

[HIGH COURT OF AUSTRALIA.]

GRANT AND ANOTHER APPELLANTS ;
DEFENDANTS,

AND

O'LEARY AND ANOTHER RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF
SOUTH AUSTRALIA.

*Vendor and Purchaser—Sale of land—Part of purchase money paid to stakeholder—
Not received by vendors—Inability of stakeholder to account—Offer of tender of
balance purchase money to vendors—Call for transfer by purchasers and refusal
by vendors—Right of purchasers to specific performance.* H. C. OF A.
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ADELAIDE,
June 14, 17.

Dixon C.J.,
Webb,
Fullagar,
Kitto and
Taylor JJ.

A contract in writing for the sale and purchase of land provided that, prior to the date fixed for settlement, part of the purchase money should be paid to a land agency company “as stakeholder between the parties until settlement”. Payment to the land agency company of such part of the purchase money was duly made by the purchasers, but, before the date fixed for settlement arrived, it became known that the company could not account for the money so received by it and that the money was irrecoverable. The purchasers offered to tender the balance of the purchase money and asked for transfer of the land. The vendors however claimed that they were under no obligation to transfer the land until they had actually received the full amount of the purchase money, including the part paid to the land agency company.

Held, that the purchasers were entitled to receive a transfer of the land, on payment of the balance of the purchase money.

Decision of the Supreme Court of South Australia (*Hannan A.J.*), affirmed.

APPEAL from the Supreme Court of South Australia.

Margaret O'Leary and Daniel O'Leary entered into a contract in writing, dated 25th August 1954, to purchase property No. 80, Morgan Avenue, Mitcham Park, South Australia, from Harold Samuel Grant and Noreen Kathleen Grant for the sum of £1,950. The contract, on a printed form provided by Frederick Proctor Ltd.,

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which company was described therein as agent for the vendors, provided that the purchase money should be paid in the following manner, "Part deposit of £10 payable (on) signing hereof and balance of deposit payable on the settlement of property at Blackwood to be held by the said agent as stakeholder between the parties until settlement and the balance thereof by cash and loan of £950 to be arranged".

The contract also contained, *inter alia*, the following provisions :—
“(i) On payment of the purchase money as aforesaid the vendor(s) will at the request and expense of the purchaser(s) sign and execute a transfer under the provisions of the *Real Property Act* of the said land and property to the purchaser(s). (ii) Settlement shall be made and possession given and taken on 30 days or sooner.”

There was no provision making time of the essence of the contract, but there was a clause enabling the vendors, on default in due payment of the whole or part of the purchase money, to resell the property or rescind the contract. The contract initially was executed by Frederick Proctor Ltd. on behalf of the vendors. At the end of the contract there was the following form of ratification, which the vendors subsequently signed, “I ratify the above agreement and agree to pay the agent's commission at the Chamber of Commerce Rates on the full contract price and agree that such commission shall be a first charge upon and payable from the said deposit”.

The sum of ten pounds was paid to Frederick Proctor Ltd. on the signing of the contract. On 6th September 1954, under an authority from the purchasers, the sum of £989 18s. 10d, being the net proceeds of the sale of the purchasers' property at Blackwood referred to in the contract, was paid to Frederick Proctor Ltd. by the agents who had sold that property. On 17th September 1954 it became known that Frederick Proctor Ltd. could not account for the money paid to it and that it was irrecoverable. On 23rd September 1954 the purchasers' solicitors offered, on receiving the unencumbered certificate of title to the land and a signed transfer, to pay to the vendors the sum of £950 1s. 2d., being the balance of purchase money owing after the amounts paid to Frederick Proctor Ltd. had been taken into account. The vendors refused to settle on this basis, and claimed to be entitled to receive from the purchasers on settlement the full amount of the purchase money provided for by the contract, less only the original ten pounds deposit, which they did not deny had been received by Frederick Proctor Ltd., as their agent.

In proceedings in the Local Court of Adelaide, the purchasers claimed specific performance of the contract, and an order was made in their favour. The vendors appealed to the Supreme Court of South Australia (*Hannan A.J.*), which dismissed the appeal. From that decision the vendors appealed to the High Court.

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J. L. Travers Q.C. (with him *J. M. White*), for the appellants. The loss must rest where it falls. The payment envisaged by the contract, in its provisions relating to payment of the purchase money, is payment to the vendors, not the land agent. The provision for the agent to receive part of the money merely sets out the machinery for payment. There was an express agreement between the vendors and the purchasers that the money paid to the agent should be held by it until settlement. When this agreement was broken, the basis of the contract disappeared. The position is very similar to that in *Minahan v. Sahib Dad* (1).

R. F. Newman (with him *A. J. L. Sutherland*), for the respondents. The purchasers did exactly what the contract required them to do, and they are accordingly entitled to receive a transfer of the land. There is no ambiguity in the contract, but, if it is suggested that there is any, the contract should be construed against the vendors, since it was prepared by their agent. [He referred to *Hampden v. Walsh* (2).]

[DIXON C.J. referred to *Christie v. Robinson* (3).]

J. L. Travers Q.C., in reply.

Cur. adv. vult.

THE COURT delivered the following written judgment:—

June 17.

This is an appeal from an order of *Hannan A.J.* dismissing an appeal from a decision of the Local Court of Adelaide. The proceeding in the Local Court was a suit in its equitable jurisdiction for specific performance of a contract. The appellants are the vendors and the respondents the purchasers. The subject of the contract was a house in Morgan Avenue, Mitcham Park. The title was under the *Real Property Act* 1886. The learned judge of the Local Court, Judge *Sanderson*, pronounced a decree for specific performance. The decree has not been drawn up.

The specific question raised by the suit is whether the purchasers or the vendors should bear the loss of a sum of £989 18s. 10d.

(1) (1925) 25 S.R. (N.S.W.) 613;
42 W.N. 123.

(2) (1875) 1 Q.B.D. 189.
(3) (1907) 4 C.L.R. 1338.

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placed under the terms of the contract in the hands of an agent as stakeholder pending the completion of the contract which, as the learned District Court Judge expressed it, never reached the hands of the appellants and is no longer available to either the vendors or the purchasers but in some way not disclosed disappeared while it was in the hands of the agent. The agent appears to have been a limited company, Frederick Proctor Ltd. The contract was dated 25th August 1954. Its terms and conditions were those contained in a printed form provided by Frederick Proctor Ltd., who were described as agents for the vendors. According to the contract in that capacity they agreed to sell, subject to the vendors' ratification, to the purchasers the piece of land already referred to for the sum of £1,950 "to be paid in the manner following:— Part deposit of £10 payable (on) signing thereof and balance of deposit payable on the settlement of property at Blackwood to be held by the said agent as stakeholder between the parties until settlement and the balance thereof by cash and loan of £950 to be arranged". The contract proceeds, "On payment of the purchase money as aforesaid the vendor(s) will at the request and expense of the purchaser(s) sign and execute a transfer . . . of the said land and property to the purchaser(s)". The final clause of the contract provides that settlement shall be made and possession given and taken on (*sic*) thirty days or sooner. There is no provision making time of the essence of the contract but there is a clause enabling the vendors in default of due payment of the whole of the purchase money to resell or rescind. At the end of the contract is a form of ratification which the vendors in fact signed. Included in the ratification is the statement that the vendors agreed that the commission should be a first charge upon and payable from the deposit.

The sum of ten pounds was in fact paid to the agent on the signing of the contract. The words "balance of deposit payable on the settlement of the property at Blackwood" refer to the sale of a piece of real property at Blackwood belonging to the purchasers. It would seem that it was not known how much this property would realize but it was intended that the net proceeds should be applied as part of the purchase money payable to the vendors under the contract now in question. Because of the uncertainty as to the amount of proceeds it was provided that the balance remaining should be paid by a loan of £950 to be arranged and by cash.

On 6th September 1954, under an authority from the purchasers, the net proceeds of the sale of the Blackwood property amounting to £989 18s. 10d., were paid to Frederick Proctor Ltd. by the

agents who had sold the Blackwood property. The period of thirty days mentioned in the contract as the time for settlement expired on 24th September but on 17th September it became known that Frederick Proctor Ltd. could not account for the money and that it was irrecoverable. On 23rd September the solicitors for the purchasers notified the vendors that they were preparing the transfer of the property and would be glad if they would appoint a time within fourteen days for settlement of the matter when on receiving the unencumbered certificate of title and a signed transfer they would pay the balance under the agreement, namely £950 1s. 2d. This evoked from the solicitors for the vendors an answer which in effect said that Frederick Proctor Ltd. were the agents of the purchasers as well as stakeholders, that the vendors were prepared to transfer the house to the purchasers on payment of the full amount owing under the contract, but if the purchasers could not find the money by the date of settlement, which apparently had been named between the parties orally as 15th October, the vendors intended to treat the purchasers' failure to perform the contract as a breach of contract entitling them to rescind. To this the solicitors for the purchasers answered that they would attend on 15th October with the balance of cash due (that is to say £950 1s. 2d.) and with a small amount for adjustment of taxes, and that they would not tender the sum of £999 18s. 10d. That sum was made up of the £989 18s. 10d. and the ten pounds paid to Frederick Proctor Ltd. A formal tender, however, was waived by the vendors and the suit was instituted by the purchasers.

The correctness of the decisions of the Local Court, and of *Hannan A.J.* on appeal therefrom, depend on the question whether under the contract the purchasers had performed all the conditions precedent entitling them to a transfer of the land. The failure to observe the period of thirty days reserved in the contract was no breach of a condition precedent, time not being of the essence of the contract, and in any case, if it were, it would have been waived. Indeed, it was not suggested on behalf of the appellants, the vendors, that the respondents', the purchasers', title to the performance of the contract was in any way prejudiced by failure punctually to observe the time. The matter upon which the appeal was argued is the effect of the provision as to payment of purchase money. So far as the sum of ten pounds was concerned, it was not denied that the term of the contract was performed when the sum was paid to Frederick Proctor Ltd. as agent for the vendors. But it was denied that the purchasers had completely discharged their obligations in respect of the purchase money by causing the proceeds of the

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sale of the Blackwood property to be paid to Frederick Proctor Ltd. and by tendering the balance. It was contended that on the terms of the contract the vendors came under no obligation to transfer the property until the amount placed in the hands of Frederick Proctor Ltd. was actually paid over to them. This is an interpretation of the contract which its terms will not bear. The words "balance of deposit payable on the settlement of property at Blackwood to be held by the said agent as stakeholder between the parties until settlement" plainly mean that the proceeds of the property at Blackwood were to be paid to Frederick Proctor Ltd. The word "agent" is defined to mean Frederick Proctor Ltd. The description of Frederick Proctor Ltd. as stakeholder means that that company was entrusted with the money to hold on behalf of the parties to the contract pending performance of the contract. Only in the event of the contract going off would the purchasers be entitled to the money from the company. If the contract was performed the vendors would become entitled as against Frederick Proctor Ltd. to the money to the exclusion of the purchasers. The effect of the appointment by vendor and purchaser of a stakeholder is stated by *Bowen L.J.* in *Ellis v. Goulton* (1):—"When a deposit is paid by a purchaser under a contract for the sale of land, the person who makes the payment may enter into an agreement with the vendor that the money shall be held by the recipient as agent for both vendor and purchaser. If this is done, the person who receives it becomes a stakeholder, liable, in certain events, to return the money to the person who paid it. In the absence of such agreement, the money is paid to a person who has not the character of a stakeholder; and it follows that, when the money reaches his hands, it is the same thing so far as the person who pays it is concerned as if it had reached the hands of the principal" (2).

In *Christie v. Robinson* (3) the question at issue was whether the agent, whose name was Good, was constituted a stakeholder. The contract did not so describe him. Indeed the contract expressly provided that the deposit (the sum of £500) was to be paid to Good as agent for the vendor. But it contained a provision that on acceptance of the title the deposit should be paid over to the vendor. The contract went off and the purchaser sued the vendor to recover the deposit which had been paid to Good. The question whether it was recoverable from the vendor was by common consent treated as depending upon the question whether the provision had the effect of constituting Good as stakeholder. In the Supreme Court

(1) (1893) 1 Q.B. 350.

(2) (1893) 1 Q.B. 350, at p. 352.

(3) (1907) 4 C.L.R. 1338.

Hodges J. held that it had this effect, and on appeal the High Court, *Isaacs J.* dissenting, agreed in this conclusion. *Griffith J.* said (1) that the contention in support of the judgment was that the clause so far controlled the statement that Good was the agent of the vendor that it transmuted Good's position from that of agent for the vendor to that of stakeholder who did not hold the money in the capacity of agent for one party rather than the other. His Honour continued: "If that be so, the respondent's contention is sound, and that view commended itself to *Hodges J.*" (1). *Isaacs J.* described the situation as follows:—"Until title is accepted, the deposit is to remain in the hands of Good, and then, and not till then, is it to be paid over to the vendor. Up to the moment of acceptance of the title, the vendor had no vestige of right to get that deposit into his hands—he could not control its possession, he could not recover it. Any arrangement between him and Good by which it should pass into the vendor's hands would have been a distinct fraud upon the purchasers. Whatever Good's agency meant, it clearly did not extend to handing that money over to Robinson except in one event" (2).

It is said, however, that under the present contract the primary duty of the purchasers imposed is to pay £1,950 into the hands of the vendors and that this duty is not qualified by the words requiring that the balance should be paid to the agent as stakeholder and, further, that the words "on payment of the purchase money as aforesaid" which follow mean that the purchase money must be actually paid to the vendors. This construction of the contract disregards both the purpose and meaning of the provision requiring payment to the agent as stakeholder. The purpose is to insure that the portion of purchase money representing the proceeds of the Blackwood land is placed in the hands of an indifferent person who will account for it to the vendors if and when the vendors become entitled to it. Except in the event of the vendors becoming disentitled to receive it the purchasers have parted with it beyond recall. In the events which have happened the vendors alone have any remedy against Frederick Proctor Ltd. It is nothing to the point that the remedy would prove fruitless owing to the inability of that company to meet its obligations. The words "as aforesaid" in the phrase "on payment of purchase money as aforesaid" refer back to the provisions describing how the money should be paid and they include the term that the balance of deposit shall be payable on the settlement of the property at Blackwood to be held

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(1) (1907) 4 C.L.R., at p. 1346.

(2) (1907) 4 C.L.R., at p. 1355.

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by Frederick Proctor Ltd. as stakeholder. There is no term of the contract forming a condition precedent to the obligation of the vendors to make a transfer which the purchasers have not performed. By paying the sum amounting to £999 18s. 10d. into the hands of Frederick Proctor Ltd. and afterwards by offering to tender the balance of purchase money they performed the conditions on their part to be observed and performed.

It follows that the judgment of *Hannan A.J.* dismissing the appeal from the Local Court was right and that this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Travers, Melville, Kelly & Hague.*

Solicitors for the respondents, *Newman, Sutherland, Sparrow & Williamson.*

B. H.