3/1934

AUSTRALIAN INVESTMENT TRUST LTD

v

WOOLWORTHS LIMITED

142 folios
7/-

AUSTRALIAN INVESTMENT TRUST LIMITED.

V

WOOLWORTHS LTD.

ORDER.

Decree of Supreme Court varied as follows :-

Omit so much thereof as orders that the suit be dismissed unless the plaintiff is prepared to accept the offer of the defendant to execute a charge over the shares held by the defendant in the company Strand and Pitt Street Properties Ltd., containing a covenant in the form referred to in the judgment delivered on 15th December 1933 by Harvey C.J. in Eq. and as orders that, the plaintiff being prepared to accept the said offer, the defendant do execute such charge.

If within one month the plaintiff by notice in writing served upon the defendant's solicitors and filed in the Registry at Sydney elects to accept such relief, substitute a declaration that the plaintiff is entitled to require from the defendant an instrument duly executed by the defendant whereby the defendant's shares in Strand and Pitt Street Properties Ltd., being 25,000 shares of £1 each, are charged with the repayment to the plaintiff without interest of all moneys paid by the plaintiff in respect of the said shares to the said Strand & Pitt Street Properties Ltd., and whereby the defendant covenants with the plaintiff that if within a reasonable time a buyer is found by or on behalf of the plaintiff able and willing to buy at a price equal to the face value thereof the defendant's shares in the plaintiff company, being 25,000 shares of £1 each, the defendant will thereupon sell and transfer its said shares in the plaintiff company to such buyer and upon payment of the price will pay to the plaintiff without interest the moneys aforesaid, subject to a proviso that if the plaintiff is willing to accept a less sum in discharge of the defendant's liability under such covenant and procures a buyer able and willing to buy such shares at a price equal to such less sum, the plaintiff may require the defendant to sell the same to the said buyer for such price and to pay the net proceeds of the sale to the plaintiff in full satisfaction of the defendant's liability under the covenant so that the plaintiff must depend exclusively upon the charge for the balance of such moneys : reserve liberty to apply to the Supreme Court for further relief consistent with the said declaration.

If the plaintiff do not elect to accept such relief, dismiss the suit with costs.

Subject to the aforesaid variation, appeal dismissed with costs.

3/6

14 December 1934

AUSTRALIAN INVESTMENT TRUST LIMITED V' WOOLWORTH'S LIMITED.

JUDGMENT. MR JUSTICE RICH .

AUSTRALIAN INVESTMENT TRUST LIMITED. V. WOOLWORTH'S LIMITED.

JUDGMENT. RICH J.

I have read the judgment of my brother Dixon and agree with it./

AUSTRALIAN INVESTMENT TRUST LIMITED V. WOOLWORTHS LIMITED.

JUDGMENT STARKE J.

The defendant - the respondent here - forwarded an application to the plaintiff - the appellant here - for 25,000 shares in the Strand and Pitt Street Properties Limited. The covering letter, dated the 6th September 1929, stated that the application was handed to the plaintiff upon the condition that the whole of the application and allotment moneys payable in respect of such shares should be paid by the plaintiff on behalf of the defendant and that the defendant should execute in favour of the plaintiff and at its expense a charge over such 25,000 shares, which was to contain a covenant by the defendant to repay such moneys without interest upon a sale being effected of 25,000 shares belonging to the defendant or the plaintiff - the Australian Investment Trust Limited. The plaintiff forwarded the application to the Strand and Pitt Street Properties Limited, which allotted 25,000 shares of £1 each to the defendant. The plaintiff paid the application and allotment moneys payable in respect of such shares to the Strand and Pitt Street Properties Limited, in accordance with the conditions of the covering letter. And this suit is brought by the plaintiff against the defendant seeking specific performance by the defendant of its agreement to execute the charge and covenant pursuant to the covering letter of the 6th September 1929. The defendant was willing to execute the charge, and also a covenant to repay the moneys paid by the plaintiff out of the proceeds of the sale at par of the 25,000 shares held by the defendant in the plaintiff Company. But this the plaintiff would not accept, and thus defined its claim when required by this Court to state explicitly the covenant that it sought:

"The plaintiff claims that the defendant in the charge should covenant that the defendant shall pay to the plaintiff within a period of twelve months from 5th February 1929 all moneys that the plaintiff should have paid to Strand and Pitt Street Properties Ltd during the said period in respect of the 25,000 shares in Strand and Pitt street Properties Ltd belonging to the defendant Company."

The question turns upon the agreement of the parties, but it is impossible to ascertain that agreement from the covering letter of the 6th September 1929 itself, for it is but the last step in transactions that are somewhat confused. The defendant carried on what is called a "chain store" business, and was desirous of obtaining a lease of some premises in the Strand Arcade in the city of Sydney. Those premises, together with

the whole of the Arcade property and certain Pitt street frontages, were the property of Stewart Dawson Limited. The defendant had obtained an option for the purchase of the property for £750,000. The terms were £50,000 on the signing of the contract, £100,000 on the signing of the transfer, and the balance to remain on mortgage for a period of years. But subsequently Stewart Dawson Ltd offered somewhat easier terms viz. £50,000 down and £100,000 in four quarterly instalments of £25,000. The defendant was quite unable to finance the purchase out of its own funds, but it had available for that purpose some £25,000 in cash. It therefore approached the plaintiff - an investment and finance Company - on the matter. It was suggested that a Company might be formed with the object of acquiring the Strand and Pitt Street properties and granting the defendant a lease of the premises it required. And in such a Company the defendant was prepared to subscribe for shares to the amount of £25,000. But the plaintiff was not prepared to undertake a transaction of this maghitude without the support of its bankers; and the bankers refused their support unless the plaintiff increased its capital from £200,000 to £300,000. The plaintiff proceeded to increase its capital by £100,000 . Another finance Company called the Phoenix Investment Company Limited arranged to take up 75,000 shares in the plaintiff Company, and on the 5th February 1928 the defendant also applied for 25,000 shares in the plaintiff Company. There is considerable dispute as to the terms upon which the defendant made this application. Williams, a director of the defendant,who negotiated the transaction with Dunlop, the Managing Director of the plaintiff Company, deposed:
"Dunlop asked me if I would consent to pay the money into the Trust, and I told him 'No, I told you before I did not want to pay the money into the Investment Trust'. He then told me it did not look as though the thing would come off at all,or it was the quickest way of handling it if I would consent. I did not want to do this, but he then turned/to Bridgland" - who was the Managing Director of the Phoenix Investment Trust Ltd. - "he had a discussion with Bridgland and said 'Look, if Mr Williams will put this money into the Trust, will you undertake the sale of these shares for me at par?' Prior to that, I had told Dunlop when he approched me and said it looked as though the business would fall phut - I stressed the point that if the transfer could be made in the new Company almost ~~x~~ immediately I could see no objection perhaps to it, but the transfer of the shares in the new Com-

pany to us would have to be made immediately. He asked Bridgland would he undertake the sale of those shares in the Trust for him at par. Bridgland said, Yes, he would, but he certainly could not undertake to do it immediately, he would have to give him time to do it, it was a large parcel, and he would probably want six months to do this, and also he stressed the fact he would want the very lowest application and allotment moneys in order to get the money in...Dunlop said 'Mr Williams, I can arrange with Mr Bridgland to sell these shares at no cost to Woolworths, but I will have to give him time to do it. ' He explained to me also, with a transaction of this size, by the time the title was approved and the agreements completed and the contracts all in order, it would probably take anything up to six months before it could be completed . I said 'Provided Mr Dunlop, you will undertake to effect this transfer for us into the new Company and you will undertake the responsibility of selling these at par, I am willing to recommend to my Board to give you twelve months'. He assured me that would be done, in fact within a minute or two he had handed me an application share form for the Australian Investment Trust."

Dunlop, on the other hand, deposed:

"Mr Williams said 'I have a further ~~option~~ option over Stewart Dawson's property for a month', I think he said he paid £200 for it. He said 'I have a fresh proposition to put before you, and that is Woolworths to take up 25,000 shares in ~~that~~ your Trust, the Trust Company, when the new Company' - the Strand and Pitt Street Properties as it was afterwards called - 'is formed, the Trust to take up 25,000 shares in that Company for Woolworths and pay for them, we to reimburse you or pay you in twelve months. Mr Bridgland here is arranging with me that he will sell the shares in the Trust on behalf of Woolworths and without loss to that Company during that period'. I turned to Mr Bridgland, and he confirmed it. I said 'I cannot give you an answer at the moment, leave it with me and I will consider it'". Next day "I told him that I had seen Stewart Dawson and that he had offered easier terms viz £50,000 down and £100,000 to be paid in four quarterly instalments of £25,000 each. I said 'That assists our finances considerably'. I told him then that we would underwrite shares in the new Company and form it. He said 'That is good'. I told him that under the new arrangements I would not need

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the whole of the £25,000 for Woolworths in one sum. He said 'That will suit us, it will save my Company interest'".

Some correspondence passed between the parties in February 1929 which is mainly concerned with the terms of the lease which the defendant required. But a letter of 25th February 1929 sets forth that the defendant's application for shares is "made conditionally upon the proposed Company being formed and registered within three months.....and acquiring the properties in question, and also upon condition of the proposed Company when formed and registered entering into a lease with Woolworths immediately after registration." In April of 1929 the plaintiff notified the defendant that 25,000 shares of £1 each had been allotted to it in the plaintiff Company on the terms of its application. But another director of the defendant, Scott Wayne, was not satisfied with this letter of allotment, and he saw Dunlop. Scott Wayne deposed:

"I told Mr Dunlop that the allotment of shares was not in accordance with the arrangement as I understood. I understood we were to receive shares in the Strand Company and not in the Trust. Mr Dunlop stated that the Trust capital had been too small to handle the finance of the Strand and Pitt Street purchase, and it had been arranged to increase the capital of the Trust, and in order to assist the Trust, Mr Williams had arranged with Mr Dunlop that our £25,000 was to go into the Trust and ultimately be exchanged for shares in the Strand Company. I asked him how the transfer was to be managed, how he proposed to exchange the shares. He said those shares would be sold. I said 'How will the shares be sold?' He said 'As the Trust cannot sell the shares it has been arranged with the Phoenix Company to sell the shares'. I asked who the Phoenix Company were, he said the Phoenix Company were the promoters of the Trust and had also underwritten a large number of shares."

Scott Wayne further said that he would communicate with Williams and advise Dunlop further. In the meantime, the defendant protested that the allotment of shares was not made in accordance with the terms of its arrangement with the plaintiff, and the plaintiff replied:

"The £25,000 was intended originally for shares in a Company to purchase Stewart Dawson's property. Owing to the smallness of the capital of this Trust, we could not get the necessary bank accommodation. To assist us in this, Mr Williams, acting for Woolworths, agreed to take up 25,000 shares

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in this Trust. The Trust on the flotation of the Company to purchase Stewart Dawsons was to retain 25,000 shares of its underwriting in that Company, to be transferred to Woolworths Ltd when the shares in this Trust were sold, time not to exceed twelve months. The Phoenix Investment Company Ltd agreed to dispose of the shares within that period without any cost to Woolworths Ltd. We have the assurance that the Phoenix Company will give a written undertaking to this effect".

Later, Scott Wayne saw Dunlop, and communicated to him the contents of Williams' letters. Scott Wayne stated that he was worried about the Phoenix Company because he doubted its stability. Dunlop reassured him, but Scott Wayne asked what assurance was there that the Phoenix Company would sell the shares. Dunlop replied that the Phoenix Company would give an undertaking and that he would procure the document. On the 2nd May 1929, Dunlop as the Managing Director for the plaintiff, wrote to the defendant as follows:

"As arranged with your Mr Scott Wayne I send herewith undertaking by the Phoenix Investment Company Ltd to unload 25,000 shares in this Trust at par within 12 months."

The undertaking was addressed to the defendant, and was as follows:

"In connection with your application for 25,000 shares in the Australian Investment Trust Ltd., we confirm our arrangement made with your Mr Williams, namely that we will unload these shares for you at par and replace them with 25,000 shares in Strand and Pitt Street Properties within twelve months".

The application and allotment moneys were then paid by the defendant on the 25,000 shares which it had applied for in the plaintiff Company. It is clear, at this stage of the transaction, that neither party contemplated a payment of more than £25,000 by the defendant. It is equally clear that all parties contemplated a sale of the 25,000 shares in the plaintiff Company at par or better within twelve months, and the taking up by the defendant of an equal number of shares in the Company formed to acquire the Strand and Pitt Street properties with the proceeds of the sale of the shares in the plaintiff Company. I doubt if any of the ~~negotiations~~ negotiators of the transaction adverted to the position that would arise if the shares were not sold or were sold at a price below par. Everyone was satisfied that the shares could and would be sold by the Phoenix Company and that the proceeds would be sufficient to take up an equal number of

shares in the new Company in the name of the defendant. But however this may be, the learned trial Judge was satisfied that there was no agreement on the part of the defendant to find moneys or to pay for an additional 25,000 shares in the new Company or to reimburse the plaintiff Company if it found the moneys in respect of such shares. The deponents were in direct opposition, as we have seen, one to the other, and in these circumstances it is quite impossible for this Court to disturb the findings of the learned Judge.

Great stress was laid at the trial upon the question whether the 25,000 shares were to be sold by the Phoenix Company as agent for the plaintiff or as agent for the defendant. I do not think, however, that this is quite the right approach. It is true that the shares could not be sold without some authority from the defendant; it is equally true that the plaintiff had some arrangement with Bridgland as to the commission he should receive from the plaintiff on the sale of these shares. But the critical question is what was the agreement actually made, or to be imputed to the parties in case the 25,000 shares were not sold or were sold below par.

The next stage of the transaction was the formation and registration of the new Company - the Strand and Pitt Street Properties Limited. In August of 1929, the parties directed their attention to taking up shares in the new Company so that the defendant might become a shareholder in that Company. The defendant forwarded an application for 25,000 shares in the new Company, to the plaintiff, but accompanying it was a letter of 13th August 1929 stating that the application was conditional upon the plaintiff ~~xxx~~ paying the whole of the moneys required in respect of such shares, and upon an agreement being entered into by the new Company to grant a lease of part of the premises acquired from Stewart Dawson . The letter also stated that the defendant would execute a charge in favour of the plaintiff over the 25,000 shares in the new Company, and in it covenant to repay such moneys without interest upon a sale being effected of the 25,000 shares belonging to Woolworths Limited - the defendant - in the hands of the Australian Investment Trust Limited - the plaintiff. As the application was conditional, the plaintiff replied that it was useless, and returned it to the defendant. Further negotiations took place

between the parties, and on the 6th September 1929, the defendant forwarded to the plaintiff an application for 25,000 shares in the new Company, and the covering letter before set forth upon which this suit is founded. The new Company appears to have failed. The defendant Company, however, obtained a lease or an agreement for a lease of the premises that it required. The Phoenix Investment Trust Limited was unable to, or in any case did not, sell or unload the 25,000 shares held by the defendant Company in the plaintiff Company at par within twelve months, but the defendant Company has acquired 25,000 shares in the Strand and Pitt Street Properties Limited, which are not, I think, of much if any value at the present time.

The strength of the plaintiff's position is that it paid moneys for and at the request of the defendant Company upon the shares taken up by it in the Strand and Pitt Street Properties Limited. And prima facie an obligation arises to repay those moneys to the plaintiff. But that obligation is negatived when the letters and the oral statements of the parties which have been accepted by the learned trial Judge are examined. The arrangement was that the defendant Company should find £25,000, which in the first place should be applied in taking up shares in the plaintiff Company. But the parties stipulated that those shares should be sold - 'unloaded on the public' is the phrase - at par within twelve months, and the proceeds applied in acquiring an equivalent number of shares in the Strand and Pitt Street Properties Limited. The basis of the arrangement between the parties was that the proceeds of the sale of the 25,000 shares in the plaintiff Company should provide the fund out of which the payments or liabilities in respect of the 25,000 shares in the Strand and Pitt Street Properties Limited should be met. The undertaking of the Phoenix Investment Trust Limited to the defendant Company to unload the shares at par within twelve months made this arrangement sufficiently safe and secure, and so it would have been but for the failure of that Company. Both parties relied upon it. But it is quite contrary to the intention of the parties, as gathered from their letters and communications, that a personal obligation should rest upon the defendant Company in case the shares should not be sold. A covenant to repay such moneys, ~~with~~ without interest, upon a sale being effected of the 25,000 shares belonging to Woolworths Limited in the Australian Investment Trust Ltd negatives such an intention. The

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obligation is conditioned upon the sale, and the implication is that the proceeds of the shares create the fund out of which the obligation is to be met. The result is that the covenant now claimed by the plaintiff cannot be supported, and that its appeal should be dismissed.

It may be that the same result could be reached by way of an estoppel by judgment. The plaintiff brought an action at Common Law alleging a special contract, substantially in the terms of the covenant now claimed, and also upon the common money counts, but a verdict was found for the defendant, and judgment entered accordingly . But in the view I take of the substance of this case, the matter does not call for determination, and I merely call attention to Hoysted's Case 1926 A.C. 155 .

The decree made in this suit is unusual and not to be followed. It orders that the suit stand dismissed out of the Supreme Court unless the plaintiff is prepared to accept the offer of the defendant to execute a charge over the shares held by the defendant in the Company, Strand and Pitt Street Properties Limited, containing a covenant in the form ~~of~~ referred to in the said judgment, and the plaintiff being prepared to accept the said offer, without prejudice to its right of appeal against this decree, the Court ordered the defendant to execute the charge and that the execution of the charge by the defendant is without prejudice to the plaintiff's right of appeal. This decree should be varied, and it should be ordered that unless the plaintiff elects within a limited time to accept a charge and covenant in the terms hereinbefore ~~mentioned~~ indicated, then the suit should be dismissed.

The plaintiff should pay the costs of the suit in any event, and also of this appeal.

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AUSTRALIAN INVSETMENT TRUST LIMITED

v

W O O L W O R T H S L T D

JUDGMENT DIXON J.

AUSTRALIAN INVESTMENT TRUST LIMITED

v

W O O L W O R T H S L T D

The appellant, the Australian Investment Trust Limited, is a financial and underwriting company formed in the year 1928. In January and February 1929, the respondent, Woolworths Ltd, a trading company conducting a " chain-store " business, obtained from the owners of the fee simple of a large piece of land in the City of Sydney two successive options of purchase at a price of £770,000 of which about £50,000 would be payable at once and £100,000 within a short time. Woolworths Ltd required business premises in the City

and to this end acquired the options. It was,however,unable from its own resources to carry through such a transaction. It hoped to find some other investor or investors who would undertake the purchase of the fee simple in the exercise of the later option and would grant to it a long lease of so much of the premises as it needed for its business. One of its directors,named Williams, placed this proposal before the managing director of the appellant, the Investment Company,one Dunlop. Dunlop was prepared to undertake on behalf of his company the formation or promotion of a new company to exercise an option and acquire the land. Woolworths Ltd was willing to contribute £25,000 to the capital of the new company. The Investment Company found,however,that its bankers would not

support the enterprise unless it increased its own capital from £200,000, the amount it apparently issued, to £300,000. Dunlop reported this difficulty to Williams and proposed that Woolworth Ltd's £25,000 should, in the first instance, be applied in taking up shares of the Investment Company to assist it in raising the required extra capital. When the new company had been floated, shares in it would in some way replace the shares in the investment Company. Williams consented to this course early in February 1929. One of the promoters of the Investment Company was an underwriting company called Phoenix Investment Company Limited, the managing director of which was named Bridgland. This Company had, for an

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underwriting commission, undertaken the responsibility of the first issue of the Investment Company's capital, and appears to have underwritten the second issue proposed of £100,000. Bridgland was present at some of the discussions between Williams and Dunlop. Those discussions ended in Woolworths Ltd's sending in, on 5th February 1929, an application to the Investment Company for 25,000 £1 shares in that Company and paying to it two shillings and six pence a share (£3,125) application money. The application was endorsed " This application is subject to our letter of 5th " February 1929." The letter commenced " We enclose herewith " our application for 25,000 £1 shares to be placed on our behalf in " the New Company to be formed to purchase,...the property covered " by our option ..... Our application is forwarded on the basis of

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" of the tentative agreement reached with you. "

Then followed a statement of terms relating to the proposed lease, and a condition that Woolworths Ltd should have the right to nominate one director of the new company. The shares applied for in the Investment Company were, on 8th April 1929, allotted to Woolworths Ltd and payment of the balance of the sum of £25,000 was requested. The Investment Company had set about promoting the new company which actually went to allotment on 6th September 1929. In the meantime difficulties had arisen as to the manner in which the shares, which Woolworths Ltd had subscribed for in the Investment Company, should be replaced by shares in the new company. Much

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discussion and correspondence had taken place between the parties, the effect of which is in dispute. As a result, however, Woolworths Ltd executed an application for 25,000 £I shares in the new company, and handed it over to the Investment Company. Woolworths Ltd paid the amount of the shares issued to it in the Investment Company. It was arranged that the Investment Company should, at any rate in the first instance, pay the amount of the shares in the new company applied for in the name of Woolworths Ltd, and this to the extent of £18,750 the Investment Company did as and when the new company called up its capital during the ensuing year. The Investment Company claims that Woolworths Ltd is liable to repay this sum of money. The latter denies that it is so liable except upon

conditions which have not occurred. In substance, the condition which it sets up is that the shares issued to it in the Investment Company should be sold at their face value and so produce the £25,000. In other words, it contends that, upon the true arrangement between the parties, it was not intended in any event to find more than one sum of £25,000. The controversy turns upon the ascertainment and interpretation of the agreement actually made between the parties. The Investment Company, having first sued unsuccessfully at law for part of the money, brought a suit in equity seeking specific performance of an alleged agreement on the part of Woolworths Ltd to enter into a covenant to repay it and to execute a charge to secure such repayment over the shares allotted to it in

the new company. The suit was heard by Harvey C.J. in Eq., who found upon the facts that the covenant into which Woolworths Ltd had agreed to enter was conditional, in effect, upon the Investment Company procuring, through Bridgland or his deputy, the sale of the shares in the Investment Company issued to Woolworths Ltd, a sale which, as I understand His Honour's finding, must be at par. In support of the appeal this conclusion was attacked as based upon an erroneous interpretation of portions of the evidence upon which His Honour had relied, particularly in reference to the credence to be given to the conflicting testimony of the witnesses. In aid of this attack, reliance was placed also upon the correspondence between the parties. A consideration of the criticisms made

upon His Honour's judgment has led me to the conclusion that the version of the arrangement made for which the appellant contends cannot be adopted in this Court. Conceding that in some respects the criticisms made by the appellant's counsel of the judgment appealed from may be well founded, nevertheless upon the whole of the evidence, including the correspondence, the account given by Dunlop of the course taken by the transaction appears to me be the less probable. It failed to find acceptance before the learned primary Judge, and, in my opinion, it should fail to find acceptance in this Court. It is unnecessary to give more than a brief statement of the facts acceptance of which is involved in this view.

It is enough to state those upon which the true nature of the arrangement between the parties must be determined. Before the Investment Company's bank refused to support it in the transaction unless it increased its capital, the parties intended that Woolworths Ltd should subscribe £25,000 of the capital of the new company, which the Investment Company should promote for the purpose of acquiring the property under the option. When it became necessary for the Investment Company to increase its capital by £100,000, Dunlop, not unnaturally desired that the £25,000 should be devoted in the first instance to the fulfilment, so far as it would go, of this requirement. Williams did not desire to take up shares in the Investment Company and consented to do so as a

temporary expedient only,which,while it might delay,would not prevent,the application of the £25,000 as a subscription of capital in the new company. Although the Investment Company would act as underwriters in respect of the issue of the new company's capital, Bridgland's company were the underwriters for the capital of the Investment Company. The proposal to issue another £100,000 capital in the latter company,therefore,concerned him . Whether for this reason,or because of some closer connection with the Investment Company,he was introduced into the transaction between Williams and Dunlop. Possibly Williams had no very clear conception as to how shares in the new company would be issued to his company in replacement of the shares it would take up in the Investment

Company. But the proposal of Dunlop and Bridgland was that the shares in the Investment Company issued to Woolworths Ltd should be disposed of and the proceeds applied in taking up shares in the new company. This would mean that, although £25,000 of the new capital required by the Investment Company would be found immediately yet in the end Bridgland would remain under the necessity of placing the whole share capital of £100,000. At that time it was not intended that anything should be paid to the new company in respect of the shares in it obtained by Woolworths Ltd until its shares in the appellant company were actually sold and the proceeds became available for the purpose. Bridgland gave his assurance that the shares would be sold within twelve months. The basis of the 129

transaction was that they should be sold at par. It was on this footing that Williams, on 5th February 1929, sent in the application for shares in the Investment Company and wrote the accompanying letter, drafted by its solicitor, which commenced " In connection with " our application of 5th inst for 25,000 £I shares which are to be " allotted to us or our nominees in a company which is to be " promoted and registered by you as a limited liability company " under the Companies Acts of N.S.W. for the purpose of acquiring" the property. The letter states that the application is made conditionally upon the registration of the proposed company within three months and the acquisition of the property and grant of a lease to Woolworths Ltd upon terms which it proceeds to set out. In a reply of the same date, Dunlop referred to the application as

one for 25,000 shares in the Investment Company,as in fact it was , but confirmed the statement of the conditions. When the Investment Company's letter of 8th April 1929 was received notifying the allotment of the 25,000 shares in it and requesting payment,Williams had left Sydney. Another director of WoolworthsLtd,named Wayne, took the matter in hand. At first,pending communication with Williams,he wrote refusing to accept allotment on the ground that, notwithstanding the letter of 25th February 1929 drafted by the company's solicitor, a misunderstanding had ~~xxxxxxx~~ arisen. He interviewed Dunlop and told him that he understood his company was to receive sharws in the new company,not in the Investment Company. Dunlop explained how it came about that shares in the Investment

Company were applied for,and Wayne asked how the shares were to be exchanged. Dunlop answered that the shares in his company were to be sold and that,as his company could not sell its own shares,they would be sold by Phoenix Investment Company Ltd which had promoted it and underwritten its shares. Dunlop wrote to Woolworths Ltd a letter dated 12th April 1929 as follows :-

" Your letter of 11th inst received. I am sorry there has been a
" misunderstanding. Briefly the facts are -
" The £25,000 was intended originally for shares in a Company to
" purchase Stewart Dawson's property. Owing to the smallness of the
" capital of this Trust we could not get the necessary Bank
" accommodation. To assist us in this Mr Williams,acting for
" Woolworths,agreed to take up 25,000 shares in this Trust. The
" Trust on the flotation of the Company to purchase Stewart Dawson's,

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" was to retain 25,000 shares of its underwriting in that Company
" to be transferred to Woolworths Limited when the shares in this
" Trust were sold, time not to exceed twelve months.
" The Phoenix Investment Company Limited agreed to dispose of the
" shares within that period without any cost to Woolworths Limited.
" We have the assurance that the Phoenix Company will give a
" written undertaking to this effect.
" The fact that your Company signed an application for 25,000
" shares in this Trust proves our contention. The chief condition
" referred to in application was that the Trust would do its utmost
" to protect your Company for a lease of part of new premises which
" will be fulfilled.
" We now await Mr Williams' report. "

In reply, Wayne wrote that he had received a telegram from Williams as follows :- " Agreement was for 25,000 shares in Trust " Company which were to be transferred to new Company, when formed,"

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and that he awaited a full report from Williams as the arrangements were not known to him, or the Chairman of Directors, or the Company's Solicitor. Dunlop's letter of 12th April 1929 was forwarded to Williams and his reply dealing with it was read by Wayne to Dunlop. It contained the following passage :- " The first paragraph of " Mr Dunlop's letter is correct. The shares were to go into the " Trust, later to be transferred by the Trust into the new Company in " the name and on behalf of Woolworths, Ltd. Also it was intended " that the time within which this transaction was to be concluded " was not to exceed twelve months. The full responsibility to do " this was and is on the Investment Trust. The undersigned has no " recollection of any suggestion that this responsibility was to be " delegated to the Phoenix Investment Coy., that is evidently some " arrangement Mr Dunlop has made for his own protection, but it in " no way concerns Woolworths. The Australian Investment Trust

" agreed to place 25,000 shares in the new Company in the name of " Woolworths,Ltd within a period of twelve months. The undersigned " however was given to understand by Mr Dunlop that this would " most likely be effected in a much shorter time than twelve months. " In fact the 12 months was only mentioned tp give them breathing " time,the idea was to make the transfer almost immediately. "

Wayne also gave Dunlop to understand that,according to Williams,the transaction did not depend upon the sale of the shares by the Phoenix Investment Company Ltd,which was acting under some arrangement with the Investment Company. Dunlop said his Company could not sell the shares and it had been arranged that the Phoenix Company should do so. Wayne expressed misgivings about that Company and asked what assurance he had that it would sell the

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shares. Dunlop said that it would give an undertaking.Wayne,in effect,asked him to obtain it. On 2nd May 1929,Dunlop wrote to Woolworths Ltd :- " As arranged with your Mr Scott Wayne I send " herewith undertaking by the Phoenix Investment Co.,Ltd to unload " 25,000 shares in this Trust at par within twelve months." The undertaking enclosed was addressed to Woolworths Ltd and signed by Bridgland as managing director of the Phoenix Investment Coy Ltd. Its text was as follows :- " In connection with your application for " 25,000 shares in The Australian Investment Trust Limited,we confirm " our arrangement made with your Mr Williams,namely that we will " unload these shares for you at par,and replace them with 25,000 " shares in Strand and Pitt Street Properties,within twelve months."

In August 1929,Wayne was no longer in Sydney and the time was

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approaching when the application must be made for shares in the new company which had been registered under the name of Strand and Pitt Street Properties Ltd. The matter was discussed by Dunlop with another director of Woolworths Ltd,named Christmas. As a result,on 13th August 1929 Woolworths Ltd wrote to the Investment Company the following letter :- " This is to confirm the verbal " arrangement made by your Mr Dunlop with our Mr Christmas under " which Woolworths Limited is to lodge an immediate application " for 25,000 shares in Strand and Pitt Street Properties Limited " upon the condition that the whole of the moneys required are to " be paid by Australian Investment Trust Limited on behalf of " Woolworths Limited and Woolworths Limited is to execute in favour of " Australian Investment Trust Limited and at the expense of that " Company a charge over such 25,000 shares which charge is to " contain a covenant by Woolworths Limited to repay such moneys

" without interest upon a sale being effected of the 25,000 shares
" belonging to Woolworths Limited in the Australian Investment Trust
" Limited.

" The application is also conditional upon an agreement being
" entered into forthwith by Strand and Pitt Street Properties Ltd.
" with Woolworths Limited to grant a lease of the premises described
" in the letter of 25th February,1929,from Woolworths Limited to the
" Directors of the Australian Investment Trust Limited for the term
" herein mentioned. "

At the same time an application was signed by Christmas,as managing director of Woolworths Ltd,for 25,000 shares of £I in the new company. The Investment Company replied stating that a conditional application was unnecessary and was useless and returned it. On 4th September 1929,Dunlop wrote to Woolworths Ltd as

follows :- " Strand and Fitt Street Properties Ltd

" The application for 25,000 shares in the above Company on your
" behalf has to be made not later than Friday, 6th inst., so that
" completed list of shareholders be handed to the Registrar on 7thinst.

" I understand that the Agreement to lease has been approved by
" your solicitors and ours, therefore, there is no further need for delay.

" I enclose fresh application for your signature. Please return to
" us by Friday at latest, otherwise we must apply for the shares in the
" name of the Trust and your name will not appear, also it will mean
" considerable loss in stamp duty when the shares are transferred
" later according to our arrangement.

" An agreement must be entered into between yourselves and the
" Trust regarding these shares to the effect that we undertake to pay
" all the calls and that you hold the shares in trust for us till such
" time as you reimburse us. "

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On 6th September 1929, Christmas sent to the Investment Company an unconditional application in his company's name. He sent it with the following letter :- " We are forwarding you herewith Form of Applicatio " for 25,000 shares in the above company which has now been signed on " behalf of Woolworths Limited, and which is handed to you upon the " condition that the whole of the application and allotment moneys " payable in respect of such shares are to be paid by Australian " Investment Trust Limited on behalf of Woolworths Limited and " Woolworths Limited is to execute in favour of Australian Investment " Trust Limited, and at the expense of that Company, a charge over " such 25,000 shares which is to contain a covenant by Woolworths " Limited to repay such moneys without interest upon a sale being " effected of the 25,000 shares belonging to Woolworths Limited in The " Australian Investment Trust Limited. "

The covenant described by these letters is to pay upon a sale being effected of the shares in the Investment Company. It is a 295

conditional covenant and upon the facts of the case, as I consider they must be found, it is impossible to treat Woolworths Limited as under an unconditional liability to pay the amount contributed to the new company in respect of the shares allotted to Woolworths Limited. But the question at once arises what is the meaning and effect of the condition. In other words, upon whom is it incumbent to procure the buyer and at what price ? In answering these questions, more must be considered than the text of the final letter. The transaction was not reduced to writing so as to make the writing the exclusive record of the agreement between the parties. The true intent of their agreement must be collected from the whole course of the transaction. It is true that prima facie a payment made on

behalf of another person at his request is repayable by him. As the shares in the new company were allotted to Woolworths Ltd, it may be said that payments made by the Investment Company in respect of the liability upon the shares were made on behalf of Woolworths Ltd, and prima facie recoverable from it unconditionally. In this view nothing but a clear expression of a condition might be considered enough to qualify or defeat the liability. But it must be remembered that Woolworths Ltd made it clear that it intended to contribute a sum of £25,000 and no more to the enterprise. That sum was devoted by it to the acquisition of shares in the proposed company. The money was diverted to the purpose of supplying new

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capital to the Investment Company at its request and upon condition that the money should afterwards reach the proposed company, or, at any rate, that shares in the proposed company should be forthcomi The sale of the shares in the Investment Company became a necessary element in the arrangement, because only by that means could the shares in the new company replace them fully paid. When the letter of 1st May was written by Bridgland, and that of 2nd May 192 by Dunlop, it was intended that the shares in the Investment Company should be sold before the shares in the new company were paid up, or, perhaps, taken up. A payment by the Investment Company in respect of these shares out of its own funds does not seem then to have been in contemplation . It was not unnatural, therefore, that Bridgland

should speak of " unloading the shares for you ",viz.Woolworths Ltd. The shares stood in that company's name and it was that company which required that they should be sold and stood to suffer if they were not. But both Bridgland and Dunlop make it clear that the sale was to be at par. In other words,the assurance sought and given was that the shares would produce the amount needed to pay the capital of the new company. In August the transaction assumed a new aspect when,the shares still being unsold,it became necessary to subscribe for shares in the new company and progressively to pay up the capital so subscribed. To the extent to which the Investment Company paid this capital,it became the person that stood to suffer

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if the shares were not sold. It stipulated for security over the shares in the new company, but it did not stipulate expressly for reimbursement from Woolworths Ltd, except when the shares were sold. In these circumstances, it does not appear to be reasonable to treat the terms of the sale in contemplation as varied. The sale of the shares in the Investment Company remains not only the occasion, but also the source of the payment. The sale must be a sale at par. It almost necessarily follows from this that it was the Investment Company and not Woolworths Ltd that should find the purchaser. No doubt, Bridgland was expected to do so, and if he fulfilled his undertaking, it was of no importance to the parties on whose behalf he acted. But as a matter of contract between the parties no

implication arose imposing a duty upon Woolworths Ltd to exercise reasonable diligence to find a buyer. No doubt, if it sold the shares voluntarily below par without the consent of the Investment Company, by thus rendering fulfilment of the condition impossible, it would expose itself to an immediate liability to pay. But, short of this, the covenant it agreed to give would impose no liability upon it to repay the full amount to the Investment Company unless and until the shares were sold at par. The purpose of the sale is to produce a sum for repayment to the Investment Company. It seems reasonable, therefore, to imply a further condition, viz. that, if the Investment Company is content

to accept less than the full amount it paid upon the shares in the new company, it may require a sale below par of ~~the~~ Woolworths Ltd's shares in its own capital. In that event, the covenant operates only as to the sum produced by the sale. In any case, the sale, whether for par or less, must take place within a reasonable time. After the effluxion of a reasonable time, the covenant would cease to impose an effectual obligation. The charge upon the shares in the new company apparently was intended to secure the Investment Company in case a sale did not take place. But recourse to the remedies arising from the charge might be had, although no sale of the shares in the Investment Company had been effected and a reasonable time had not elapsed. If the full sum were not

produced by those remedies, a sale of the shares might be insisted upon to produce the balance. It is a reasonable consequence of this position, a position which the express arrangement between the parties appears to bring about, that if a sale for less than par is required by the Investment Company, the charge remains an available security for the balance. It may result that Woolworths Ltd would lose the whole of its £25,000. But it would not incur any liability in debt beyond the sum produced by the sale of its shares in the Investment Company. What, in the event, actually happened in detail is not made clear by the evidence. But neither Bridgland nor anyone else effected a sale of the shares at par or at

all. The Investment Company paid up £18,750 in respect of the shares allotted to Woolworths Ltd in the new company. It requested Woolworths Ltd to give a covenant and charge in a form which referred only to ~~the~~ a sale of the shares without stating the price. Eventually Woolworths Ltd insisted that the covenant should state the price as par and no covenant was given. The new company appears to have failed and the charge to be given over its shares may be of little or no value. At any rate, the personal liability of Woolworths Ltd is the matter in contest. In my opinion that liability is not now enforceable.

The decree appealed from requires Woolworths Ltd to give a covenant and a charge. The covenant is to be conditional

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only, but the condition is so expressed as to make it uncertain on the face of the decree what exactly is intended. I think the substance of the covenant is to repay the amount paid by the Investment Company upon the Investment Company's procuring a purchaser of the shares at a price at least equal to the face value thereof. It may be desirable to amend the decree to express this meaning, and, perhaps, also, the implication contained in the agreement between the parties.

The appeal should be dismissed with costs.

AUSTRALIAN INVESTMENT TRUST LIMITED

V

WOOLWORTHS LIMITED

JUDGMENT McTIERNAN J.

In my opinion the appeal should be dismissed.

The appellant, at the instance of the respondent, promoted a new company called Strand and Pitt Street Properties Limited, to exercise certain options held by the respondent, to purchase land variously described as the Strand and Pitt Street Properties and Stewart Dawson's property, in the City of Sydney. The respondent wished to erect business premises on the land and it was proposed that the new company should give a lease to the respondent. The bank which was to provide financial accommodation to enable the land to be acquired, insisted that the appellant's capital should be increased by £100,000. The respondent was to take up 25,000 £1 shares in the new company but it agreed to help the appellant to comply with the bank's condition by putting the sum which was available to buy these shares in the new capital of the appellant. Following upon that agreement the respondent company wrote a letter to the appellant company in which they said "We enclose herewith our application for twenty-five thousand (25,000) £1 shares to be placed on our behalf in the New Company to be formed to purchase Stewart'Dawson's property covered by our option in Pitt and King Streets". The application which was enclosed was for 25,000 ordinary shares of £1 each in the appellant company. The letter continued "Our application is forwarded on the basis of the tentative agreement reached with you" and proceeded to state a number of conditions which the respondent company required to be put in its lease which it was to get from the new company. The appellant did not reply to this letter and on 25th February, the respondent wrote a further letter to the appellant in which the following reference to the application of the 5th February is made."In connection with our application of 5th inst. for 25,000 £1 shares which are to be allotted to us or our noninees in a Company which is to be promoted and registered by you as a Limited Liability Company under the Companies Acts of New South Wales".The letter then describes the purpose for which the new company was to be formed and continues "This application is

made conditionally upon the proposed company being formed and registered within three months from this date and acquiring the properties in question and also upon the condition of the proposed Company when formed and registered entering into a Lease with Woolworths immediately after registration to the following effect". The letter then proceeded to state the terms and conditions of the lease and concluded,"We shall be glad to receive your acceptance of these terms,which are in lieu of and are to be substituted for those set out in our letter to you of the 5th inst".

On 8th April the appellant company allotted the respondent 25,000 shares in the appellant's capital and on 11th April notified the respondent that the shares had been so allotted. This notification was received by Scott Waine, a director of the respondent company, who had not previously handled this matter. He interviewed Dunlop, the director of the appellant company, who had the conduct of the matter for it, and on 11th April also wrote to him. The appellant replied by letter dated 12th April which contained the following statement:-

"Briefly stated the facts are:-
"The £25,000 was intended originally for shares in a company to purchase "Stewart Dawson's property. Owning to the smallness of the capital of "this Trust we could not get the necessary Bank accommodation.To assist "us in this Mr. Williams, acting for Woolworths agreed to take up 25,000 "shares in this Trust. The Trust on the flotation of the Company to "purchase Stewart Dawson's was to retain 25,000 shares of its under- "writing in that Company to be transferred to Woolworths Limited when "the shares in this Trust were sold, time not to exceed twelve months
" The Phoenix Investment Company Limited agreed to dispose of "the shares within that period without any cost to Woolworths Limited. "We have the assurance that the Phoenix Company will give a written "undertaking to this effect.
" The fact that your Company signed an application for 25,000 "shares in this Trust proves our contention. The chief condition re- "ferred to in application was that the Trust would do its utmost to protect your Company for a lease of part of new premises which will "be fulfilled".

The new company was formed at the end of July or the beginning of August 1929,It entered into an underwriting agreement with the appellant which forwarded to the respondent for signature an application for 25,000 shares in the new company. After discussion as to the terms of the lease which were arranged, the respondent sent to the appellant a letter, dated 6th September 1929, which is in the following terms:-

" re Strand and Pitt Street Properties Limited.
" We are forwarding you herewith Form of Application for 25,000 "shares in the above company which has now been signed on behalf of "Woolworths Limited,and which is handed to you upon the condition that "the whole of the application and allottment moneys payable in respect "of such shares are to be paid by Australian Investment Trust Limited

"on behalf of Woolworths Limited, and Woolworths Limited is to execute "in favour of Australian Investment Trust Limited, and at the expense of "that Company, a charge over such 25,000 shares which is to contain "a covenant by Woolworths Limited to repay such moneys without interest "upon a sale being effected of the 25,000 shares belonging to Woolworths "Limited in the Australian Investment Trust Limited".

The parties are in dispute as to the meaning of the condition "upon a sale being effected of 25,000 shares belonging to Woolworths Limited in the Australian Investment Trust Limited". It is common ground that the letter of 6th September is not the sole repository of the agreement between the parties. The effect of this condition must therefore be determined upon a consideration of all the correspondence and conversations which took place between the parties in the course of the transaction. The view which is taken as to the credibility of the witnesses will determine what parts of the oral evidence should be relied upon. In a careful analysis of the evidence Mr. Weston forcibly stated a number of reasons why the estimate, which the learned Chief Judge in Equity formed of the credibility of the witnesses, should not be adopted. But there is no such conflict between the documents and the ascertained facts on the one hand, and the conclusions founded on the evidence of witnesses whom the learned Judge believed on the other, as to afford any substantial grounds for rejecting His Honour's views as to the credibility of any of the witnesses. The appellant contended that the proper inference from the whole course of dealing between the parties was that the respondent was obliged to effect the sale referred to in the concluding part of the letter of 6th September. It would be otiose to recapitulate in detail the facts and the whole of the correspondence between the parties in the light of which this letter is to be construed. Reference has already been made to the receipt on 11th April by Scott Waine, a director of the respondent company, of a notification that the appellant had allotted 25,000 shares in its own capital to the respondent. At this critical stage he had a discussion with Dunlop. The learned Judge accepting Scott Waine as a trustworthy witness thus summarises the effect of this interview as it was comprehended by this witness:-

"From his interview with Mr. Dunlop he understood that the finalarrange- "ment had been that the defendant company should apply for shares in the "plaintiff company, that such shares should subsequently be sold and the "money applied in set off against the moneys required to take up shares "in the Strand Company".

Again, this witness read to Dunlop the following extract from a letter purporting to explain the transaction, which the witness had received

from another director who had been in the negotiations before him.:-

"The shares were to go into the Trust, later to be transferred by the "Trust into the new company in the name and on behalf of Woolworths Ltd. "Also it was intended that the time within which this transaction was "to be concluded was not to exceed twelve months. The full responsibility "to do this was and is on the In vestment Trust; the undersigned has no "recollection of any suggestion that this responsibility was to be "delegated to the Phoenix Investment Co., that is evidently some "arrangement Mr. Dunlop has made for his own protection, but it in no "way concerns Woolworths."

The evidence does not show that Dunlop denied that this statement represented the arrangement between the parties. But what is there expressly stated is sharply in conflict with the version of the arrangement which Dunlop insisted upon at the trial. The appellant, however, relies upon a document which the learned trial Judge says was the "most debated in this case and is the plaintiff's sheet anchor" addressed by Bridgland, the Principal Director of the Phoenix Investment Trust, to the respondent. The document is in these terms:-

"In connection with your application for 25,000 shares in the Australian "Investment Trust Limited, we confirm our arrangement made with your "Mr. Williams, namely that we will unload these shares for you at par, "and replace them with 25,000 shares in Strand and Pitt Street Properties "within twelve months".

Upon a consideration of the whole course of the transaction, I agree with the learned Judge that this letter does not establish, as the appellant contended, that it was a term of the arrangement that responsibility for selling its shares [redacted] rested upon or had been accepted by the respondent. His Honour was right in construing that letter to mean that Bridgland was selling the shares on behalf of the respondent company in the sense that the transaction was arranged between the appellant and the respondent to provide the means for taking up shares in the new company.. The respondent, for the accommodation of the appellant took up shares in its new capital with the moneys which it was well understood between the parties were to be applied in paying for shares in the new company in which it was essential for the respondent's purposes that it should be a large shareholder. It was never intended that the respondent's outlay would exceed the amount of these moneys, namely £25.000. Accordingly, the respondent provided the application and allottment moneys in respect of the respondent's shares in the new company because the respondent's funds, which were to have been available for this purpose, had been [redacted] put in the capital of the appellant company for its accommodation. The parties agreed that

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the moneys so paid by the appellant should be repaid to it upon a sale of the respondent's shares in the appellant's capital being affected.

In my opinion the agreement between the parties imposed the obligation of selling the shares on the appellant and the respondent is not under a personal liability to the appellant to repay the moneys. It is, I think, a necessary implication that the sale would be at a price not less than the nominal value of the shares. The appellant is entitled under its agreement to the execution of a charge over the respondent's shares in the new company and to the execution of a covenant for the repayment of the moneys paid in respect of these shares upon a sale being effected by the appellant of the respondent's 25,000 shares of £1 each in the capital of the appellant at a price not less than £1 per share.

In the result the appellant fails in the appeal.

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In the High Court of Australia.

(New South Wales Registry)

No. 3 of 1934
On appeal from the Supreme Court of New South Wales in Equity.

Coram:- Rich, Starke, Dixon & McTiernan JJ.

Friday, 14th Dec, 1934.

Mr. Dudley Williams for appellant Trust

Mr. B.J.F. Wright for Respondent

Motion made

FDY

Australian Investment Trust Ltd
v.
Woolworths Ltd

Reasons for Judgment

Published at Melbourne Wednesday 17th October, 1934

On an application made by Mr. Fitt for Appellant that formal Judgment be not pronounced by the Court this day, as both parties desire to speak to the Form of Judgment when the Court sits in Sydney, liberty was given to the parties to speak to the minutes in Sydney.

(See back hereof)