[HIGH COURT OF AUSTRALIA.]

WHITE AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS AND DEFENDANTS,

AND

AUSTRALIAN AND NEW ZEALAND THEATRES LIMITED . . . . . RESPONDENT.
DEFENDANT AND PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1943.

SYDNEY, *April* 8, 9, 29.

Latham C.J., Rich, Starke and Williams JJ.

Contract—Construction—Theatrical artists—"Sole professional services"—Extrinsic evidence—Condition to do "as required and directed by the" theatre proprietor—Artists' right to act as producers—Denial by proprietor—Breach—Repudiation—Damages.

A written contract between two theatrical artists and a company which owned and controlled theatres in Australia provided that the company engaged the "sole professional services" of the artists "as required and directed" for a stated period on certain terms and conditions as to remuneration. The contract did not specify the nature of the said professional services.

Held that extrinsic evidence was admissible to identify such services.

Held, further, that upon the evidence so admitted the artists were employed under the contract in their capacities of theatrical artists and producers in relation to a certain revue and that, though the company was willing to continue to pay salaries in accordance with the contract, their exclusion by the company from all the work of producing the revue was a breach which went to the root of the contract and entitled the artists to refuse to continue to perform any other part of the contract and also to recover damages.

Decisions of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought by them in the District Court, Sydney, the plaintiffs, Eric Edgley White and Clem Dawe White, otherwise Clement Edward White, alleged that in consideration that the

plaintiffs would construct, devise and produce a certain theatrical revue and give their sole professional services thereto for a certain period the defendant, Australian and New Zealand Theatres Ltd., promised the plaintiffs to employ them at a certain salary in the said capacities for the period and that although the plaintiffs were always ready and willing to perform the agreement on their part except in so far as they were excused and prevented by the breaches of the defendant the defendant repudiated the agreement and refused to be bound thereby whereby the plaintiffs lost the benefit of the agreement and the profits they otherwise would have made therefrom. The plaintiffs claimed the sum of £400, the statutory limit, and abandoned any excess over that sum.

A similar sum was claimed by the company in an action brought by it against the Whites in which it was alleged that in consideration that the company would engage the sole professional services of the Whites for reward the Whites promised the company to well and truly render their exclusive professional services to act, perform, sing, dance or otherwise exercise their talents at such theatres and other places of public amusement as required and directed by the company in Australia and New Zealand and for a certain period and that although the company was always ready and willing to perform the agreement on its part save in so far as it was excused and prevented by breaches of the Whites the Whites repudiated the agreement and refused to be bound by it whereby the company lost the benefit thereof and the profits it would otherwise have made thereunder.

On 14th October 1941, at Melbourne, an agreement was signed between the parties in the following terms :—" Messrs. Eric Edgley & Clem Dawe, Melbourne. Dear Sirs, Confirming our negotiations, it is agreed that my Company engages your sole professional services from November 29th 1941, on the following terms and conditions : . . . All other terms and conditions to be as per our printed form of contract dated October 16th 1940 with the exception of the provision that my company contributes £100 to your transportation and fares from South Africa, which obligation has already been discharged. Yours truly, Australian & New Zealand Theatres Ltd. F. S. Tait, Managing Director. We agree to above—Clem Dawe Eric Edgley."

The printed form referred to in the agreement is a document containing twenty-four clauses incorporating a group of thirty rules and regulations. Clause 1 provides : " The company hereby employs the artist and the artist hereby agrees to well and truly render their exclusive professional services to act, perform, sing,

H. C. OF A. 1943. WHITE v. AUSTRALIAN AND NEW ZEALAND THEATRES LTD.

dance, or otherwise exercise her talents at such theatres, opera houses, halls, cabarets, places of public entertainment, and for films, radio, television and recordings as required and directed by the company in Australia, New Zealand, for a period of thirteen weeks, commencing on or about the 21st December, 1940." Clause 11 provides: "The company shall have the right to immediately terminate this agreement summarily and without notice or payment in the event of the artist refusing or neglecting to appear and perform or to fulfil any of the conditions of this agreement, or any of his/her duties thereunder, or to obey any lawful orders given by or on behalf of the management or by any responsible officer of the company, or being guilty of any wilful act of insubordination or inattention to their duties, and the artist shall in such cases be entitled to such proportionate part of his/her salary as they shall actually have earned. Such termination shall not affect any other of the company's rights under this contract."

The District Court Judge held that there was evidence that the company agreed to employ the Whites to carry out, amongst other duties, those of producers, and the company had repudiated the agreement by supplanting them in the work of production. He awarded the Whites £400 in their action, and found a verdict for them in the company's action.

The Full Court of the Supreme Court of New South Wales allowed appeals against those decisions and in the action by the Whites ordered that the verdict and judgment for them be set aside and judgment entered for the company. In the action by the company it was ordered that the verdict and judgment for the Whites be set aside and judgment entered for the company in the sum of one shilling.

From those decisions the Whites appealed to the High Court.

Further facts appear in the judgments hereunder.

Shand K.C. (with him *Beale*), for the appellants. It was a material term of the contract that the appellant Eric Edgley White should carry out, *inter alia*, the duties of a producer. All negotiations were on the basis of production by that appellant. In the circumstances parol evidence was admissible to define exactly what was the area of employment (*Bacchus Marsh Concentrated Milk Co. Ltd.* v. *Joseph Nathan & Co. Ltd.* (1); *Price* v. *Mouat* (2); *Kelantan Government* v. *Duff Development Co. Ltd.* (3); *Charrington & Co. Ltd.* v. *Wooder* (4)). Under the contract the respondent was bound

(1) (1919) 26 C.L.R. 410, at p. 427.
(2) (1862) 11 C.B. (N.S.) 508, at p. 511 [142 E.R. 895, at p. 896].
(3) (1923) A.C. 395, at pp. 411, 412.
(4) (1914) A.C. 71, at p. 77.

to provide employment for Eric Edgley White as a producer of revue (*Herbert Clayton and Jack Waller Ltd.* v. *Oliver* (1)). The appellants were entitled to and bound to produce but were also bound to perform such stage parts as were assigned to them. Primarily and essentially on the oral evidence and the conduct of the parties there was a contract that the appellants should be and remain producers. The depriving of the appellants of the publicity attendant upon the fact that they were producers went to the root of the contract (*Herbert Clayton and Jack Waller Ltd.* v. *Oliver* (2) ; *McCarthy* v. *Windeyer* (3)).

Barwick K.C. (with him *Asprey*), for the respondent. The extrinsic evidence relating to the contract was wrongly admitted. There is no evidence of (*a*) the contract set up by the appellants, (*b*) a breach thereof or of any contract, (*c*) repudiation by the respondent, or (*d*) any loss of enhancement of reputation due to the breach. It is not denied that *de facto* the appellant Eric Edgley White was a producer in the " stage director " sense, but he was never a producer *de jure*, that is, in the sense that he had a contractual right. There is only one relevant agreement between the parties. It is in writing and is constituted by the printed document and the letter bearing date 14th October 1941. It is manifestly an artist's contract. It is self-contained, unambiguous and needs no explanation ; therefore extrinsic evidence was and is inadmissible. As it is unambiguous the conduct of the parties thereunder does not affect the interpretation thereof (*Beal's Cardinal Rules of Legal Interpretation*, 2nd ed. (1908), pp. 126-128). The respondent was not bound to allow the appellant Eric Edgley White to produce merely because it had retained him as a producer (*Grimston* v. *Cuningham* (4)). Assuming that producing constituted one of the other talents within the meaning of the written contract, nevertheless the respondent was not bound to call upon them to exercise all their talents ; this aspect is covered by the words " as required and directed " which appear in the contract. The claim to damages made by the appellants was limited to loss of salary and did not include loss of enhancement of reputation. The principle as to damages was discussed in *Withers* v. *General Theatre Corporation Ltd.* (5).

Beale, in reply. There is evidence (*a*) that the appellants were to be the producers of the revue, (*b*) that the production was an

(1) (1930) A.C. 209.
(2) (1930) A.C., at p. 217.
(3) (1925) 26 S.R. (N.S.W.) 29; 42 W.N. 175.
(4) (1894) 1 Q.B. 125.
(5) (1933) 2 K.B. 536.

H. C. OF A. 1943.

WHITE v. AUSTRALIAN AND NEW ZEALAND THEATRES LTD.

April 29.

important element in the contract, and (*c*) that the appellants were supplanted under circumstances which made it intolerable for them to remain. The meaning of the words " or otherwise " in a contract was considered in *Sutton* v. *London, Chatham, and Dover Railway Co.* (1).

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. The appellants sued the respondent in the District Court (N.S.W.) for damages for breach of contract and recovered judgment for £400. The action was tried by a judge without a jury. There was a cross-action by the respondent claiming damages for breach of contract which the learned District Court Judge dismissed. Upon appeal to the Full Court upon the ground that there was no evidence to support the findings of the learned judge, the judgments were set aside, the action of the plaintiff was dismissed, and judgment was given for the defendant in the cross-action for one shilling damages.

The relevant facts are stated fully in the judgments of my brothers *Starke* and *Williams*, which I have had the advantage of reading, and I do not restate them. I can indicate shortly my reasons for agreeing that the appeal should be allowed.

The contract between the parties, which is in writing, provides that the respondent company engages the " sole professional services " of the plaintiffs for a stated period on certain terms and conditions as to remuneration. The contract contained an option of extending the period of employment and it also provided that all other terms and conditions were to be in accordance with a printed form which was identified.

The contract does not specify the nature of the professional services which the company hired and which the plaintiffs undertook to perform. It was therefore not only proper, but, indeed, necessary, to identify such services by means of extrinsic evidence. The law upon this subject was summarized by *Isaacs* J. in *Bacchus Marsh Concentrated Milk Co. Ltd.* v. *Joseph Nathan & Co. Ltd.* (2) in the following words : " It is not legitimate to refer to such " (that is, extrinsic) " evidence either for the purpose of adding a term to the written agreement or of altering its ordinary legal construction, and therefore it is not legitimate to show that it was intended to use words bearing a different sense from that which the words used express when applied to the circumstances. But it is legitimate to adduce extrinsic evidence of the surrounding circumstances in order

(1) (1896) 12 T.L.R. 425.

(2) (1919) 26 C.L.R., at p. 427.

to prove that words susceptible of more than one meaning are applicable to one only of those meanings—that is, not to alter the contract but to identify its subject. Further, for the purpose of identifying the subject of the contract, prior negotiations are available just as any other circumstance would be. But the prior negotiations cannot be used for the purpose of importing additional or different terms—that is, terms other than the words actually used express when the subject matter is fully identified."

In the present case there was evidence that the services to which the contract referred were services of the plaintiffs as theatrical artists in revue and pantomime and as producers in revue. I agree with the learned Chief Justice of the Supreme Court that " there is no evidence that the parties at any stage of their negotiations were discussing, with a view to a contract being entered into for that purpose, the idea of the Whites or either of them being appointed producers for the company, or that any agreement to that effect was ever contemplated or arrived at." In my opinion, however, the plaintiffs' case does not depend upon establishing that they were to be employed generally as *the producers for the company*. They establish their case if they show that the contract was a contract whereby they were to be employed in their capacities of theatrical artists and producers. There is, in my opinion, properly admissible evidence that they were so engaged in relation to a revue called " Thumbs Up." The details of that evidence are set out in the judgment of my brother *Williams*. In the Supreme Court particular attention was paid to a statement by Eric Edgley White in his evidence—" I conferred with Mr. Tait, but when it came to a showdown he was still the producer of the show." The accuracy of this report of the evidence is challenged. It is said that " he " should be " I." I hardly need the concurrence of the learned trial judge in this correction to be satisfied that the report is erroneous. But, even if the report is accepted as accurate, the statement is inconsistent with all the other evidence on this point given by the witness, and it was open to the learned judge to accept and to act upon that other evidence.

Under a contract of this character the employer is not only bound to pay the remuneration agreed upon, but is also under an obligation to afford an opportunity to the persons employed to exercise and display their talents (*Marbe* v. *George Edwardes* (*Daly's Theatre*) *Ltd.* (1); *Herbert Clayton and Jack Waller Ltd.* v. *Oliver* (2)). The evidence shows that the plaintiffs were excluded from all the work of producing the revue. This was a breach of contract which

(1) (1928) 1 K.B. 269. (2) (1930) A.C. 209

H. C. OF A. 1943. WHITE v. AUSTRALIAN AND NEW ZEALAND THEATRES LTD. Latham C.J.

went to the root of the contract and entitled the plaintiffs to refuse to continue to perform any other part of the contract. The defendant company was prepared to pay the plaintiffs the remuneration contracted for, but, for the reason which I have stated, the mere payment of remuneration was not a performance of the defendant's obligations under the contract. The plaintiffs were therefore entitled to refuse to carry out the contract further and also to recover damages. There is no dispute that if the plaintiffs are entitled to damages they are entitled to £400, the sum awarded by the learned District Court Judge.

In my opinion the appeals should be allowed and the judgments of the District Court should be restored.

RICH J. I concur in the judgment of the other members of the Bench and agree that the appeals should be allowed.

STARKE J. Appeals from judgments of the Supreme Court of New South Wales in Full Court in consolidated appeals.

The appellants, Eric Edgley White and Clem Dawe White, known professionally as "Edgley and Dawe," whom I shall call the artist, sued the respondent, Australian and New Zealand Theatres Ltd., whom I shall call the company, in the District Court for breach of an agreement whereby the company engaged the "sole professional services" of the artist. And the company sued the artist for breach of the same agreement. The District Court found a verdict for the artist for £400 damages and entered judgment for the artist in the cross-action.

The Supreme Court allowed an appeal on the part of the company from these judgments and set aside the verdict and entered judgment for the company in the action brought against it by the artist and in the action brought by it against the artist set aside the judgment and entered judgment for the company in the sum of one shilling. The artist appeals to this Court from these judgments.

The rights of the parties depend upon a theatrical contract in which their obligations are not explicitly set forth and which leaves much to the good sense and loyalty of the parties for its successful operation. So far as relevant the contract is expressed in a letter to the artist which was accepted by the artist, in these terms:— "It is agreed that" my company engages your sole professional services from 29th November 1941, on the following terms and conditions:—(1) Duration of contract to be twenty-six weeks; guaranteed period to be twenty-two weeks. (2) The salary is set forth in this clause for revue, for pantomime, if played twice daily, and for pantomime matinees and revue at night. (3) An option is

given to the company by this clause to extend the contract for any period not exceeding twenty-six weeks upon the same terms and conditions, " all other terms and conditions to be as per our printed form of contract."

The printed form of contract provided, so far as material :—

1. The company employs the artist and the artist agrees to well and truly render their exclusive professional services to act, perform, sing, dance, or otherwise exercise their talents at such theatres, opera houses, halls, cabarets, places of public entertainment, and for film, radio, television and recordings, as required and directed by the company in Australia, New Zealand, for a period of thirteen weeks.

3. (*b*) The artist hereby agrees to perform and render for the company or any other company, firm, person or persons nominated by the said company, all such characters, parts, specialties, turns, transcriptions and recordings as may be assigned to him or her, and to rehearse (free of cost), understudy, play, sing, dance, record, broadcast, televise, and perform to the best of his or her ability, whenever and wherever required by the company so to do, during the term of the agreement, any or all such characters, parts, specialties, or turns as may be assigned to him or her in a correct and painstaking manner, paying strict regard to " make-up " and proper dressing of the character assigned.

8. The artist agrees that he/she will not during the currency of this agreement act, sing, perform, manage or appear or take part in any theatrical or musical performance or appear in any public or private place of entertainment whatever or take part in the performance of any production for any firm or proprietary, without the consent of the company in writing first had and obtained.

11. The company shall have the right to immediately terminate this agreement summarily and without notice or payment in the event of the artist refusing or neglecting to appear and perform or to fulfil any of the conditions of this agreement, or any of his duties thereunder, or to obey any lawful orders given by or on behalf of the management or by any responsible officer of the company.

The contract belongs to the class or category of contracts in which the employer engages not only to pay the agreed remuneration but also to afford the employee an opportunity of doing the work for which he is engaged (*Marbe* v. *George Edwardes* (*Daly's Theatre*) *Ltd.* (1) ; *Herbert Clayton and Jack Waller Ltd.* v. *Oliver* (2)). But the work or " professional services " which the employee can be called upon to give is not precisely stated. The artist is, no doubt, a revue and pantomime artist. But what is the artist to do ? The

(1) (1928) 1 K.B. 269. (2) (1930) A.C. 209.

H. C. OF A. 1943.

WHITE v. AUSTRALIAN AND NEW ZEALAND THEATRES LTD.

Starke J.

printed and common form conditions do not answer the question, for they are drawn in general terms to cover the work of all artists employed by the company and must be construed in relation to the talent possessed by the particular artist who is employed.

Argument was addressed to the question whether the artist, on the true construction of the contract, stipulated for services as a team—an expression used in argument—or, to adopt an expression of one of them, for appearance together, as opposed to a separate appearance of each of them. It is unnecessary, I think, in this case to decide the point, but I would observe that the individual talents of the artist were in fact used in combined and in separate "turns" on the same programme, which I think, was quite in accordance with the terms of the contract.

The printed form of contract provided, it will be remembered, that the artist should render services as required and directed by the company. It was argued that this gave the company complete authority to direct at any time the nature and character of the service that the artist was to perform within the scope of revue and pantomime. The company has, no doubt, the direction and control of the theatrical performances that it will produce and of the times and places at which they will be produced, the rehearsals to be held, the run of the performance and so forth. But it agrees to give the artist a reasonable opportunity of rendering the service for which the artist was employed, and it has no right to say the artist shall not perform at all or shall not perform what the artist has been required to do: See *Marbe* v. *George Edwardes* (*Daly's Theatre*) *Ltd.* (1).

This leads to a consideration of the facts of the particular cases now before the Court. The artist had been employed by the company under the agreement already mentioned in producing and performing in a revue known as "Funny Side Up." The artist Eric Edgley White was the producer, and both he and Clem Dawe White, the other artist, were performers in the revue. This revue ran for some time, and then another revue called "Thumbs Up" was suggested. The artist was asked to produce, provide and devise a revue, to be known as "Thumbs Up," exactly the same as in "Funny Side Up." And the artist did so. The artist Eric Edgley White acted as the producer, and both he and Clem Dawe White, the other artist, were, I gather, performers in the revue. It opened about the end of November 1941. In February 1942 the company intimated that it was expecting too much of the producing artist to attend to the stage direction and watch the revue from the audience

(1) (1928) 1 K.B., at pp. 285, 289, 290.

viewpoint. Accordingly it had decided to bring in one Chapman to supervise the running of the production and make alterations as decided by the directors, and the hearty co-operation of the artist was requested. But the artist objected, because to do so would affect the artist's standing as a producer. The company, however, insisted, and Chapman took over the production. The artist intimated that this constituted a breach of the contract and released the artist from any obligation to appear, and accordingly the artist refused to, and did not, appear further in the revue called " Thumbs Up."

It was contended for the company that no breach took place, because the artist was not engaged as producer and acted voluntarily. Evidence, however, of the service under the contract was admissible to explain the meaning of the words " professional services " used in the contract and the course of dealing between the parties under this contract. And evidence was tendered and admitted which disclosed that the talent possessed by the artist and used by the company was performing in and producing revue, and the artist might also, I should think, have been required to produce pantomime, for that was part of the artist's talent. Further, it was said that there was no breach of contract, because the artist was bound to do " as required and directed by the company," which was entitled to withdraw the artist from production and confine the services to that of performers.

It is open to question, I think, whether under the contract in this case the company was bound to give the artist a reasonable opportunity of producing as well as performing. But the fact, and, to my mind, the decisive fact, in this case is that the artist was " required and directed," to use the words of the conditions, to produce and to perform in the revue called " Thumbs Up " and did so produce and perform in it. In my judgment, once that requirement and direction was made and given, the artist was bound so to act upon it and the company was equally bound to allow the artist to act as the producer of " Thumbs Up " and to perform in it. The company might control the times and places of performance, the run of the revue, and do many other things in the way of management. But it was not entitled to say that the artist should not act as the producer of the revue known as " Thumbs Up " and to substitute another producer to whose directions the artist should conform. It was a breach of the contract on the part of the company and so important from the point of view of the artist's reputation that it went to the root of the contract, and entitled the artist to treat the contract at an end and to refuse to perform it further on their part and to sue the company for damages for the breach.

H. C. OF A. 1943. WHITE v. AUSTRALIAN AND NEW ZEALAND THEATRES LTD. Starke J.

But the company insists that there was no damage, for it was always ready and willing to pay the artist the salary stipulated in the contract. It is, however, now settled that the artist is entitled to substantial damages in addition to the loss of salary for the loss suffered in the refusal to employ the artist in the manner contemplated by the contract.

The District Court assessed the damages for breach of the contract at £400, and the *quantum* has not been challenged if the company was guilty of a breach of contract for which substantial damages might be given in respect of the refusal of the company to employ the artist as a producer.

The result is that the appeals should be allowed and the judgment in favour of the artist for £400 damages should be restored.

WILLIAMS J. The appellants are two brothers who made a joint contract with the respondent company which was reduced to writing and embodied in a letter dated 14th October 1941 written by the respondent to the appellants. The letter is in the following terms :—

" Australian & New Zealand Theatres Ltd.,
Comedy Theatre, Exhibition St.,
Melbourne, 14th October, 1941.

Messrs. Eric Edgley & Clem Dawe, Melbourne.

Dear Sirs,—Confirming our negotiations, it is agreed that my Company engages your sole professional services from November 29th 1941, on the following terms and conditions :—(1) Duration of contract to be twenty-six (26) weeks ; guaranteed period to be twenty-two (22) weeks. (2) Salary to be as follows :—(*a*) for Revue, £75 per week, and in addition 7% of the gross receipts in excess of £1,000 per week ; (*b*) For Pantomime, if played twice daily, salary to be £90 per week ; (*c*) If Pantomime, matinees and Revue at night, salary to be £75 per week ; and in addition $2\frac{1}{2}$% of the gross takings of the Revue only. (3) My company to have the option of extending this contract for any period or periods not exceeding twenty-six (26) weeks upon the same terms and conditions as above.

All other terms and conditions to be as per our printed form of contract dated October 16th 1940, with the exception of the provision that my Company contributes £100 to your transportation and fares from South Africa, which obligation has already been discharged.

Yours truly,
Australian & New Zealand Theatres Ltd.
F. S. TAIT, Managing Director.

We agree to above—Clem Dawe.
Eric Edgley."

The appellants have been engaged in the theatrical business for many years. It has been their practice to make a joint contract so as to be associated together in the same productions. Eric Edgley White is both an actor and a producer. He has had twenty years' experience as a producer and has devised and produced over forty revues, in practically all of which he and his brother have also taken part as performers. Clement Edward White is an actor, but he gives his brother some assistance in his work as a producer.

On 16th October 1940 an agreement was made between the appellants, who were then in South Africa, and the respondent, under which the appellants agreed to proceed from South Africa to Australia to perform for the respondent. This is the agreement referred to in the letter of 14th October 1941 as the printed form of contract. The appellants came to Australia and acted in pantomime for six weeks. They then devised and produced for the respondent a revue called "Funny Side Up." This revue opened in Melbourne in April 1941, where it ran for nine weeks; it then ran in Sydney for six weeks and in Brisbane for two and a half weeks. Eric Edgley White supervised the stage production and he and his brother acted in it. The programme stated that he was the producer. While this revue was being performed the respondent suggested that he should prepare a layout for a new revue, which he immediately commenced to do. Early in October 1941 the appellants had correspondence and conversations with Messrs. F. and E. J. Tait, the joint managing directors of the respondent, with reference to the new revue, which was to be called "Thumbs Up." They then proceeded to devise and produce the new revue in exactly the same way as they had devised and produced "Funny Side Up." They said that during these negotiations it was suggested that Mr. Chapman, a permanent employee of the respondent, should assist in the production, but that they refused because this would affect their status as producers in outside theatrical circles.

Eric Edgley White gave the following evidence with respect to the work involved in setting up and producing a revue:—"First of all I gave them an explanatory long written list showing scene by scene what it would consist of, how many people were in it, and the various sketches and items in it—a typewritten explanation showing the whole show; I then submitted it to Mr. Frank Tait and it was O.K'd and then I would immediately get to work and show the plots for every department—such as for the people who make the scenery, telling them what the scenery should consist of and what it would represent, and for the property people what properties and furniture had to be made and the wardrobe mistress

H. C. OF A. 1943.

WHITE v. AUSTRALIAN AND NEW ZEALAND THEATRES LTD.

Williams J.

would be given a description of the dresses required, and where possible I would give them pictures and designs, to which they would add others themselves.

I would then get the music together—obtain it from the publishers such as Chappel, Davis's and Albert's; I would then get a selection from their forthcoming numbers around which to build and produce a scene, and select verses and choruses for the ballet, and I would give the musical director his plot—in the case of 'Funny Side Up' that was Mr. Davidson, and then he would attend to his arrangement of the scores, and we would get him to rehearsal, when all the actors would get their parts and scripts. I would also hold auditions, and then I would make suggestions who I would like to be included in the cast, and I would find out who were available in Sydney or Melbourne, and Frank Tait in this case discussed the matter and E. J. would also come over and I would hold auditions for ballet girls and singers, and when I found anyone worth while I would immediately get Frank to hear them in Melbourne, or E. J. to hear them in Sydney. That was preliminary."

"Q. And as producer what did you do after the opening? A. This was the first production in Australia—I appeared in the show with my brother—we have been partners in a double act—and we did many little sketches, and at the same time I supervised everything at the back of the curtain, watching it go along smoothly—there were cuts and alterations and so on, and I was in charge throughout the Sydney and Melbourne seasons. Q. Do you conduct rehearsals from time to time during the show? A. Yes, at least two a week. Q. Even after the show begins? A. Yes, with the ballet you have to keep it right up to the mark and keep it smart, and there were one or two understudy calls—in case anyone is sick. Many people don't have these rehearsals but I always did. One of the main things is to keep the show speeded up—speed in a revue is essential." "Thumbs Up" opened in Melbourne on 29th November 1941 where it ran for nine weeks. It then came to Sydney, where it opened on 14th February 1942. On 19th February Eric Edgley White received a memorandum from Mr. E. J. Tait with respect to certain alterations which he desired should be made in the performance. Most of these alterations were agreed to by the appellant and carried into effect.

On 26th February 1942, Mr. E. J. Tait, as managing director of the respondent company, wrote the following letter to Eric Edgley White:—"The Directors, who fully appreciate your efforts, realize that it is evidently expecting too much of you to appear on the

stage and attend to the stage direction, and watch the show from the audience viewpoint.

Therefore, it has been decided to bring in Mr. Alan Chapman to supervise the running of the production and to make alterations as may be decided upon by the Directors, and we ask you to give your hearty co-operation to Mr. Chapman and see if we cannot make the show run more smoothly and help it towards being a success."

At a rehearsal on the following day Mr. E. J. Tait placed Mr. Chapman in charge of the production of the revue. The appellants objected and claimed that this was a breach of the contract which went to its root so as to excuse them from further performance. They refused to continue to act in the revue and left the theatre. They sued the respondent in the District Court for damages for breach of contract, abandoning any excess over £400. Shortly afterwards the respondent sued them in the District Court alleging that by so refusing they had broken the contract. The two actions were heard together. The learned trial judge came to the conclusion that in the first action the appellants had made out their case and gave them a verdict for £400. He dismissed the second action. There were appeals to the Full Court of New South Wales in both actions. The Full Court set aside the verdict and ordered that judgment should be entered for the respondent in the first action, and directed that judgment should be entered for the respondent for nominal damages in the second action. The appellants have appealed to this Court against the judgment of the Full Court in both actions.

Under the *District Courts Act* 1912-1936 (N.S.W.), sec. 142, an appeal lies to the Supreme Court where a party is aggrieved by the ruling, order, direction or decision of the judge in point of law, or upon the admission or rejection of any evidence. Under the *Judiciary Act* 1903-1940, sec. 37, this Court has power to make the same order as the Supreme Court should have made, so that the only question on this appeal is whether there was any evidence on which the learned trial judge could have reasonably found a verdict for the appellants. At some stage of the proceedings it appears to have been argued that the contract between the parties was partly in writing and partly oral, but this contention was not pressed before this Court. The whole of the contract between the parties is contained in the letter of 14th October 1941 and the document of 16th October 1940 which it incorporates. Where there is any inconsistency between the terms of the letter and the incorporated document the terms of the letter must prevail. The letter of 14th October 1941 refers to the engagement of the appellants' "sole professional services" from 29th

H. C. OF A. 1943.

WHITE v. AUSTRALIAN AND NEW ZEALAND THEATRES LTD.

Williams J.

November 1941, but does not state what these sole professional services are to be. The incorporated document is also silent on this point. It is in an omnibus form which must be adapted to meet the circumstances of each particular case. It relates mainly to performances at rehearsals and on the stage. But the negative covenant contained in clause 8 includes an agreement not to *manage* or appear or take part in any theatrical or musical performances. By clause 1 the respondent employs the artist and the artist agrees to act, perform, sing, dance, or otherwise exercise his talents at such theatres, opera houses, halls, cabarets, places of public entertainment, and for films, radio, television and recordings, as required and directed by the company in Australia or New Zealand. By clause 3 (*b*) the artist agrees to perform and render for the company or any other company, firm, person or persons nominated by the company all such characters, parts, specialties, turns and recordings as may be assigned to him or her. But these options could only be exercised so that the artist should be given a suitable part for his or her talents; and particular characters or parts would have to be assigned to an artist in each production, as it could not be expected that an artist who could only act should be asked to sing or dance, or that any artist should have to fulfil more than a reasonable number of different characters or parts in any particular production. The agreement is made on the basis that the services an artist can render are of a special intellectual character giving them a peculiar value (clause 7). In order to ascertain, therefore, what professional services any particular artist had contracted to render under the agreement, it would be necessary to ascertain what particular professional services the artist was personally qualified to render, and what particular parts had been assigned to him in a particular production. In the case of the appellants the general provisions of the agreement would also have to be adapted to the fact that the services which they had agreed to render were their joint professional services.

In *Charrington & Co. Ltd.* v. *Wooder* (1) Lord *Kinnear* said that evidence is not admissible to put a peculiar meaning upon plain and unambiguous words, but that it may be necessary to prove the relation of the document to facts, and that for this purpose evidence may be given to prove any fact to which it refers, or may probably refer, or to identify any person or thing mentioned in it. Lord *Dunedin* (2) cited a statement from the speech of Lord *Davey* delivering the judgment of the Privy Council in the case of *Bank of New Zealand* v. *Simpson* (3), where Lord *Davey* quoted the following passage from

(1) (1914) A.C., at p. 80.
(2) (1914) A.C., at p. 82.
(3) (1900) A.C. 182, at p. 188.

a decision of Lord *Blackburn's* : " The general rule seems to be, that all facts are admissible " (to proof) " which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used " (*Grant* v. *Grant* (1)). The surrounding circumstances which are admissible in evidence to identify the meaning of the words " sole professional services " in the letter of 14th October 1941 are as follows :—(1) Eric Edgley White was an experienced deviser and producer of revues as well as an actor while his brother was an actor. (2) The appellants had been absent from Australia for several years and had taken part in and seen many revues and other theatrical productions abroad capable of being adapted for use in Australia. (3) After they had come to Australia at the end of 1940 the respondent had commissioned Eric Edgley White to devise and produce " Funny Side Up." (4) While this revue was being performed he had at the request of the respondent commenced to devise and produce the new revue " Thumbs Up " and by 14th October 1941 had completed the preparatory work. (5) The engagement under the letter of 14th October 1941 commenced on 29th November 1941, the date upon which the performance of " Thumbs Up " was to commence in Melbourne. No remuneration was to be paid to the appellants for any preliminary work, other than the remuneration provided for in the letter. (6) From the time the revue was first produced in Melbourne right throughout the Melbourne season and during the Sydney season until 26th February the principal task of Eric Edgley White was to supervise the performance of the revue. (7) He was advertised in the programme as the producer and stated to be a person having special qualifications for this work. (8) The appellants were entitled to a share of the takings when revue (but not when pantomime) was being performed, from which an inference can fairly be drawn that their professional services in revue were to extend to something beyond acting in it.

Upon this evidence it was legitimate for the learned trial judge, in my opinion, to reach the conclusion that it had been agreed that the principal professional service Eric Edgley White was to render in the case of " Thumbs Up " was to be the producer of the revue. The authorities make it clear that a proprietor of a theatre must give an actor whom he engages a proper opportunity of acting in a part suitable for his talents. In *Herbert Clayton and Jack Waller Ltd.* v. *Oliver* (2) Viscount *Dunedin* said :—" I think each contract as it arises must be considered by itself in order to see what are the prestations which each party is bound to perform. Considered from that point of view I think that in this case the appellants contracted

(1) (1870) L.R. 5 C.P. 727, at p. 728. (2) (1930) A.C., at p. 221.

H. C. OF A. 1943.

WHITE v. AUSTRALIAN AND NEW ZEALAND THEATRES LTD.

Williams J.

not only to pay the respondent a salary, but to give him the opportunity of appearing before the public in a part which answered to the stipulated description."

There is evidence that publicity is just as important to a producer as to an actor. There is also evidence that the respondent deposed Eric Edgley White from the position of producer on 27th February, so that, if this was done without justification, the respondent committed a breach of contract which, having regard to the disparagement which, as Mr. F. Tait admitted, such a deposition would cause to Eric Edgley White's reputation with the public as a producer, went to its root and amounted to a repudiation of the contract on the part of the respondent which justified the appellants in treating it as at an end.

A great deal of evidence was given of the extent to which a producer is bound to obey the orders of the management. Eric Edgley White contended that, although he would naturally submit his plans to the management and pay careful attention to their wishes, if it came to a showdown, his decision would be final. It is quite unnecessary to decide the exact relation between a producer and the management. As the respondent has to bear all the expenses of producing the revue, it must obviously have the main say in the expenditure, and therefore in approving of the scenes which are to be played both before and during the performance of the revue, but the producer must obviously also have a big say in the scenes it should include, the manner in which it should be performed, and whether cuts or alterations made from time to time would destroy its balance. The relation is probably analogous to that which exists in cases where, under the law of copyright, the author of the work has been held to be under a contract for services as opposed to a contract of service. A producer must be given considerable latitude in the exercise of his discretion. But the evidence is clear that in the devising, production and supervision of the performances of "Funny Side Up" and of "Thumbs Up" until 26th February 1942, Eric Edgley White was not responsible to any other persons except Mr. F. S. Tait who managed in Melbourne and Mr. E. J. Tait who managed in Sydney. He produced and supervised the running of both revues subject to any direct supervision they were entitled to exercise. There is evidence that on 19th February Mr. E. J. Tait made suggestions for several alterations in the performance of the revue and that Eric Edgley White gave effect to all of them except two to which he objected. He did not finally refuse to give effect to these two alterations. Mr. E. J. Tait did not reply to his objections to these

alterations before writing the letter of 26th February installing Chapman in his place. The evidence does not establish that Eric Edgley White broke the contract by refusing to give effect to lawful orders given to him by Mr. E. J. Tait. It only establishes that Mr. E. J. Tait claimed that he was entitled to supersede the appellant as the producer by installing Mr. Chapman in his place. The respondent's action in appointing Mr. Chapman was based on the supposition that the appellant had no contractual right to supervise the performance of the revue, so that he could be superseded at the wish of the respondent. It was not based on the supposition that the appellant had so misconducted himself in the performance of his duties that the respondent was entitled to treat the contract as discharged.

As the appellant Eric Edgley White had the right, so long as the contract was not discharged, to continue to act as the producer of "Thumbs Up," it follows that the respondent broke the contract when it appointed Mr. Chapman to supersede him.

The appeals should in my opinion be allowed.

Appeals allowed with costs. Orders of the Supreme Court set aside. Judgments of District Court restored. Respondent to pay costs of appeals to Supreme Court.

Solicitors for the appellants, *Remington & Co.*
Solicitors for the respondent, *Ernest Cohen & Linton.*

J. B.