No. 12 of 1946.

IN THE HIGH COURT OF AUSTRALIA.

EVANS

v.

FRASER

ORIGINAL

REASONS FOR JUDGMENT.

Judgment delivered at MELBOURNE

on WEDNESDAY, 16th OCTOBER, 1946.

H. J. Green, Govt. Print., Melb.

C.2774

EVANS v. FRASER.

REASONS FOR JUDGMENT.

LATHAM C.J.

STARKE J.
DIXON J.
McTIERNAN J.
WILLIAMS J.

REASONS FOR JUDGMENT. LATHAM C.J.

Various questions have been argued in this case, some of general importance, but the matter, in my opinion, may be determined upon the ground which is the basis of the judgment of the trial judge. Clause 5 of the agreement sued upon is in the following terms:-

> ".....it is further agreed that if either of the parties hereto as Vendor and Purchaser, should at any time neglect to perform or refuse to comply with any part of this Agreement, the party so refusing or neglecting shall pay unto the other of them, who shall be willing to complete the same, the sum of One hundred (£100/0/0) pounds (exclusive of the sum of Twenty-five (£25/0/0) pounds now deposited) as or in the nature of liquidated damages ....."

The question is whether the words in clause 5 "neglect to perform or refuse to comply with any part of this Agreement" apply to the obligation which is placed upon the other party to the agreement by clause 4A. Clause 4A is in these terms:-

> "The Vendor warrants that the lease herein referred to is for a period of not less than two years with the right of option for an additional three years."

His Honour Mr. Justice Gavan Duffy held that that was a warranty as to the existence of a lease of a particular description and, as it was established that there was no such lease, the result was that there had been a breach of the warranty; but that there had been no "neglect to perform" or "refusal to comply" with any part of the agreement on the part of the other party. In other words, he interpreted clause 4A as referring to things thereafter to be done under the agreement and not as referring to the warranty of an existing fact. I agree with that construction of the agreement. Upon this view clause 5 does not apply to a breach of clause 4A. Accordingly, no argument founded upon clause 5 having relation to any limitation of the amount of damages recoverable under the agreement has relevance to a claim based upon a breach of clause 4A. I add that it has been argued that clause 4A impliedly contains a promise, and really means that the vendor will pay damages if he has got a lease of the

description mentioned. In my opinion a promise contained in a contract is a promise to do or abstain from doing a particular thing or is a warranty that a particular thing exists; it is not merely a promise to pay damages in the event of a breach of the term of the contract. In other words, terms of contracts impose obligations in themselves and the law provides remedies. The promises in a contract are not merely promises to provide the remedies which the law provides.

Upon the view of the meaning of clause 5 which I have stated, it is not necessary to consider whether clause 5 is a clause providing for a penalty or for liquidated damages or to consider the further point whether, if it is a penalty clause, it operates to impose a limit upon the amount recoverable as damages. Accordingly, in my opinion, the appeal should be dismissed with costs, and the cross-appeal also should be dismissed.

JUDGMENT. STARKE J.

I agree with the learned judge in the court below that the provisions of clause 5 do not apply to the so-called warranty in clause 4A and for the reasons which he assigned.

JUDGMENT. McTiernan J.

I agree.

JUDGMENT. DIXON J.

I agree.

JUDGMENT. WILLIAMS J.

I also agree. Clause 5 applies, so far as material, where either party neglects to perform the contract. All that the vendor agreed to do so far as the lease was concerned in order to perform the contract was to assign the lease, if any, held by her of the premises. The promise that this was a lease with two years to run and with an option of renewal for three years was a collateral promise made by the vendor in consideration of and incidental to the purchaser entering into the contract. It is quite independent of clause 5.

ORDER.

Appeal dismissed with costs. Cross-appeal dismissed. No order is made as to the costs of the cross-appeal.