VENDOR AND PURCHASER: THE FALLIBILITY OF THE TEXT BOOK

WHITE v. ROSS [1960] N.Z.L.R. 247

In 1899, in the case of In re Hollis's Hospital and Hague's Contract [1899] 2 Ch. 540, 551, Byrne J. declared:

> For the exposition of our very complicated real property law it is proper in the absence of judicial authority to resort to text-books which have been recognised by the courts as representing the views and practice of conveyancers of repute.

For many contemporary conveyancers the order of reference in this statement is inverted, judicial authority being resorted to only after the views of the conveyancing text writers have been canvassed exhaustively. The illogicalities which can result, and be perpetuated, are indeed startling on occasion, but it is unfortunately only in the relatively rare case that the danger of such uncritical reliance is demonstrated. There is an object lesson for all in the decision of Cleary J. in White v. Ross [1960] N.Z.L.R. 247, a case of a defaulting purchaser in a contract for sale and purchase of property. The question was whether the vendor could rescind for the breach and claim damages from the defaulter, time having been made of the essence of the contract. The dispute was first heard by the Magistrate who rejected the plaintiff's claim and gave a decision in favour of the defendant, the defaulting purchaser. On appeal to the Supreme Court, however, this decision was reversed by Cleary J. in a judgment which, with respect, is a fine example of clear and logical expression. In his view the vendor was, in the circumstances, entitled to sue for damages, this remedy to be in addition to the rescission and re-sale which had already taken place.

In the lower court the learned Magistrate placed much reliance upon a statement in Williams on Vendor and Purchaser (4th ed.) 1010:

> If the vendor resells after he has elected to rescind the contract, he resells in his capacity

> of owner of the land and for his own benefit and at his own risk exclusively. If the land realises a higher price than at the sale rescinded, he is entitled to keep the surplus; and if the price is lower, he has no right of action against the former purchaser for the difference; for, having once elected to rescind the contract, he can no longer claim to treat it as subsisting and recover damages for its breach.

It cannot be gainsaid that Williams is a text book which has been accorded a stature and respect which is but rarely granted, but the reliance placed upon this text has perpetuated in the law relating to sale and purchase of property a deviation from the clear and basic principles of the law of contract.

In an article entitled "Rescission and Damages"[1] T. Cyprian Williams, the author of the above work, propounded the major premise upon which his reasoning was based. He stated that where there has been a breach of a main duty under a contract by one party, the other party (if specific performance is not sought) has his choice of two common law remedies: he may either rescind the contract and sue for restitutio in integrum, or he may affirm it and sue thereunder for damages for its breach, each of these courses being alternative and mutually exclusive. He added that rescission, if chosen as a remedy, avoids the entire contract as in the case of fraud or misrepresentation. These statements were not correct and were, in fact, highly misleading.

The short point for discussion, therefore, is whether a claim for damages may be maintained by the vendor against the defaulting purchaser after the vendor has purported to rescind the contract for sale and purchase by which they were bound.

In the case of Hirji Mulji v. Cheong Yue Steamship Company Limited [1926] A.C. 497, 509, rescission of a contract

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1. (1931) 7 N.Z.L.J. 213.

was declared by Lord Sumner to be:

> . . . the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end if he chooses, and to claim damages for its total breach, but it is a right in his option and does not depend in theory on any implied term providing for its exercise, but is given by the law in vindication of a breach.

Rescission, of course, is not entirely a unilateral matter - there must either be a breach of the contract by one party or mutual agreement to terminate it before there can be rescission. In the former case it is usually said that there is a wrongful repudiation followed by a rightful rescission. That the view above expressed by Lord Sumner was not novel is evidenced by the fact that the Privy Council in 1909[2] advised that the plaintiffs in the case before the Court were entitled, by virtue of the wrongful repudiation of the contract by the defendants, to treat the contract as at an end and to recover damages for the loss of it. This was in addition to the damages payable in respect of breaches committed by the defendants before the repudiation. Still an earlier example is to be found in Johnstone v. Milling (1886) 16 Q.B.D. 460, C.A. Lord Esher M.R. stated quite clearly (at 467) with reference to renunciation of the contract by one party:

> The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation.

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2. Dominion Coal Co. Ltd. v. Dominion Iron and Steel Co. Ltd. and National Trust Co. Ltd. [1909] A.C. 293.

Similar views are to be found in many other decisions[3]. Most of the cases on this point of law are concerned with renunciation in the strict sense, that is, anticipatory breach, but there is judicial authority for the proposition that there is no distinction between ". . . the nature of the repudiation which is required to constitute an anticipatory breach and that which is required where the alleged breach occurs after the time for performance has arisen": per Wynn-Parry J. in Thorpe v. Fasey [1949] 2 All E.R. 393, at 398. It would thus appear that no distinction may safely be drawn between these two situations and that they may be treated on the same footing in pari ratione.

There are therefore weighty expressions of judicial opinion to the intent that a wrongful breach of contract may support not only rescission by the injured party but a simultaneous claim for damages for injury arising out of such breach. It is necessary then to examine the authorities cited by Williams in support of his contrary view of the law. These he lists in his article in the New Zealand Law Journal noted above, making reference specifically to pages and footnotes in Williams on Vendor and Purchaser (3rd ed.) and Contract of Sale of Land by the same author.

The first of these cases is Michael v. Hart and Co. [1902] 1 K.B. 482, C.A. There, Lord Collins M.R., delivering the judgment of the Court, adopted the statements made by Cockburn C.J. in the earlier case of Frost v. Knight (1872) L.R. 7 Ex. 111, and declared what he considered to be the general rule with regard to a wrongful anticipatory breach of contract by one party. He said (at 490):

> It only has the effect of giving the other party to the contract an option to treat the repudiation of the contract as a definitive breach of it, and thereupon to treat the contract as rescinded, except for the purpose of his bringing an action for breach of it. It gives him the right to do that; . . .

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3. e.g. Noble v. Edwardes (1877) 5 Ch.D. 378; Lodder v. Slowey [1904] A.C. 442; Mayson v. Clouet [1924] A.C. 980.

This was not obiter dictum and it is a clear statement that the injured party may not only rescind but also claim damages for the breach by the other party. It is submitted that the case does not support Williams's argument to the contrary in any way.

Clough v. London and North Western Railway Co. Ltd. (1871) L.R. 7 Ex. 26 was a case of fraud and the Court of Exchequer Chamber discussed the requirements for the rescission of a contract on this ground. It was held that the innocent party may elect either to rescind and resume his property, or affirm and take the benefit of the contract, subject however to the rights of an innocent third party who may in the interim have acquired an interest in the property involved. The question of damages did not arise. Another case on fraud which is relied upon is United Shoe Machinery Co. v. Brunet [1909] A.C. 330 in which Lord Atkinson delivered the advice of the Privy Council to the effect that a contract, voidable for fraud, remains in existence until the injured party exercises his right of election to rescind. Neither of these cases affords any support for Williams since the issue in each was the question of the remedy available to an innocent party where the other party had induced the creation of the contract by fraud, and the question of rescission and damages together did not arise. In any case, the effect of fraud on a contract involves other considerations since an election to rescind a voidable contract renders it void and of no effect, but an action will lie in tort to recover damages for deceit on account of the fraud.

The next group of cases upon which the learned author relied involved the question of misrepresentation and the extent of the assistance the Courts would give an injured party. In Redgrave v. Hurd (1881) 20 Ch. D. 1, C.A. restitution was granted but no damages, although it appears to be implicit in the judgment of Jessel M.R. that had the facts before the Court been different an award of damages might have been made. In Newbigging v. Adam (1886) 34 Ch.D. 582, the Court of Appeal held that damages cannot be obtained at law for misrepresentation which is not fraudulent but that the injured party may be placed in statu quo so far as regards the rights and obligations which have been created by the contract into which he was induced to enter. The decision was upheld in the House of Lords (sub nom. Adam v. Newbigging (1888) 13 App. Cas. 308) and followed in the

later case of Whittington v. Seale-Hayne (1900) 82 L.T. 49, which is also used by Williams in support of his argument. The other case in this group is the well-known Lagunas Nitrate Co. v. Lagunas Syndicate [1899] 2 Ch. 392, C.A., which involved the directors of a company against whom the shareholders alleged misrepresentation, misfeasance, breach of trust and concealment of material facts. The shareholders sought rescission and damages. The Court held that if restitution cannot be made in full there can be no rescission. As for the claim for damages, this was grounded upon the allegedly wrongful acts of the directors in their actual running of the company and did not flow from the breach or rescission of the contract. Only by drawing the widest possible analogy can these cases on misrepresentation be said to have any bearing on the present issue or afford any assistance to the reasoning involved. In any event, such different and complex considerations are involved in the question of misrepresentation that the use of the cases thereon to support other aspects of the law of contract may well be questioned.

The final section of the authorities relied on by Williams may be said to assist him even less than its predecessors since the cases concerned are without exception confined primarily to the discussion of one main point - which covenants constitute a stipulation going to the root of a contract. In Duke of St. Albans v. Shore (1789) 1 H.Bl.270 there were mutual covenants in an agreement for sale and purchase, and an action was brought under the agreement for the penalty. It was held that in a claim by the first party for non-performance, the other may plead the inability of the first party to perform in full, but such inability must go to the whole of the consideration, and must be of such a nature as to render the subject matter of the contract something quite different from what was originally contemplated. From the report of Seaward v. Willock (1804) 5 East 198, the passage cited as authority by Williams was a page of counsel's argument. In any event the decision was on a failure to carry out a stipulation in the contract which gave to the plaintiff a right to claim damages at law. In Flight v. Booth (1834), 1 Bing. (N.C.) 370, there was a discrepancy between the restrictions in a lease as described in the particulars of sale of a leasehold property and the actual

restrictions in the lease itself, and it was held by the Court that the discrepancy was sufficiently wide to allow the purchaser to rescind and recover the purchase price rather than have to rely on the compensation clause in the agreement. The Court discussed at some length the degree of misdescription which would entitle the injured party to rescind but was silent on the possibility of damages being awarded in addition to rescission. The other cases cited by Williams are Bettini v. Gye (1876) 1 Q.B.D. 183, and General Billposting Co. Ltd. v. Atkinson [1909] A.C. 118. In the former there was a discussion as to whether performance of a term in the contract was a condition precedent to the defendant's liability, or whether the term was only an independent agreement, a breach of which would not justify a repudiation of the contract but would give a cause of action for damages. The Court did not discuss this on the basis that the remedies of rescission and damages were, under different circumstances, mutually exclusive. Atkinson's case, decided by the Court of Appeal and affirmed by the House of Lords, is no authority in support of the learned author but is actually against him, since it adopts the principle stated in Johnstone v. Milling (1886) 16 Q.B.D. 460, C.A. that a party rescinding retains the right to sue for breach.

To summarise, the authorities relied upon by Williams are not only not on the point but are in many cases against him. With the utmost respect it would seem that he has eschewed accuracy in the necessity of supporting his hypothesis. Furthermore he has taken exception to the decision in Lock v. Bell [1931] 1 Ch. 35 which is directly against him but the facts of which cannot be distinguished from those before the Divisional Court in Bradley v. Walsh (1906) 88 L.T. 737, upon which the Judge in Lock v. Bell placed full reliance.

The misapprehension under which the learned author appeared to be labouring was that rescission of a contract for failure by the other party to perform meant complete annulment and abrogation, and that the entire transaction was thereafter at an end. This is not necessarily so. Williams had clearly overlooked the distinction which exists

between the rescission of a contract which is voidable and of one which is valid in all respects but repudiated by one party for a wrongful reason. A contract may be entered into by one party in complete reliance upon the good faith of his co-contractor but at a later stage he may discover that at the time of entering into the agreement some invalidating factor (e.g. misrepresentation) was, unknown to him, in existence. Such a contract, provided there has been no supervening act which would render it absolute and valid, as would be the position were it affirmed in spite of the original misrepresentation, may be rescinded by the innocent party. On rescission the contract becomes void ab initio and of no effect, and restitutio in integrum is the exclusive remedy available to the injured party. Damages will not be awarded by the court. The intention is that the parties will be placed as nearly as possible in the position which prevailed before the agreement was entered into. In other words, the court will act as if the contract had never existed. This is the effect of rescission within the old common law meaning of the word: the cancellation or revocation of the contract. Where there has been a wrongful breach by one party the situation is quite different. In this case there was a valid contract, not voidable on any ground, so that the ensuing rescission does not avoid it ab initio: it only operates to end future obligations which would otherwise have fallen to be performed under the agreement.

This use of the word 'rescission' is thus not the same as was formerly its use at common law: now the element of abrogation is lacking. This distinction had been drawn some time before Williams wrote his monumental works. As long ago as 1888 Bowen L.J. stated in Boston Deep Sea Fishing and Ice Co. v. Ansell (1888) 39 Ch.D. 339, 365, C.A. that rescission for breach ". . . is not a rescission of the contract in the ordinary sense in which the term is used at common law". As to the remedy of damages being available in addition to that of rescission Lord Sumner said in Hirji Mulji's case (supra) at 510 that a claim for damages may be made, not on the basis of an implied term in the contract, but because ". . . it is given by the law in vindication of a breach". While Lord Sumner and Bowen L.J. thus appear to find different reasons to support the same conclusion, namely, that rescission

and a claim for damages are not always mutually exclusive remedies, this nevertheless does not invalidate or even weaken the argument against the theory propounded by Williams that they are in fact exclusive. To summarise briefly, then, it appears clear that the view of the learned author that rescission means complete cancellation and revocation of a contract is clearly not in accord with the authorities on the point.

The decision of the House of Lords in Heyman v. Darwins, Ltd. [1942] A.C. 356 supports the criticism stated above. This was a case of alleged repudiation in which it was contended that the repudiation having been accepted the contract had ceased to exist for all purposes and that the arbitration clause could not therefore be relied upon. The House held that if the clause were sufficiently wide in its terms it remained effective in spite of the repudiation and ensuing rescission. In the course of the judgments the views of the learned Lords on the problem at present being considered were clearly stated. Viscount Simon L.C. said (at 361):

> Alternatively, the other party may rescind the contract, or (as it is sometimes expressed) "accept the repudiation", by so acting as to make plain that, in view of the wrongful action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages.

Then Lord Wright (at 379):

> . . . if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission; but only as far as concerns future performance. It remains alive for the awarding of damages, either for previous breaches or for the breach which constitutes the repudiation.

And Lord Porter (at 399):

> Strictly speaking, to say that, upon acceptance of the renunciation of a contract, the contract is

> rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded.

From the above quotations it would appear that Viscount Simon, Lord Wright and Lord Porter support the view of Bowen L.J. that in spite of rescission, part of the contract remains alive to support a claim for damages for its breach. It is submitted with respect, however, that the opinion of Lord Sumner that damages may be claimed as a remedy given by law avoids the use of a somewhat artificial distinction between rescission ab initio for fraud and rescission for breach, by emphasizing one of the first principles of the law of contract, namely, that damages are the pecuniary compensation which the law affords to a person for the injury he has sustained by reason of the act or default of another (11 Halsbury's Laws of England (3rd ed.) 216). There must be an injury in the legal sense, some loss which can be estimated in monetary terms, but given this prerequisite damages will be awarded. Not, however, on the basis of an implied term in the contract, and not because rescission for breach still leaves part of the contract alive, but simply because the common law provides a remedy against the person who breaks an agreement into which he has entered. This is an argument for the jurisprudent, though, and cannot be elaborated here.

It was in the light of the principle enunciated in Heyman's case that Cleary J. gave his decision in White v. Ross. With the utmost respect it is submitted that the decision was the proper one, but nonetheless difficult to give in view of the plethora of apparent authority to the contrary. The sole New Zealand case in point is Botherway v. Stinson [1921] N.Z.L.R. 403 in which Salmond J. dealt with the problem on the basis that rescission did not exclude the right to claim damages since the plaintiff is entitled to be placed in as good a position as if the contract had been fulfilled. This approach, of course, closely parallels that

of Lord Sumner noted above. An English authority referred to by Cleary J. is Harold Wood Brick Co. v. Ferris [1935] 2 K.B. 198, C.A., an instance of the court applying without any specific reason or discussion a principle which it obviously considered to be well-established at that time. There, the vendor was held to be entitled to rescind (by reselling the property the subject of the contract) and to sue for damages for the loss sustained. The main point at issue, however, was whether or not time was of the essence of the contract and this was the ratio decidendi of the case. An Australian decision which is also mentioned by the learned Judge is that of Holland v. Wiltshire (1954) 90 C.L.R. 409, where the High Court granted rescission and awarded damages and considered that the confusion between the two had "long since been dissipated" (at 416 per Dixon C.J.).

There are two troublesome snags in the stream of authority, however. The first of these is the early case of Henty v. Schroder (1879) 12 Ch.D. 666, a decision of an outstanding judge and master of the law, Jessel M.R. In a very brief judgment (as reported) he held that the plaintiffs were only entitled to have the agreement rescinded and could not at the same time claim damages for its breach. Secondly, there is Howe v. Smith (1884) 27 Ch.D. 89, C.A. in which the issue before the Court was whether or not the vendor was entitled, on the purchaser's default, to retain the deposit which had been paid. At the close of his judgment, Fry L.J. said (at 105):

> . . . it affords the vendor an alternative remedy, so that he may either affirm the contract and sell under [the penalty clause] or rescind the contract and sell under his absolute title . . . if he sell as owner, he may retain the deposit, but loses his claim for the deficiency under the clause in question.

It is interesting to note that Henty v. Schroder (supra) was decided by Jessel M.R. on 25th July, 1879, yet on 6th February in the same year he had delivered the decision (concurred in by the other members of the Court of Appeal) in Ex parte Stapleton, In re Nathan (1879) 10 Ch.D. 586, in which it was

held that a vendor who had rescinded a contract was entitled to prove in the bankruptcy of the purchaser for damages for the failure of the purchaser to perform, and further that the measure of damages was the difference between the contract and re-sale prices if the latter were lower. This case clearly conflicts with Henty v. Schroder (supra) but it is scarcely probable that in five months a judge as distinguished as the learned Master of the Rolls would have applied two conflicting principles in cases where the issue was the same. It is submitted that the decision in Ex parte Stapleton (supra) should therefore be followed by virtue of its binding authority over Henty's case. In any event it would appear from the reports that Henty v. Schroder and Howe v. Smith (supra) were cases involving initially the remedy of specific performance and only subsequently, upon the continued non-performance by the purchaser, the claims for rescission and damages or forfeiture of deposit. At the time when these cases were decided, not many years after the fusion of Law and Equity by the Supreme Court of Judicature Act, 1873 (U.K.), it may well have been the position that a decree for specific performance granted by a court in the Chancery Division acted as a bar to a subsequent claim for an order granting rescission and damages together in respect of the same agreement. To a Chancery Judge such a proceeding would savour of the 'approbation and reprobation' which was regarded with such disfavour by Equity. A similar attitude is evident in Barber v. Wolfe [1945] Ch. 187, where Romer J. held that on a vendor's action for specific performance, damages will not be awarded for breach by the purchaser of the contract in respect of which rescission is sought. Again there appears this 'blowing hot and blowing cold' which arouses judicial ire.

In conclusion, then, it is submitted that on the authorities cited above no New Zealand conveyancer should now find himself in the dilemma posed by D. Perry in an article in the New Zealand Law Journal[4] of some years ago in which he traversed the obscurities of this branch of the law. Mr. Perry concluded in these words:

> It is not, however, my intention to attempt to answer the difficult questions raised . . . .

4. (1938) 14 N.Z.L.J. 134.

> I raise them as an example of some of the many difficulties that face the conveyancer.

With respect, Cleary J. in White v. Ross [1960] N.Z.L.R. 247 has now overcome perhaps one of the greatest difficulties of all which have perplexed conveyancers in the past. It is to be hoped that Williams' Vendor and Purchaser will not now be so unquestioningly accepted by the profession at large.