14 ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

GEISSMANN

V.

YOUNGMAN

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Tuesday, 20th December 1960

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

GEISSMANN v. YOUNGMAN

ORDER

Appeal dismissed with costs.

GEISSMANN v. YOUNGMAN

JUDGMENT

FULLAGAR J.
KITTO J.
TAYLOR J.

GEISSMANN v. YOUNGMAN

This is an appeal from an order of the Supreme Court of Queensland by which, at the suit of the respondent, the Court decreed specific performance of a written contract of sale made between the respondent as purchaser and the appellant as vendor. The subject property was approximately 108 acres of farming land, together with certain improvements, situated at North Tamborine and the purchase price specified in the contract was £6,800. This sum was payable as to £1,000 thereof by way of deposit and the balance "within thirty (30) days from date hereof in exchange for possession of the property, a Memorandum of Transfer thereof, duly signed by the vendor in favour of the purchaser or his Nominee". By cl. 19 possession of the property was to "be given not later than 22nd May 1959" and by the succeeding clause time was "in every respect" deemed to be of the essence of the contract. It should be said at this stage that the contract bore the date, 4th May 1959, and the dispute between the parties was concerned with the question whether in the circumstances hereinafter related the respondent had by the 25th May 1959 made default in payment of the balance of the purchase money and whether the appellant became entitled, on that account, to rescind the contract and forfeit the deposit. Clearly enough, if nothing more appeared, it might readily be concluded that the time for payment of the balance of the purchase money did not expire until the 3rd June 1959 but the argument was advanced on behalf of the appellant that in the proved circumstances the last day for such payment was 24th May 1959.

In part, this argument rested upon evidence of dealings which took place between the parties prior to and upon the day when the written contract was executed by

the appellant. Indeed, the statement of defence in the proceedings went so far as to allege that the only contract between the parties was an oral contract made on the 24th April and that the subsequent written instrument was prepared as "a document to evidence the said agreement". Accordingly, it was said, the period of thirty days from the date of the contract expired on the 24th May and that since the balance of purchase money was still outstanding at the end of that period the respondent was in default and the appellant was entitled to rescind.

As already mentioned there had been some dealings between the parties prior to the 24th May and it is clear that at an early stage they had reached agreement on the principal matters with which they were concerned. Originally, they had negotiated for the sale and purchase of 102½ acres of the appellant's land and at their first meeting on the 19th April they had reached agreement that the price should be £6,500 and at the conclusion of their discussion the respondent paid a deposit of £1,000. The evidence shows that it was the desire of both the appellant and the respondent that a transaction on this basis should be concluded and completed as soon as possible. The respondent was anxious to obtain possession quickly and the appellant was anxious to secure a sum sufficient to enable him to finance the planting of a wheat crop on another property. But the matter was complicated by the fact that the contemplated transaction would exclude from the sale a portion of approximately 5½ acres of the appellant's land. This, he wished to reserve in order to make some provision for his sister, Mrs. White, and since a sale of the remaining 102½ acres to the respondent would involve a sale of land which was not the whole of the land contained in the relevant Certificate of Title he was bound to pay the deposit which he had received to the credit of a bank account and to retain it there until the conditions prescribed

by s. 24AA(3)(1) of The Auctioneers and Commission Agents Acts 1936-1953 had been fulfilled. This was, however, unknown to the parties on the 19th April and they also failed to appreciate the fact that the necessity for a subdivision would delay settlement of any sale of the 102½ acres for a considerable period. In those circumstances, the parties, when they became aware of this complication, considered various alternatives with a view to expedition. It does not appear that Mrs. White had any legal interest in the land but one alternative proposed by the respondent was that he should purchase the remaining 5½ acres from Mrs. White for an additional £300 - an offer subsequently increased to £400 - so that a subdivision would be unnecessary. These offers were not acceptable. But on the 24th April 1959 the appellant called to see the respondent's solicitor, Mr. Thompson, and informed him that he was prepared to sell the whole of the property to the appellant for £6,800, provided the latter would give to Mrs. White an option, available for twelve months, to purchase the residual 5½ acres at a price of £300. It is common ground that in the course of this interview Thompson spoke on the telephone to the respondent who said that he was agreeable to a purchase on these terms and he instructed Thompson to prepare a contract. This was communicated by Thompson to the appellant during the course of their discussion and the former set about preparing the contract and other necessary documents. One of these was a letter addressed to Mrs. White which purported to inform her that the writer was acting for the respondent "who has purchased from your brother Mr. A. W. Geissmann the property situated at North Tamborine containing 108 acres 2 roods 5.3 perches being the land contained in C/T.564150 Volume 2787 Folio 140". The letter then went on to say:

" Your brother has informed the Doctor that you may be interested in purchasing an area of approximately 5 acres 3 roods 22.1 perches situated on the southern boundary of the subject land which was surveyed by Mr. Kenneth Baird, Authorised Surveyor on the 11th August, 1955, for £300. The Doctor has instructed us to offer to you an option to purchase this block for £300 any time within the ensuing twelve month.

It is to be clearly understood that should you exercise your option then all costs and expenses incurred in the subdivision of this block from the remainder of the land, and of the registration of the relative Plan of Subdivisions and subsequent transfer are to be borne by yourself. In short, the Doctor is to be at no expense whatsoever in the matter.

This option will lapse should you not notify the Doctor within twelve months from the date hereof of your intention to exercise it".

In view of the previous discussions which had taken place concerning the interest, if any, of the appellant's sister in the property Thompson also prepared a letter for signature by Mrs. White. This letter purported to confirm that her brother had full power and authority to sell the whole of the land as described above and disclaimed any right title and interest in and to such land. Both of these letters were dated 24th April 1959 and were handed to the appellant it being intended that the letter containing the option should be handed to Mrs. White and retained by her and that the second letter should be signed by her and returned to Thompson. Much was made of the intimation in the firstmentioned letter that the respondent had purchased the property in an attempt to establish that a sale had, in fact, taken place on the 24th April. Moreover reliance was placed upon certain other documents in the case which, standing alone, might furnish some support for the allegation that a sale had taken place that day. But when the evidence is examined it is clear beyond dispute both on Thompson's evidence and that of the appellant that the former had no authority whatever to make a binding agreement on behalf of the respondent to purchase the property and, further, that he did not, in fact, purport to do so. There is, in our view, no doubt that his instructions went no further than to intimate to the

appellant that the respondent was agreeable to the general proposal which had been made that day and to prepare a contract to carry the proposal into effect. Quite clearly, the letter addressed to Mrs. White on that occasion was given to the respondent in order that it might be passed on to his sister when she had signed the second letter so that these subsidiary matters might be put in order and the contract when signed carried to completion with due expedition. The contract, itself, was in fact signed by the appellant on the 24th April and we shall refer presently to the circumstances in which this took place. But it is sufficient at the present stage to say that the evidence clearly shows that when the appellant signed the contract he was fully aware of the necessity for its subsequent signature by the respondent and he was anxious that it should be signed by him as soon as possible.

A further argument on behalf of the appellant was that when he signed the written contract on the 24th April 1959 he stipulated that it should be signed by the appellant on the same day. Alternatively, it is contended that upon the true construction of the written contract "thirty days from the date hereof" meant thirty days from that date. In fact, the contract was not signed by the respondent until the 4th or 5th May 1959 though the appellant was not aware of that fact until about the 22nd May. It is, however, clear that when the appellant signed on the 24th April the common intention was that it should become binding upon the parties when the respondent executed it. And if the

terms of the appellant's offer constituted by his tender of the contract executed by him included a requirement that it should be accepted by execution on behalf of the respondent that day it would, in the circumstances of the case, provide no answer to the respondent's claim for specific performance. The fact is that even if the offer so made was not accepted within a stipulated time the appellant became aware of this fact not later than 22nd May and subsequently thereto insisted that the contract should be carried into effect. Nor, in face of the provisions of the written contract can it assist the appellant to contend, as he did, that an agreement was made that day that the written contract should operate from the 24th April or that time for payment of the balance of purchase money should commence to run as from that date. But, however this may be, the learned trial judge expressly found that no such stipulation or agreement was made and, in our view, there is no reason upon the evidence why we should doubt the validity of this finding.

The alternative contention requires some examination of the written contract itself. The contract is partly printed and partly typed. The printed form so adapted is in a usual form but its general conditions are appropriate to a purchase of land by instalments. The front page of the contract contains what may be described as two paragraphs the first of which purports to acknowledge that the vendor has "sold this day" to the purchaser the subject - property. Then follows provision for the date to be inserted and a space for the vendor's signature. The second paragraph purports to acknowledge that the purchaser has "this day purchased the said property for the sum first abovementioned". Then follows space for the vendor's signature but there is no provision for any further date. When the contract was executed by the appellant on the 24th April the date was left blank. Likewise when the respondent executed the

contract he also left the date blank. There is evidence to the effect that on each occasion this was done at Thompson's request and the date which the contract now bears, 4th May, was filled in by Thompson in his office when he received the contract back from the respondent on or about the 6th May. The respondent, himself, does not know whether he executed it on the 4th or 5th May but that it was executed on one or other of these days is beyond dispute. But, says the appellant, the form of the contract indicates that the appropriate date for insertion immediately above the vendor's signature was the date of the execution of the contract by him. In this case that date was the 24th April and it is contended that Thompson had no authority to insert any other date. This argument we regard as untenable. To us "the date hereof" quite plainly means the date of the contract and that date was the 4th, or at the latest, the 5th May 1959. Indeed, apart from any other consideration the relevant expression appears too frequently in the general conditions in contexts too plain to admit of any other conclusion. We are of this opinion notwithstanding the curious provisions of cl. 19 which call for possession of the property to be given not later than 22nd May 1959, and notwithstanding the fact that the balance of purchase money is payable "in exchange for possession of the property". The anomaly is, to some extent, explained by evidence which shows that the provision as to the giving of possession assumed a minor significance in the discussions between the parties for it had been arranged between them that the appellant should be permitted to retain the possession of the dwelling upon the property for an indefinite period. That evidence, however, does not dispose of the anomaly to which the two provisions of the contract give rise. But the stipulation that the purchaser was to have thirty days from the date of the contract within which to pay the balance of purchase money is too plain to be overridden by

the provisions of cl. 19.

It was, to say the least, an unfortunate circumstance that the appellant was not provided with a copy of the contract after the respondent had executed it but that fact does not furnish any foundation for rejection of the appellant's claim. In our view the appeal must be dismissed for the reasons which we have given.