ORIGINAL

IN THE HIGH COURT OF AUSTRALIA.

H A R R I S

V.

C A M E R O N

REASONS FOR JUDGMENT.

MR. JUSTICE WILLIAMS

Delivered at SYDNEY,

on FRIDAY, 11th MAY, 1945.

40358 A. H. PETTIFER, ACTING GOVT. PRINT.

HARRIS

v

CAMERON

ORIGINAL

Judgment — Williams J.

The plaintiff claims damages against the defendant for breach of a covenant contained in a deed made between the plaintiff of the one part and the defendant of the other part dated 24th July 1941 providing for the dissolution, as from 1st January 1941, of a partnership under which they had been carrying on the business of licensed victuallers at Mackay in Queensland since 9th March 1936. One of the assets of the partnership was the Grand Hotel, Mackay, where the plaintiff had lived during the partnership occupying a bedroom surrounded by a glassed in verandah situated on the flat roof of the hotel. The effect of the deed was to dissolve the partnership upon the basis that the defendant acquired the assets and took over the liabilities and agreed to pay the plaintiff the sum of £2,600 for his share of the nett assets, payable £500 in cash and the balance pf £2,100 together with interest at 7 per cent on the outstanding purchase moneys by weekly instalments of £5 per week. The defendant is still indebted to the plaintiff for a substantial sum under the deed. The text of the covenant upon which the plaintiff has sued is as follows:- The said William Home Cameron shall provide the said Alfred Harris free of rents rates and charges of all kinds with a home for himself and his wife and both and each of them with all the comforts and conveniences thereof including board lodging and service at the Grand Hotel Mackay aforesaid and the free and unrestricted use and enjoyment of the apartments at present occupied by the said Alfred Harris and his wife for so long as the said William Home Cameron or his wife shall remain the owner or part owner of the said Grand Hotel.

The apartments referred to in the covenant are the room and verandah on the roof of the hotel to which I have already referred.

The deed also provides that so long as any moneys shall remain due and owing the defendant shall not sell or dispose of the business carried on by him at the hotel without first obtaining the consent in writing of the plaintiff.

The evidence establishes that after the dissolution of the partnership the plaintiff and his wife continued to live in the apartments until September 1941 when business caused them to go and live for a time at a hotel at Bowen of which the plaintiff had become mortgagee in possession. During that period the apartments were kept locked up, the key being held by the plaintiff or on his behalf. The plaintiff whilst he was living at Bowen visited Mackay on a few occasions and was accommodated in other rooms at the hotel. He does not allege that there was any breach of the covenant prior to 18th April 1943. On 1st February 1943 possession of the hotel was acquired by the Commonwealth under reg.54 of the National Security (General) Regulations and the hotel was converted into an American hospital. The plaintiff's apartments were not altered or occupied but he was forced to remove his belongings from the hotel and from that date until the present time the board and lodging covenanted for by the deed has not been available. The plaintiff sold the hotel at Bowen in April 1943 and he and his wife returned to Mackay where his daughter lives on 18th of that month. After staying at Mackay for a short time with their daughter they travelled first to Brisbane and then to Sydney. The plaintiff has sworn that he would have stayed at Mackay if he had been able to obtain proper accommodation there, and I think that I must accept this evidence. The Commonwealth returned the hotel to the defendant on 9th April 1945 and he states that, as soon as it is ready to receive guests, which will be in about a month's time, he is ready and willing to restore the plaintiff to his rights under the covenant.

It is clear that the defendant continued to be the owner of the hotel within the meaning of the covenant

during the period that the Commonwealth remained in possession, so that the only defences with which I need deal are (1) that the covenant was frustrated by the requisition of the hotel for an indefinite period from 1st February 1943 or alternatively suspended during the period the Commonwealth remained in possession, and (2) that the effect of reg.60K of the National Security (General) Regulations is to confine the plaintiff's rights to a claim for compensation under reg.60D and to deprive him of his right to sue the defendant for breach of contract in respect of the period of possession.

The rights conferred upon the plaintiff by the covenant are contractual. The defendant could at any time revoke the license for the plaintiff and his wife to occupy the apartments and if they refused to quit they would become trespassers. But if the defendant acted in this manner he would render himself liable for damages for breach of covenant: Cowell v. Rose Hill Racecourse Co. 56 C.L.R. 605: Thompson v. Park 170 L.T. 207.

The law of frustration of contracts has been discussed by the House of Lords in four recent cases, namely Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corpn.: Fibrosa Spolka Akegyna v. Fairbairn 1943 A C 32: Denny Mott and Dickson Ltd 171 L.T. 345: Cricklewood Property and Investment Trust Ltd v. Leightons Investment Trust Ltd 172 L.T. 140. It has also been recently discussed by this Court in Scanlan's New Neon Ltd v. Tooheys Ltd 67 C.L.R. 169, a decision from which the Privy Council refused special leave to appeal. I shall not attempt to add to the many definitions of the doctrine and statements of its basis that occur in these cases. It is generally considered to be based on the presumed common intention of the parties. In Constantine's case at p.172 Lord Maugham points out that one instance where a contract can be frustrated is where circumstances arise which make the performance of the contract impossible in the manner and at the time contemplated. If the present covenant has been frustrated it must be on this ground. The effect of frustration is to put an end to the contract as a whole as from the occurrence of the supervening event. Of course if a document contains not one contract but two or more, one or more of these contracts may be frustrated

without the remaining contracts becoming discharged. But the deed in the present case is to my mind a single and not a composite document, the covenant in suit being an integral part of the consideration flowing from the defendant to the plaintiff for the sale of the plaintiff's rights in the partnership assets to the defendant. The contract was completely performed on the part of the plaintiff at the time he executed the documents required to transfer these assets to the defendant, so that the further performance of the contract after that date became the sole obligation of the defendant. In Tamplin's case, 1916 2 A.C. 397 at p.423 Lord Parker, in whose speech the Lord Chancellor concurred, said "Some conditions can be more readily implied than others. Speaking generally it seems to me easier to imply a condition precedent defeating a contract before its execution has commenced than a condition subsequent defeating the contract when it is part performed." If the change in circumstances relied on had the effect of relieving the parties from any further obligations to perform the deed after 1st February 1943, the defendant would have been freed from his obligation to pay the balance of purchase money and interest. But it would be extremely difficult, I think, to presume such a common intention, and even if Lord Wright's "heretical view" expressed in Denny Mott & Dickson Ltd (supra) at p.349 that the theory of the implied condition is not really consistent with the true theory of frustration should finally be accepted, it would be equally difficult for "informed and experienced minds" to give to the event such an exaggerated importance in relation to the express contract. The possibility of the Commonwealth entering into possession of the hotel was, I think, entirely beyond the contemplation of the parties when they entered into the deed, but that consideration alone is not sufficient. The change of circumstances must also be so fundamental as to be regarded, as Lord Simon said in Cricklewood's case (supra) at p.142, as striking at the root of the ~~agreement~~ contract, or as Lord MacMillan said in Denny Mott and Dickson Ltd (supra) at p.348, as defeating ~~the~~ its purpose ~~of the contract~~

In the present case the impossibility of the defendant for an indefinite period providing board and lodging at the hotel would not produce such a change of circumstances as to strike at the root of the deed or even of the covenant and defeat its purpose. The purpose of the covenant was to provide the plaintiff and his wife with free board and lodging at a first class hotel. If the defendant was disabled from providing this corrody at his own hotel, the plaintiff would be placed in substantially the same position by being provided with the money to obtain the same maintenance at some other comparable hotel. There is ample authority that a contract is not frustrated when it is capable of being substantially performed although there is some interference with its performance according to its strict terms. So in Matthey v. Curling 1922 2 A.C. 180 Lord Buckmaster said at p.230 "At any rate, I am satisfied that a terminable

> occupation by military authorities during an uncertain time, for which compensation may prove to be recoverable, constitutes no answer to the obligations of this repairing covenant."

I agree with Mr Mason that this statement does not appear to hinge upon the contract to which Lord Buckmaster was referring being a lease. In Denny Mott and Dickson Ltd (supra) at p.351 Lord Wright said "Nor do I doubt the possibility that there might be cases in which the contract provides for various matters

> to be performed in such a way that the impossibility of performing some of the stipulations might not frustrate the contract as a whole".

In the same case Lord Porter at p.351 cited with approval the statement that appears in 11th Edition of Pollack on Contracts edited by Professor Winfield at p.255 "Further it is to be

> observed that the disturbing cause must go to the extent of substantially preventing the performance of the whole contract. Interference leaving a considerable part capable of performance will not be an excuse."

Mr Sheppard referred me to two statements in Cricklewood's case, one by Lord Russell of Killowen at

p.144:- "It may well be that circumstances may arise during the currency of the term which render it difficult, or even impossible, for one party or the other to carry out some of its obligations as landlord and tenant, circumstances which might afford a defence to a claim for damages for their breach, but the lease would remain."

And to the statement of Lord Goddard at p.148:- "If, however, the tenants came under an obligation to build, but were prevented from so doing by the orders, they would furnish them with a good defence, were they sued for breach of their covenant to build, but not to a claim for rent under this lease."

I am inclined to agree with Mr Mason that their Lordships may have had in mind some change in the law which made it illegal for the covenantee to perform his covenant. On that point Viscount Simon L.C. said in Constantine's case (supra) at p.163

"Discharge by supervening impossibility is not a common law rule of general application like discharge by supervening illegality."

And in Denny Mott and Dickson Ltd at p.348 Lord MacMillan said:

"It is plain that a contract to do what it has become illegal to do cannot be legally enforceable; there cannot be default for not doing what the law forbids to be done."

But in the absence of further elucidation it is difficult, even in that case, to reconcile those statements with the reiterated view of members of the House of Lords that frustration operates to discharge and not merely to suspend performance of the contract.

I think I should add that, even if the covenant could be severed from the rest of the deed, I would still be of opinion that in the circumstances the supervening event would not be sufficient to destroy it. It has been held, of course, on several occasions that if it is probable that the impossibility created by the change of circumstances is likely to continue so indefinitely as to defeat the purpose of a commercial contract, the parties must not be left in

indefinite suspense and the contract must be considered to have been frustrated immediately on the occurrence of the event. See the authorities referred to by Lord Wright in Denny Mott and Dickson Ltd (supra) at p.350. But I venture to think that this principle should be applied with caution to a covenant such as the present.' To hold the defendant still bound by the covenant during the period of interruption would not prevent him from carrying on his business or destroy the substantial identity of the performance contracted for. As I have already said, the defendant had received full consideration for entering into the covenant and the covenant was one which was capable of substantial performance by the provision of board and lodging at another hotel. The deed provided for the payment of the purchase money by instalments over a long term of years and during this term the defendant was not entitled to sell the hotel and thereby terminate the covenant without the consent of the plaintiff. It was not probable on 1st February 1943 that the hotel would be required as a hospital for a prolonged period, and subsequent events, which can be looked at, have shown that the interruption was limited to two years. Mr Sheppard referred me to the case of Innholders Co. v. Wainwright 33 T.L.R. 356, where Ridley J held that the obligations under a covenant in a building lease was suspended during the continuance of an order which prohibited such work. The legislation in that case made it illegal to do the work and it may be, in view of the statements by Lord Russell and Lord Goddard to which I have referred, that legislation could operate to suspend a covenant whilst it was illegal to perform it, although, as I have said, such a view appears to be inconsistent with the general view that frustration effects a complete discharge. Improvements may still be invented for "a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands" in the inherent jurisdiction of an ultimate Court of appeal. But in the present state of development of the law of frustration I feel bound to say that if Innholders Co. v.

Wainwright is not distinguishable, I am not prepared to follow it. For these reasons I am of opinion that the defence that the covenant was destroyed, or alternatively, that its obligations were suspended during the period mentioned fails.

It remains to consider the effect of reg.60 K. This regulation provides that "no action, other than an action for the recovery of compensation determined by agreement, or in pursuance of these regulations, or of any other regulations, or of any orders relating to the requisition or impressment of animals or things, shall be maintained against any person in respect of anything purporting to be or to have been done in pursuance of any of the regulations and sub-regulations mentioned in reg.60 D of these regulations, or in pursuance of any order made in pursuance of any of those regulations or sub-regulations." Reg.60 D which creates the right to compensation is of wide scope and gives a right to any person who has suffered loss or damage in relation to any property in respect of which he has, or has had any legal right or any contract to which he is, or has been a party. It may well be, therefore, that the plaintiff acquired a right to be compensated by the Commonwealth for the disturbance of his contractual rights to live at the hotel. But I am unable to construe reg.60 K so as to limit the plaintiff to this right and to deprive him of his right to claim damages against the defendant for breach of covenant. The regulation applies, I think, to damage or loss caused to a claimant by some person exercising statutory powers on behalf of the Commonwealth and limits any rights of action in respect of such exercise against that person or the Commonwealth to the recovery of compensation which has first been determined as therein mentioned. It does not affect the enforcement of contractual and other rights and obligations existing independently of the regulations or convert those rights into claims for compensation against the Commonwealth. For these reasons I am of opinion that this defence also fails.

The plaintiff is therefore entitled to damages. It has been agreed that I should assess the whole of the damages which the plaintiff has suffered to date. On the basis that the

defendant will, as he said in the witness box, provide the plaintiff with the board and lodging covenanted for in approximately a month's time, ~~xxx~~ I assess damages at £600 and order that judgment be entered for the plaintiff for this amount with costs including reserved costs.