dismissed. *Nicholas* J. was of opinion that the plaintiff's action should be dismissed and that

(1) (1938) 38 S.R. (N.S.W.) 632; 55 W.N. (N.S.W.) 228.

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there should be a new trial of the cross-action limited to the question of damages. The defendant has now appealed to this court.

The determination of the appeal depends upon the interpretation of the clause which has already been quoted. The agreement consists of two documents, a letter and a contract note. The letter, dated 7th December 1935, was written by the advertising company to the Luna Park company. It stated that the advertising company would be prepared to accept a contract for fifty-three roof boards on Sydney trams, the advertising company to supply certain of the boards, to paint, erect and maintain them, the contract "to operate for the duration of two or three seasons." No rate of payment was specified, and it is clear that the letter was not an offer the acceptance of which could result in the making of a contract. The letter contained the following statement: "The average time that each car is on the tracks is eight hours per day, and we would recommend all routes serving the industrial suburbs." It is upon this statement that the argument of the plaintiff principally depends. The terms of the letter show that a form of contract note was forwarded with the letter.

On 10th December 1935 a contract note, which is the other document constituting the contract, was signed on behalf of the parties. It consisted of a printed form filled up in writing. It provided for what was described as a twelve months' service over three full seasons, with a minimum of fifty-two weeks. The form provided for (*a*) inside posters, and (*b*) roof boards. The reference to inside posters was struck out, but various provisions in the body of the note relating to posters as distinct from roof boards remained uncancelled. It was suggested for the plaintiff that these provisions should be applied to roof boards, but it is quite clear that the contract note draws a distinction between posters and roof boards and that it is not possible, upon ordinary principles of construction, to apply the poster provisions to roof boards. The contract note contained the following provision: "I/We agree to pay for such service at the rate of twenty pounds (£20) per week from date of first appearance of complete number of boards 53 in all, payable monthly." At the time when the contract note was signed the parties made two memoranda on the letter of 7th December. The first memorandum

signed on behalf of both parties, was : " This letter is part and parcel of the contract." The second memorandum, signed on behalf of the advertising company, consisted of the provision already mentioned, namely : " We guarantee that these boards will be on the tracks at least eight hours per day throughout your season."

The plaintiff contends that the reference to the average time for which the cars of the tramway service are on the tracks affects the construction of the " guarantee," which should accordingly be regarded as providing only for an average time of display. In my opinion this contention is opposed to the natural meaning of the words. What is called the guarantee is a guarantee as to each and every board. It is an undertaking that each board will be on the tracks for at least eight hours on every day all through each season. The statement in the body of the letter is a statement which indicates the nature of the service which the normal running of the cars would be expected to provide. It is clear, however, that the Luna Park company was not satisfied with a mere statement that the average time that each car was on the track was eight hours per day. It required something more definite. The guarantee is an undertaking which is not in any way inconsistent with the statement of fact contained in the letter. The effect of the undertaking, read with the statement in the letter, is that, whatever might be the average time that cars were on the track, the roof boards were to be displayed for at least eight hours on every day. The guarantee contains no reference to averages, and it is apparent that there may be business reasons why the defendant required regular and continuous publicity. I agree with what *Nicholas* J. says in his reasons for judgment—the guarantee " was an assurance to the advertiser that, whatever might be the ordinary practice of the Tramway Department, the boards advertising Luna Park would be on the track not only for an average period of eight hours but for eight hours on every day, and that by this means a proclamation of the allurements of Luna Park would continuously be thrust upon the attention of residents of the industrial suburbs " (1).

It follows that in my opinion the plaintiff must fail upon the claim because the plaintiff sues upon the special contract and has not

(1) (1938) 38 S.R. (N.S.W.), at p. 661.

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performed the contract in accordance with its terms. The plaintiff could not by any amendment succeed upon a common count for services rendered at the request of the defendant, because the alleged services were not so rendered. The defendant had not only not asked the plaintiff to display the boards but had asked the plaintiff not to display the boards. Thus there is no possibility of implying a request from the communications between the parties. Nor can a request be implied from a voluntary acceptance of benefits in fact provided though not in accordance with the terms of the special contract. The plaintiff displayed the roof boards, but the defendant did nothing which amounted to an acceptance of the services rendered.

In the cross-action, the defendant claimed damages for breach of contract by the plaintiff in not displaying the fifty-three roof boards daily throughout the whole contract period of fifty-two weeks. The claim therefore was based first upon the actual failure to display the roof boards as required by the contract during the first and second seasons, and secondly, as to the third season, upon a discharge of the contract alleged to have been rightfully brought about by the defendant and entitling the defendant to sue for damages even though the time for performance by the plaintiff had not expired.

It is admitted by the plaintiff that if the defendant's construction of the clause is adopted the contract has been broken by the plaintiff. Therefore, as a matter of course, the defendant is entitled to nominal damages. This right does not in any way depend upon whether the defendant was entitled for any reason to determine the contract. Thus, according to the construction of the clause which I regard as correct, there is no doubt whatever as to the defendant's right of action for damages for breach of contract in respect of the first two seasons. But the extent of the breach is quite uncertain. It appears from statements contained in letters written by the advertising company that seventeen of the trams bearing roof boards bore odd numbers and thirty-six of them bore even numbers. According to the system governing the trams, odd and even numbered cars were out on alternate days, assisted by even and odd numbered cars at peak periods. The letter from the advertising company contains

the statement that this system ensures each car in the various depots the same time on the track except in cases of overhaul and repair which are required periodically in the case of all cars. The facts stated are consistent with no display whatever of some, or even of all, of the roof boards on particular days. But it is quite impossible to ascertain from the evidence available the number of days upon which particular boards were not shown or, if shown, were shown for less than eight hours. Thus the extent of the breach is undetermined.

It is true that there are many authorities which establish that substantial damages can be awarded where a breach of contract is established, even though the calculation of the damages is "not only difficult but incapable of being carried out with certainty or precision" (*Chaplin* v. *Hicks* (1)): See also other cases dealing with damages for loss of publicity, *Marbe* v. *George Edwardes* (*Daly's Theatre*) *Ltd.* (2); *Herbert Clayton and Jack Waller Ltd.* v. *Oliver* (3); *Withers* v. *General Theatre Corporation Ltd.* (4). In all these cases, however, the extent of the breach was established. There was a complete failure on one side to perform the contract. In the present case, however, there has not been a complete, but only a partial, failure to perform the contract. The extent of the failure is unascertained. Thus the evidence which the defendant was content to put before the court does not make it possible to reach any estimate of damage suffered. I can see no reason why the defendant should be allowed to fight the matter over again. If a party chooses to go to trial with incomplete evidence he must abide the consequences. The fact that his evidence might have been strengthened affords no reason for ordering a new trial. Thus the defendant must be content, so far as the first and second seasons are concerned, with nominal damages.

In the Supreme Court a great deal of attention was devoted to the consideration of the question whether the particular clause in question was a condition or a warranty. As I have already stated, this question is unimportant in relation to the right of the defendant to claim damages for past admitted breaches. The defendant

(1) (1911) 2 K.B., at p. 791.
(2) (1928) 1 K.B. 269.
(3) (1930) A.C. 209.
(4) (1933) 2 K.B. 536.

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cannot, however, claim damages in respect of the third season unless he was entitled to determine the contract. If he was not so entitled then he has been guilty of a breach of contract for which the plaintiff is entitled to recover damages. The plaintiff, however, has not sued for such damages, although it was intimated before the District Court judge that the plaintiff desired, if necessary, to make an amendment in order to claim such damages. The learned judge held that, as such damages could be claimed only upon an ordinary summons and not upon a default summons, it was not possible to allow the amendment, because a default summons could not be amended so as to carry a claim which could not be made upon such a summons when originally issued. The Supreme Court disagreed with this decision. The question, however, does not arise if the defendant was entitled to determine the contract.

In my opinion the defendant was entitled to determine the contract for two reasons: first, by reason of the plaintiff's actual breaches of the contract, and, secondly, by reason of the plaintiff's evident intention (notwithstanding the challenge by the defendant) to continue to perform the contract in the future in the same manner as in the past. In the past the plaintiff had given and had intended to give only a display of an average of eight hours per day per board, and it was clear that the plaintiff intended to continue to perform the contract in the same way. I agree with the Full Court that the guarantee clause was a condition and not a warranty in the sense in which those words are used by *Fletcher-Moulton* L.J. in *Wallis, Son & Wells* v. *Pratt & Haynes* (1). It was a term of the contract which went so directly to the substance of the contract or was so "essential to its very nature that its non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all." The breach of such a term by one party entitles the other party not only to obtain damages but also to refuse to perform any of the obligations resting upon him.

The essential character of the clause in question appears both from its own terms and from the circumstances in which the contract was made. In the first place the words "we guarantee" are particularly suited, in a contract drawn by laymen, to emphasize

(1) (1910) 2 K.B. 1003, at p. 1012.

the importance of the clause which they introduce. In the next place, the payment of £20 per week was not to begin until the complete number of roof boards, namely, fifty-three, were all displayed at the same time. The money is made payable " from date of first appearance of complete number of boards 53 in all." Thus, if the advertising company displayed even as many as fifty-two boards on every day throughout a whole season, it would never become entitled to recover any payment. This provision in the contract therefore supports the view that the parties regarded the completeness of the display contracted for as an essential element in the contract. Further, the preliminary correspondence shows that the advertising company represented continuity of display as an important feature. In a letter of 27th November 1935 the company emphasized the offer as an offer of " an exclusive full-powered type of publicity that is *continuous day in day out and gets* 100 *per cent attention all the time.*" Reference was made in the same letter to the advantages of the " tremendous full-attention coverage available *continuously over the entire week.*" (The words italicized were typed in large print in the letter.) Reference to these statements is permissible because, when the question is whether a promise is a condition or a warranty, " there is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out" (per *Bowen* L.J. in *Bentson* v. *Taylor, Sons & Co.* (*No.* 2) (1)); and see *Halsbury's Laws of England*, 2nd ed., vol. 7, p. 333. A discontinuous and irregular display is a different thing from a guaranteed continuous and regular display. For these reasons, in my opinion,

(1) (1893) 2 Q.B., at p. 281.

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the clause was a condition and not a mere warranty. Accordingly any breach of the clause would entitle the defendant to determine the contract.

But it is still necessary to consider what default will amount to a breach of the clause. The clause used the words "at least eight hours," but, in my opinion, such a phrase should not be interpreted with absolute mathematical exactitude in a commercial contract of this class. In some contracts it may be proper to construe references to time with absolute and precise accuracy down to minutes and seconds, but in a contract dealing with the display of roof boards on trams for at least eight hours per day the words "eight hours per day" should be understood as meaning substantially eight hours per day. The clause would not, in my opinion, be broken by small occasional deficiencies. I give to this clause the same kind of construction which was given in *Bowes* v. *Chaleyer* (1) to such phrases as "half" the goods and "two months later." The court read these provisions as conditions but interpreted them as if the word "substantially" had been introduced into them. I take the admission that each board was not exhibited for at least eight hours a day as an admission that it was not the case that each board was exhibited for substantially eight hours each day. I am accordingly of opinion that the defendant was entitled to determine the contract by reason of the past breaches of the plaintiff.

But further, apart from any right of the defendant to determine the contract on account of breach of a condition in the past, the defendant was entitled to determine the contract on another ground. The plaintiff was prepared to continue the performance of the contract only upon the basis of the plaintiff's construction of the contract, that is, by giving an average daily eight hours' display of the roof boards. Probably this was the only way in which the plaintiff could perform the contract, because the plaintiff did not control the running of the trams. The position, therefore, was that the plaintiff had given the defendant the right to believe that the contract would not be performed according to its true construction. The circumstances were such as to justify the inference that breaches such as those which had already been committed would be committed in

(1) (1923) 32 C.L.R. 159.

the future. The plaintiff, therefore, must be regarded as renouncing the contract which it had in fact made, even though it was contended by the plaintiff that the contract would be properly performed: See *Withers* v. *Reynolds* (1); *Martin* v. *Stout* (2); *Millar's Karri & Jarrah Co. (1902)* v. *Weddel Turner & Co.* (3); *Morris* v. *Baron & Co.* (4). The defendant can justify the repudiation of the contract upon any ground which in fact existed whether or not such a ground was previously relied upon by him (*Shepherd* v. *Felt and Textiles of Australia Ltd.* (5)).

It follows that the defendant, having rightfully determined the contract, was entitled to claim damages for the non-performance by the plaintiff of the contract for the third season. Damages claimed in respect of that season must depend upon an estimate of the difference between what the defendant was bound to pay for that season, namely, £20 per week, and the benefit which the defendant would have obtained from the proper performance of the contract. That estimate would measure the loss suffered by the defendant by reason of non-performance of the contract. But no evidence whatever was given with respect to this subject, and there is therefore no basis upon which other than nominal damages can be estimated in respect of the third season. Accordingly in the cross-action there should be judgment for the defendant for one shilling as nominal damages, without costs.

The only question which remains outstanding is the question whether the plaintiff was entitled to amend the summons so as to claim unliquidated damages in respect of the repudiation of the contract by the defendant. As already pointed out, however, this question does not arise if the defendant was entitled to determine the contract. As in my opinion the defendant was so entitled it is not necessary to consider the question.

I think that the appeal should be allowed, the judgment of the Supreme Court set aside, and the claim of the plaintiff dismissed; the judgment for the defendant on the cross-action should stand except as to the amount of damages, which should be reduced to one shilling. The defendant is entitled to the costs of the action

(1) (1831) 2 B. & Ad. 882; 109 E.R. 1370.
(2) (1925) A.C. 359, at pp. 363, 364.
(3) (1908) 100 L.T. 128, at p. 129.
(4) (1918) A.C. 1, at p. 41.
(5) (1931) 45 C.L.R. 359.

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and of the appeal to this court. There should be no order as to the costs of the cross-action or as to the costs of the appeal to the Supreme Court, in which, in the opinion of this court, the plaintiff should have succeeded only in part and the defendant in part.

RICH J. The foundation of this case is the meaning to be attributed to two documents to which the parties committed their intentions. The subject is that of advertising upon trams by means of boards affixed thereto. Whatever skill may be claimed by the parties or one of them in the composition of clear and telling advertisements, it does not extend to the lucid exposition of their contractual intentions. Although their infelicity of style is accompanied by some lack of attention to grammar I think that the only safe course is to attribute that intention which the prima-facie grammatical meaning of their language expresses. The contractual clause on which the case turns is expressed in the following terms: "We guarantee that these boards will be on the tracks at least 8 hours per day throughout your season." It is a bold undertaking to deny the possibility of any words bearing a secondary meaning and I am not prepared to say that they are incapable of referring to the average performance of trams to which advertising boards were affixed. We live in a day when statistics and averages and other unrealities of our economic environment dominate the minds of even such realists as advertising agents and amusement proprietors. It is conceivable that the parties were thinking in such terms, but to my mind the natural meaning of their language is that the advertising company took the responsibility of guaranteeing that each and every board would be exhibited to the public gaze upon the tramways of Sydney for an aggregate of eight hours upon each and every day of the amusement proprietor's season. Unless I am required by context or subject matter to give another meaning I prefer to adhere to this. A consideration of context and subject matter discloses a not unusual number of doubts and difficulties as to what the parties did mean, but provides me with no satisfactory evidence that they had any definite meaning other than that which the natural construction of the words expresses. I, therefore, hold that the undertaking of Tramways Advertising Pty. Ltd. was that throughout the season

of Luna Park (N.S.W.) Ltd. each of the boards borne upon the roof of the tram would be seen upon the tracks for at least eight hours on each day. This undertaking was not fulfilled and, in my opinion, the Tramways Advertising Pty. Ltd. was not entitled to recover the amount it claimed under the contract. I agree, however, with the view taken by the Full Court and all my colleagues that the amount of £300 awarded to Luna Park (N.S.W.) Ltd. for breach of this undertaking is not supported by the facts proved.

I think that the appeal should be allowed and the judgment of the Full Court varied by discharging so much thereof as enters judgment for the plaintiff upon the plaintiff's claim and by entering judgment thereon for the defendant. I think there should be no order for costs of the appeal from the District Court to the Supreme Court but the respondent should pay the costs of the appeal to this court.

DIXON J. This litigation depends primarily upon the meaning to be placed upon a contract composed of a letter and a printed form, which is neither well expressed nor altogether appropriate for the particular purpose of the parties. The substance of the contract is that the respondent, which is an advertising agent, agrees with the appellant, which is described as an amusement proprietor, that in consideration of a weekly sum of £20 payable monthly, it will for fifty-two weeks, distributed over the three summer seasons beginning in December 1935 and ending in the earlier part of 1938, cause a specified number and kind of roof boards advertising the appellant's amusements to be carried upon tram-cars running upon certain lines or routes in Sydney. The chief point of dispute about the meaning of the contract arises upon a clause or provision describing the amount of time which the roof boards, or the trams carrying them, are to appear upon the tramway tracks. The letter formed part of the negotiations resulting in the contract which the printed document was intended to embody. It bears a memorandum signed by the parties stating that it is part and parcel of the contract. The letter itself contains a statement that the average time that each car is on the track is eight hours a day ; but at the foot of the letter another memorandum or note has been added by which a more explicit

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undertaking is given by the respondent. It runs : "We guarantee that these boards will be on the tracks at least eight hours per day throughout your season." The respondent interprets this clause as meaning that, if an average is taken over each season of the running time of all cars bearing the roof boards, it should be found to work out at not less than eight hours a day a car. The appellant interprets it to mean that on every day during a season every car bearing a roof board must spend not less than eight hours in running upon the tracks.

In the Supreme Court *Jordan* C.J., with whom *Davidson* J. concurred, gave the provision an intermediate meaning. He took it as requiring a daily running time of eight hours upon an average only and not an actual running time of that duration upon each and every day of a season, but he did not interpret the clause as allowing the average to be taken over all the tram-cars collectively. According to his Honour's interpretation, the average of each car bearing a roof board must be taken separately over the season and must work out at an average running time of eight hours a day. In this interpretation I agree. The reasons for it, a statement of which is contained in his Honour's judgment, may be summarized as follows: —(1) The form of expression adopted in the memorandum or note, saying that the boards would be on the tracks eight hours per day throughout the season, appears to me to be capable of meaning that the duration of the appearance of the boards upon the tracks would amount upon an average to eight hours a day. (2) The body of the letter represents that the average that each car is on the tracks is eight hours per day, and that form of statement (*a*) implies that sometimes a car is more and sometimes less time upon the tracks, but (*b*) limits the average to the performance of each separate car and does not admit of taking the average over all the cars. (3) The respondent which gave the guarantee or promise is not in control of the tramways, and upon the face of the documents it plainly appears that what it is purporting to do is to warrant the time during which, in the usual course of management of the service upon the routes concerned, the advertisements will be exhibited in the public streets. During a season the withdrawal for a day or so of one at least of a number of tram-cars is almost certain to be

found necessary. If routine examination and repair do not require it, some accident or mishap is almost sure to do so. To make the guarantee absolute in respect of every day for every car appears an unreasonable construction. (4) At the end of the 1935-to-1936 season the respondent made it clear to the appellant that the performance or fulfilment it was giving was according to an average only, and the appellant took no objection to the assumption thus impliedly made as to the meaning of the clause. (5) The addition to the letter of the memorandum or note is sufficiently explained by a desire on the part of the appellant for an explicit promise or guarantee of what had only been stated as a matter of information, viz., the average time on the tracks of a tram-car bearing a board.

The three interpretations which I have already mentioned do not exhaust the meanings to which the contract is open in reference to the duration of time for the appearance of the boards in the streets. A fourth view makes the respondent promise that on each and every day during a season an average taken over all the trams carrying boards will work out at not less than eight daily hours a tram.

Nicholas J., who dissented, mentioned a fifth meaning as suggested, but only to reject it. The suggestion was that the provision required the display of the roof boards for an average period of eight hours a day during a season, but so that some portion of every day during the season must be included. *Nicholas* J. himself adopted the appellant's interpretation of the contract, an interpretation which he based upon the primary meaning of the language used in the added memorandum or note expressing the obligation.

In choosing among the various meanings proposed, it is impossible to do more than attach that interpretation to the contract which to the individual mind appears most favoured by the evidential considerations comprised under the three heads of grammatical construction, context and subject matter, when brought into combination. My own choice may be the result of giving greater weight to context and subject matter than to the exact grammatical construction which the language of the clause, isolated from other considerations, might seem presumptively to bear. But we are not dealing with phrases or expressions of a fixed prima-facie import. The clause is inartificial, an unstudied production in ordinary words. " A word

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is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used" (*Towne* v. *Eisner* (1), per *Holmes* J.). It may be suspected that in the case now in hand the living thought was itself incomplete and ill-considered. But the actual intention of the parties and the implications which are involved must be discovered from the entirety of the writings. The verbal skin in which the particular meaning has been encased does not appear to me incapable of containing either of the two rival intentions which respectively commended themselves to *Jordan* C.J. and *Davidson* J., on the one hand, and to *Nicholas* J. on the other. That is to say, as I have already stated, I think that, as a matter of ordinary English, the language of the memorandum or note added to the letter is susceptible of the construction which the majority of the Supreme Court have placed upon it and the weight of probability favours that construction as the true meaning of the parties.

Once this meaning is placed upon the contract, the decision of the appeal rests upon matters of evidence and of procedure.

The respondent sued by a default summons in the District Court to recover payment for one month from 6th January to 5th February 1938 at £20 a week. But it gave no evidence that, construed in the manner stated, the guarantee contained in the added memorandum or note had been fulfilled or complied with. On the other hand, the appellant, who was defendant in the action, filed no notice of defence which denied performance or compliance either *simpliciter* or according to the meaning I have placed upon the provision.

Sec. 69 (2) of the *District Courts Act* 1912 (N.S.W.) enacts that at the trial of an action brought by default summons the defendant shall not, except with the consent of the plaintiff or by leave of the judge, set up any grounds of defence not included in the notice of defence. As matters stood, the respondent was not bound to prove compliance. The defences which it did file placed upon the contract what I may call the appellant's construction, or a construction analogous thereto, and stated a discharge by breach, by reason of which, before the period in respect of which the respondent sued, the appellant had refused to be further bound by the contract. Owing to an amendment the reason for which has not been explained, one of these defences somewhat lost its form and significance.

(1) (1918) 245 U.S. 418, at p. 425; 62 Law. Ed. 372, at p. 376.

By way of cross-action, the appellant sought to recover damages from the respondent for non-performance of the contract. Again the appellant assigned to the contract the interpretation which I have called its, or one analogous to it. Upon the cross-action it recovered £300 damages; but I agree in the view taken by all the judges of the Supreme Court that, even adopting that interpretation, the assessment of damages could not stand, for the reason that the extent and character of the breach was not proved and no evidence of actual damage was given.

In this state of affairs, the respondent in strictness is entitled, assuming the correctness of the interpretation I have adopted, to judgment upon the claim and upon the cross-action. But it seems highly probable that it has not performed the contract so interpreted, or at all events that, if it has done so, it is only by chance and it would be difficult for it to establish performance.

The trial in the District Court was unsatisfactory. When the respondent proposed to go into evidence of performance on its part, that is, as I understand it, performance according to the meaning which the respondent placed upon the contract, its evidence was rejected on quite untenable grounds.

It would, I think, have been open to the Supreme Court to direct a new trial, giving the appellant leave under secs. 68, 69, 75 (2) and 96 of the *District Courts Act* to file fresh defences in lieu of those of which it gave notice and giving the respondent leave to amend.

Although on the view I take I would not have substituted such an order for that actually made by the Supreme Court, I would not have been prepared in the circumstances to dissent from an order for a new trial upon such terms, if such an order had found favour. As it is, I think the appeal should simply be dismissed.

McTiernan J. In my opinion the appeal should be allowed, and the verdict given for the appellant in the District Court restored, the verdict in that court for the appellant in the cross-action for £300 set aside, and a verdict for nominal damages in the sum of 1s. be entered for the defendant in lieu of that verdict.

In my opinion the correct construction of the contract is that the respondent undertook that the roof boards would be displayed for at least eight hours during each day of each season. That construction is the one which most closely follows the words of the contract itself. It was admitted on behalf of the respondent that

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each board was not on the road for eight hours each day. Moreover, it was proved that early in September 1937, when the appellant's third season was approaching, its representative told the respondent's representative that unless it could give better service than it had given in the past the appellant would not continue the service any longer, and that the respondent's representative said that it would not be possible for it to give better service than it had in the past. The appellant's representative is proved to have said that what the respondent had done was not good enough. This evidence shows that the respondent repudiated its obligation under the contract to display the roof boards for at least eight hours during each day of the season. I agree with the Chief Justice that this was an essential condition of the contract. Its repudiation justified the appellant in terminating the contract. The termination of the contract effectively barred the respondent from claiming any payment for any advertising which did not fulfil the above-mentioned conditions of the contract. It follows that the respondent's action should fail.

The appellant in its turn claimed damages in a cross-action for breach of the condition. It was admitted that there was a breach of the condition. But there is no evidence of the extent of the breach. It might, so far as the evidence goes, have deprived the appellant of much or an insignificant amount of the advertisement which the respondent had on the true construction of the condition promised. The verdict on the cross-action assessing damages for the loss of advertising at £300 should not, in my opinion, stand. The evidence does not justify a verdict in the cross-action for more than nominal damages.

Appeal allowed with costs. Order of the Supreme Court discharged. Judgment for defendant with costs in the action restored. Judgment for defendant in the cross-action set aside and judgment entered for defendant therein for one shilling without costs. No order as to costs of appeal to the Supreme Court.

Solicitors for the appellant, *Primrose & Primrose.*
Solicitor for the respondent, *H. N. Chippendall.*

J. B.