[HIGH COURT OF AUSTRALIA.]

COOPER . . . . . APPELLANT;
DEFENDANT,

AND

UNGAR . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1958.

SYDNEY, *Mar.* 28.

Dixon C.J., McTiernan, Williams, Fullagar and Taylor JJ.

Vendor and Purchaser—Sale of land—Terms and conditions of sale—Failure of purchaser to comply therewith—Provision for vendor to resell and recover deficiency (if any) as liquidated damages—Contractual right and not one in derogation of contract—Resale at less than contract price—Action to recover deficiency—Whether implied that power to resell and recover deficiency conditional upon resale within reasonable time—Defence that resale not within reasonable time and right to recover lost—Resale within reasonable time established if such condition implied—Vendor entitled to recover.

In a contract dated 4th May 1951 for the sale of land wherein U. was vendor and C. purchaser, cl. 14 provided :—" If the purchaser shall fail to comply with these conditions or any of them, or with the terms of sale, all moneys . . . which the purchaser shall have paid . . . on account of the purchase shall be absolutely forfeited to the vendor, and the vendor shall be at liberty . . . without any notice to the purchaser, to resell the property by public auction or private contract, together or in lots, for cash or on credit, and upon such other terms and conditions as he may think proper, with power to vary or rescind any contract for sale, buy in at any auction and resell, and the deficiency (if any) arising on such sale and all expenses of and incidental to any such sale or attempted sale shall be recoverable by the vendor from the purchaser as liquidated damages."

C. defaulted in completion of the contract above mentioned and persisted in his default, notwithstanding letters from U.'s solicitor requiring completion not later than 31st January 1952. U., acting in reliance upon cl. 14, attempted to sell the property against him, first by auction and later by private treaty. Notwithstanding persistent efforts by U. all attempts at resale proved abortive until a private sale was effected in June 1953. U. then sued C. pursuant to cl. 14 to recover the sum of £6,125 being the difference between the price contracted to be paid by C. and the price obtained on the resale in 1953. C. claimed that the right given to the vendor to resell was subject to an implied condition that it should be exercised within a reasonable

time, and that the re-sale by U. had not taken place within a reasonable time. U. contended that no implication could be made in the contract, but that, if any term was to be implied, it could amount to no more than a promise by the vendor, for breach of which a cross-action for damages would lie.

Held, that whichever term (if either) was to be implied, it was not open to a jury to find that the re-sale had not taken place within a reasonable time.

Decision of the Supreme Court of New South Wales (Full Court), affirmed.

Dixon C.J. McTiernan J. Williams J. Fullagar J. Taylor J.

APPEAL from the Supreme Court of New South Wales.

Reuben Cooper appealed to the High Court of Australia from a judgment of the Full Court of the Supreme Court of New South Wales (*Roper* C.J. in Eq., *Clancy* and *Hardie* JJ.) disallowing an appeal by Cooper against a verdict and judgment in the sum of £6,125 obtained by Harriet Ungar in an action tried by *Richardson* J. and a jury which had been instituted by the said Harriet Ungar to recover the sum mentioned as and for liquidated damages upon the failure of Cooper to complete a contract for the purchase from her of land and premises at Cranbrook Road, Rose Bay, Sydney.

The relevant facts are sufficiently set forth in the judgment of the Court hereunder.

J. W. Smyth Q.C. and *L. G. Gruzman*, for the appellant.

K. W. Asprey Q.C. and *H. H. Glass*, for the respondent, were not called upon.

The oral judgment of the Court was delivered by DIXON C.J.:—

This is an appeal from the judgment of the Full Court of the Supreme Court of New South Wales, affirming a verdict and judgment for the plaintiff at a trial before *Richardson* J. The action was an action upon a contract of sale of land. The plaintiff was the vendor and the defendant was the defaulting purchaser. The contract of sale was made on 4th May 1951. The subject of the contract was a piece of land in Cranbrook Road, Rose Bay, with a dwelling upon it. The purchase price named in the contract was £18,750. Of the purchase price, ten per cent or £1,875 was payable as a deposit and it was so paid. The balance was to be paid in cash upon completion. The contract was expressed in a long form containing conditions and terms of sale of a more or less familiar description. Many of the conditions are of no importance in this action. That governing completion was cl. 22 which said : " Completion of the sale and purchase hereby agreed upon shall take place within ten days of the completion of the purchase by the vendor of the property as comprised in Certificate of Title " number so and so, " and the purchaser shall not make any objection to any delay

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thereby occasioned in completion of the sale and purchase hereby agreed upon." In that part of the contract which is described as " Terms of Sale " it was provided that upon signing the contract, the purchaser should pay into the hands of the vendor a cheque for a deposit of £1,875 of the whole amount of the purchase money, and the balance of purchase money should be paid to the vendor as follows : in cash on completion.

Of the other provisions one is of considerable importance. It is cl. 14 of the contract. I shall not read the text in full because it has been examined during the argument but I shall make some comments upon it.

The first part of it provides for the case of the purchaser failing to comply with the terms and conditions of the sale. In that event the money paid by the purchaser by way of purchase money is to be absolutely forfeited to the vendor and the vendor is to be at liberty to rescind the contract. I shall not pause to comment on the word " rescind ". The use of it in that context is the subject of discussion in cases which are perhaps well enough known although perhaps the observations which they contain are not all in harmony. Cf. *Grassmere Estates Co. Ltd.* v. *Illingworth* (1) ; *Jeeves (N.S.W.) Ltd.* v. *Rogers Bros. Ltd.* (2) ; *National Trustees Executors & Agency Co. of A/Asia Ltd.* v. *Dwyer* (3) and cases there cited.

Then there is an alternative. It is to sue the purchaser for breach of contract. That, I imagine, was introduced into this clause, which is an old one, at a time when there was a notion that after a rescission at common law for breach of contract a cause of action for damages no longer continued in the vendor. It was a view based perhaps on a confusion between a rescission for some extrinsic collateral cause, such as misrepresentation, and one for breach. Cf. *McDonald* v. *Dennys Lascelles Ltd.* (4).

Then there is another alternative and it is that with which we are concerned. The text of that alternative I will read. It says: " . . . without any notice to the Purchaser, to resell the property by public auction or private contract, together or in lots, for cash or on credit, and upon such other terms and conditions as he may think proper, with power to vary or rescind any contract for sale, buy in at any auction and resell, and the deficiency (if any) arising on such sale and all expenses of and incident to any such sale or attempted sale shall be recoverable by the Vendor from the Purchaser as liquidated damages."

(1) (1889) 15 V.L.R. 687.
(2) (1936) 36 S.R. (N.S.W.) 430, at p. 445.
(3) (1940) 63 C.L.R. 1, at pp. 25, 39.
(4) (1933) 48 C.L.R. 457, at pp. 469, 470, 476-478.

Provisions of the character of the third limb of this clause have been the subject of discussion in decided cases and it has been pointed out that such a provision gives a contractual right to the vendor. It is a right in the nature of a power and when he pursues it he is acting under the contract and not in derogation of the contract or on the footing that it is discharged completely.

In the present case the purchaser made default. The default persisted, with the result that on 12th December the vendor's solicitor wrote a letter to his solicitor dealing with the situation that arose. The earlier part of it is concerned with certain grounds of dispute between the parties which are not material to the problem with which we have to deal. After dealing with these the writer proceeds to refer to the requests that had been made to the purchaser to submit a draft transfer for perusal and proceeds : " It is obvious that your client is evading these issues. The matter cannot be allowed to drift on as at present. There is no valid reason why the draft transfer should not be submitted immediately and the purchase thereupon completed. By this letter I notify your client through you that if the purchase is not completed by your client before or during Tuesday 15th January, 1952, my client will exercise her rights under cl. 14 of the contract that your client's deposit become forfeited to her, to resell the property and take steps to recover any deficiency. This time is more than reasonable and has been given so that no possible question can arise as to your client's real intentions. Would you please favour me by acknowledging receipt of this letter."

That I take to be an express statement of an intention to act under the third alternative which is contained in cl. 14 of the contract, that portion which I read.

After a lapse of a month, namely on 14th January 1952 the vendor's solicitor wrote another letter to the purchaser's solicitor on the same subject. The material part says : " To give your client an opportunity for further considering this matter, the time for the completion by your client of the purchase is hereby extended from the date Tuesday 15th January 1952 named in my letter of the 12th December, until 31st January 1952 after which later date failing your client's completing the purchase by that later date as required in mine of the 12th December except as to alteration of date of completion, the deposit paid by your client under the contract will become forfeited to my client and my client will take steps to resell the property and to recover from your client any deficiency. Will your client please regard this notice as a final one." It will be noticed that the last words of the letter follow the

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words of the latter part of cl. 14 and it is clear that that is a renewed expression of intention to act under that portion of cl. 14.

In fact the vendor proceeded to attempt to sell the property by auction. The auction sale was abortive. The abortive auction sale took place on 11th March 1952. A reserve price was fixed on the advice of the agents or auctioneers of £17,000. It appears that the sale was duly advertised, no fault could be found with the vendor on that ground. Only one bid, however, was obtained and that was £10,000.

After the auction sale the property was placed in the hands of estate agents for sale and it appears that there were attempts to find a purchaser which were continued and of which it is not complained that they were inadequate for the purpose of selling the property. However, there was a tendency to fix a price somewhat higher than might be thought to be readily obtainable.

One can see that a vendor acting under a provision such as the last part of cl. 14 may be rather in a dilemma. If he sells hastily at the price which is obtainable from the first purchaser he finds for it, he may throw the sale open to an objection from the purchaser who must pay the difference, on the ground that it has been made too promptly and without sufficient care and inquiry into the possibility of obtaining a higher price. If, on the other hand, the vendor delays for a very long time he may, of course, lay himself open to the objection that he waited too long, until in fact there has been a fall in prices. What actually happened seems to have involved a reasonably persistent effort on the part of the plaintiff to sell. In the end a sale took place. The sale took place in June 1953. When the deposit had been taken into account the price obtained left a deficiency of £6,125. The action was brought to recover that amount as liquidated damages under the last words of cl. 14.

It is hardly necessary to point out after what I have said that in so suing the plaintiff was suing upon the contract, that is on a term of the contract and not for unliquidated damages as for a wrongful repudiation of the contract or for a breach in failing to complete it. The difference may not always be of importance, but, if the nature of the cause of action is to be understood it is as well to bear in mind that the cause of action under such a provision as the last part of cl. 14 is for the balance of money the title to which is reserved by the contract.

To the claim in the action the defendant made or attempted to make a number of answers. There is no present purpose in describing them. So far as they attacked the contract collaterally, they

failed. Indeed they all failed and upon this appeal there is really only one defence upon the merits that gives rise to the points which we now have had debated before us. It is argued, as it was argued at the trial, that in cl. 14 there is to be implied a term that the sale for which the latter part of cl. 14 provides shall take place within a reasonable time. There are two possible versions of such an implication if it were to be made. On the one hand the proposed implication might take the form of a condition governing the exercise of the power given by cl. 14 to sell with a view of recovering the deficiency from the defaulting purchaser. It would mean that the power of sale which is thereby given could be exercised only within a reasonable time ; time must not be allowed to run on indefinitely. That would be a condition of the power upon which its existence may depend. If it were broken it would lead to the determination of the power to sell and recover the deficiency under the last words of the clause. But that would not mean any breach of obligation on the part of the vendor.

Another implication, however, is suggested, namely an implication binding the vendor who is acting under the provision to sell *and* to sell within a reasonable time, so that if he does not sell within a reasonable time he has done more than lose the power which he otherwise would have possessed if he had broken the contract ; he has exposed himself to a liability to the purchaser for a breach of contract sounding in damages.

At the hearing the defaulting purchaser as defendant strove to set up a plea based on such an implication as I have described in the first part of what I have said. Before the judge at the trial it was debated whether it was possible to raise such implication or whether the implication must not be, if it existed at all, of the latter kind. The plaintiff's counsel took the position that there was no implication, but that if it existed it must be of the latter kind. The defendant's counsel took the position that an implication did exist in cl. 14 and that it was of the former kind. If the defendant's counsel's contention were right the implication would of course have supplied a defence to the action provided that the essential fact were made out, namely that when the sale did take place, more than a reasonable time had elapsed. For the appellant, the defendant purchaser, it is said that at one point of the trial the learned judge appeared to be prepared to accept the view of the supposed implication which his counsel put forward. He applied to file a plea in bar setting it up as a defence. It is said that at first his Honour was prepared to allow the plea. In the end, however, the learned judge adopted the view that the proposed implication would

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not support a plea as an answer to the action, that is to say his Honour was not prepared to allow a plea to be pleaded setting up an implied condition upon which the exercise of the power should depend, but only a plea by way of cross action claiming damages for breach of an implied term that the sale would be made within a reasonable time.

We can, I think, pass by the controversy which I have thus briefly described, for the reason that in our view on the facts there was no breach of such a condition, if it ever existed in either sense. We think that more than a reasonable time was not allowed to pass before the power to sell was exercised. In our opinion the facts were not such as to entitle the jury to hold that the actual sale made was made after a reasonable time had elapsed. What is a reasonable time is of course a question of fact. But in judging what is you must look at the circumstances, the nature of the supposed condition and the duties which it would impose. Although it is a question of fact, the court must decide whether more than one view is reasonably open to a jury. In the present case it is complained that although the vendor persisted in attempting to sell the vendor demanded too high a price. There was a persistence, however, and after all the purchaser might well have complained if he had had to pay too great a deficiency under cl. 14 because of the opposite error on the part of the vendor.

In all the circumstances we do not think it would have been possible for the jury correctly to find that at the time the sale took place it was too late and outside the scope of the provision, even if one or other of the implications I have described were made in cl. 14 limiting the vendor to a reasonable time.

It is hardly necessary to say that we do not suggest that either of the implications should be made in cl. 14. It is a matter which on the facts does not arise for our decision and it is better in such a matter to confine ourselves to the questions which the facts raise.

For the reasons I have given we think that the vendor's action was bound to succeed and that the vendor was entitled to recover the amount of £6,125.

The action was of course tried with a jury. Unfortunately there has been some confusion as to what the jury meant by their findings when they first brought in their verdict.

I have not traversed the pleadings but it is a fact that there were two counts in the declaration, the first of which was based upon the assumption that there had been a breach of contract enabling the vendor as plaintiff to recover unliquidated damages calculated on loss of his bargain, and the second of which dealt with the cause

of action under the last part of cl. 14 which I have discussed. The measures of relief under the respective counts, that is to say the amounts recoverable under each, are by no means necessarily the same. The learned judge had left to the jury a cross-action based upon the view that there was an implication exposing the plaintiff to a liability for damages for failing to sell within a reasonable time. All this led to the jury returning into court with findings which appear to exhibit a considerable amount of confusion. In the end, however, the jury did find a verdict on both counts for the same amount and that is the amount which I have mentioned. We need not inquire whether it could be supported as representing a proper measure of damages under the first count if the cause of action under that count and not under the second had been made out. The judgment should, in our view, have been on the second count and it is that on which the verdict for the sum claimed should have been found.

These, however, are matters not going to the merits but to the form the proceedings took and we think that the appeal must be decided on the merits. We do not think that the confusion resulted in any real miscarriage having regard to the view we take of the case. Nor do we think that we are called upon further to notice it, because in our judgment, on the facts as stated, the learned judge's clear course was to direct the jury to find a verdict for the sum of £6,125. We will accordingly dismiss the appeal from the judgment of the Full Court of the Supreme Court. That judgment leaves the plaintiff entitled to recover the sum mentioned.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Maurice Isaacs & Glass.*
Solicitor for the respondent, *Sydney B. Glass.*

R. A. H.