

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The South African Breweries, Limited, v. Hodgson, from the Supreme Court of the Cape of Good Hope ; delivered the 18th May 1904.*

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Present at the Hearing :

THE LORD CHANCELLOR.

LORD LINDLEY.

LORD KINROSS.

SIR ARTHUR WILSON.

[*Delivered by Lord Lindley.*]

The Plaintiffs in this action seek to recover from the Defendant, who is the executor of a Mr. Martienssen, a sum of 1,250*l.* The claim is based upon a contract dated 4th April 1899, and made between Martienssen and the Plaintiffs.

Martienssen was the owner of an extensive brewery business in the Cape Colony, and was entitled to a brewery and several houses, hotels, and stores, which the Plaintiff Company agreed to buy of him. One of these hotels was the Princess Royal Hotel, which Martienssen had agreed to buy from one Flanagan. The agreement for the purchase of this property by Martienssen is dated the 15th February 1899. The transfer was to be given and taken on 1st July 1899. The purchase money was 9,500*l.*, which was to be paid as follows, 2,500*l.* on the 1st July, and 7,500*l.*, with interest at 6 per cent., from that date was to be secured. Possession was to be given as a licensed premises, and as then licensed, on the 15th March 1899.

Shortly after this agreement was signed, viz., on the 23rd February 1899, Martienssen offered this hotel to a person named Corlett on the following terms: "A goodwill 1,500*l.* to be "paid on taking possession, a rental of 30*l.* a "month." This rental was to be increased if Corlett took some cottages and stores and he was to sign the usual agreement relating to the purchase of Colonial beers, &c. What is called "goodwill" in this document would in this country be called a premium. Corlett verbally accepted the offer so made, but the premium was reduced to 1,250*l.* It will be observed that although this was an offer to grant a lease of the Royal Hotel for a premium and a monthly rent, the duration of the lease was not specified. Moreover, no time was mentioned for delivery of possession or for the payment of the premium. Corlett did not obtain any lease until after the 4th April, nor did he enter into possession until after that date. In the meantime Flanagan was in possession of the Royal Hotel, and he held the license of it, but subject to his agreement to transfer it to Martienssen as already mentioned. The 1,250*l.* which Corlett was to pay was plainly not payable by him to Martienssen before he agreed to sell the property to the Plaintiff Company. This is an important fact to remember, as one of the main controversies in the case turns upon it.

The conveyance of the 4th April 1899 was based upon a less formal agreement entered into between the Plaintiff Company and Martienssen by their respective brokers and dated 1st March 1899. There is no discrepancy between the two documents; but the broker's document, shows what is not so plain from the formal conveyance viz., what outstanding debts had been valued at that date. A knowledge of this circumstance throws considerable light on the meaning of one passage in the conveyance.

The formal conveyance is set out on pages 5 to 7 of the Record. As already stated it is dated 4th April 1899. It conveys to the Plaintiff Company in general terms, Martienssen's brewery business in the Colony with the stock in trade, outstanding debts, land, and houses; then follow particulars, and these include the Princess Royal Hotel "at present under option to the sellers." Then come the following clauses:—

"(H) The plant, stock in trade, and goodwill,  
 " including all outstanding debts, assets,  
 " and rights appertaining to the business  
 " at present carried on by the sellers of  
 " every nature and description.

"(I) And generally all the tied houses  
 " belonging the sellers' business as  
 " breweries, including the stock in  
 " trade of such supported or tied houses,  
 " the goodwill thereof, and all rights  
 " appertaining to the leases and options  
 " to purchase.

"(2.) The purchase price shall be the sum of  
 " 75,000*l.* sterling, payable as to 10,000*l.* in cash  
 " on the signing of this agreement and as to the  
 " balance of 65,000*l.* upon the passing of transfer  
 " of the land and the taking possession of the  
 " premises and business.

"(3.) The sellers shall be entitled to remain in  
 " possession of the premises and to carry on the  
 " business until the 31st July 1899 on their own  
 " account and on their own behalf, and shall pay  
 " interest at the rate of five per cent. per annum  
 " from the date 4th April 1899 upon the 10,000*l.*  
 " until the business be taken over by the  
 " purchasing Company.

"(4) The sum of 65,000*l.* referred to above  
 " is subject to adjustment upon the following  
 " lines:—

" In arriving at this figure the plant and stock  
 " in trade have been put in at 7,500*l.*, and the

“ good outstanding debts at 8,000%. If it should  
“ be found that these figures are not correct  
“ when the property and business is taken over,  
“ then the purchase price shall be amended  
“ accordingly.

“ (5.) The sellers shall guarantee all good out-  
“ standing book debts and be responsible for them,  
“ six months being allowed to the purchasing  
“ Company for the collection thereof.

“ (6) Should there be any variance or dispute  
“ between the parties to this agreement regarding  
“ the value of any plant or stock in trade or with  
“ reference to any outstanding debts, such dispute  
“ shall be referred to arbitration under the Act of  
“ 1898, if not adjusted before the 31st August  
“ 1899.

“ (7) The sellers shall carry on the business  
“ until the 31st July 1899, with due regard to  
“ the handing over thereof as a going concern to  
“ the purchasing Company on the 1st August  
“ 1899; and they further undertake and bind  
“ themselves not to engage in or be interested in,  
“ directly or indirectly, any brewery or any  
“ similar business within this Colony of the Cape  
“ of Good Hope, and promise and undertake  
“ to use their influence and their best endeavours  
“ towards advancing the interests of the pur-  
“ chasing Company and the securing to the said  
“ Company to its fullest extent the goodwill of  
“ their business.

“ (9) Seeing that the purchasing Company has  
“ agreed to pay over the sum of 10,000% on  
“ account of the purchase consideration the  
“ sellers, as an earnest on their behalf, do hereby  
“ cede to the purchasing Company all their rights  
“ in, to, and under an agreement dated the 15th  
“ February 1899, with one John Flanagan,  
“ regarding the purchase of certain block of  
“ buildings comprising the ‘Princess Royal’  
“ Hotel, with all accessories, and do hereby  
“ dispose thereof to the said purchasing Company

“ for the amount aforesaid and authorise the said  
 “ Company to take transfer thereof into its own  
 “ name as soon as shall be convenient.”

Then follows the witnessing part with this—

“ Addendum.

“ Clause 9 of this Agreement is not intended to  
 “ cast upon the purchasing Company the onus of  
 “ paying Flanagan the 9,500*l.* due to him, but  
 “ required that this liability be discharged by the  
 “ said sellers (Martienssen) and the purchasing  
 “ Company be at liberty to take transfer from  
 “ the said Martienssen simultaneously with the  
 “ passing of transfer into his name of the  
 “ ‘ Princess Royal ’ property, without payment of  
 “ any further sum than the 10,000*l.* already  
 “ deposited.”

The short effect of this document appears to their Lordships to be as follows: First, the Plaintiff Company acquired all the property described in the document, including all Martienssen's interest in the Princess Royal Hotel, which again included all his interest in the lease arranged to be given to Corlett. But Martienssen was to pay Flanagan. Secondly, the Company were to pay for all the property so acquired 75,000*l.*, but as the property was not to be handed over at once, and the stock in trade and business debts would vary, 15,500*l.*, part of this sum, was to be subject to adjustment on completion. In other words 59,500*l.*, *i.e.*, 75,000*l.*, less 15,500*l.*, was the price fixed for everything except what was liable to fluctuation, and 15,500*l.* was an estimate left open to be adjusted when the fluctuating assets were actually taken over. The 15,500*l.* was arrived at in this way: the plant and stock in trade had been valued by the brokers on the 1st March at 7,500*l.*, and the “ outstanding book debts ” at 8,000*l.* These sums are mentioned in the conveyance, but the expression “ outstanding debts ” is used, and this possibly may have a wider

meaning than "outstanding book debts." It appears, however, to their Lordships that the fixed premium of 1,250*l.*, which Corlett was to pay to Martienssen, cannot be regarded as an outstanding debt of the same class as those left open to adjustment. It was included in the general words of the conveyance "all rights appertaining to the leases and options of purchase," and was part of the non-fluctuating property taken over, and was not included in the fluctuating assets left open to future adjustment.

Shortly after the conveyance of 4th April 1899, viz., on the 8th April, Martienssen granted Corlett a lease of the Princess Royal hotel and a few days later Corlett paid him 400*l.* cash on account of the 1,250*l.* premium, and gave him promissory notes for 850*l.* in payment of the balance.

In May 1899 the Company and Martienssen were desirous of expediting the completion of their purchase in order to prevent any breach in the continuity of the business taken over by the Company. Mr. Chidell on behalf of the Company, and Mr. Hodgson on behalf of Martienssen, met to adjust the stock-in-trade and outstanding debts.

A list was prepared by Hodgson, and Corlett's premium of 850*l.* was inserted in it, and Chidell, misunderstanding the state of affairs, wrote Martienssen's name against this entry in order to indicate that the Company would not take this sum over. The consequence was that this sum was omitted from the schedules annexed to the formal agreement of 16th June 1899 signed by Chidell for the Company, and by another gentleman for Martienssen, and specifying what outstanding debts and loans were to be taken over by the Company, and what was to be paid for them.

This mode of dealing with the premium has

created the difficulty which has led to this litigation. The final adjustment was made on the footing of the agreement of the 16th June 1899. The Defendants contend that the Company rejected this item of 850*l.*, and are now trying to obtain the premium without paying for it. The Company contend that there was a manifest blunder in putting this premium into the list of items requiring adjustment, and that the blunder ought not to have the effect of depriving the Company of their right to the premium. The first view commended itself to the Supreme Court in the Colony, but their Lordships are unable to adopt it.

The evidence of Chidell and Hodgson satisfies their Lordships that both parties made a mistake in treating the unpaid balance of Corlett's premium as an outstanding debt with which they had to deal. In their Lordships' view they had nothing to do with it. The premium of 1,250*l.* would properly appear in a list of the Company's assets; but the unpaid balance of 850*l.* had no place in a list of the items left for adjustment. It was properly left out of the schedules to the agreement of the 16th June 1899, although Chidell's reasons for leaving it out were attributable to the mistake already noticed. The mistake was a mutual mistake and does not affect the rights of the parties under the conveyance of 4th April 1899.

It only remains to consider what ought now to be done. The premium passed by the conveyance, but Martienssen never received more than 400*l.* on account of it. The balance, as already stated, was secured by promissory notes. It is stated in the Appellants' case that in the middle of 1900 Martienssen brought an action against Corlett on these notes, and that the action stood over to enable Corlett to recover the amount from one Gourlay, to whom he had assigned the lease. The Respondent states in

his case that Corlett recovered judgment against Gourlay for 750*l.*, and Martienssen claimed this, and it was paid into Court. Martienssen has since died, and the Respondent is his executor. Their Lordships have no further information about the unpaid balance of the premium in question in these proceedings. All, therefore, that their Lordships can do is humbly to advise His Majesty to allow the Appeal and to reverse the judgment of the Supreme Court, so far as it relates to this premium of 1,250*l.*, and to order the Defendant to pay the costs of the action up to and including the trial thereof, so far as it relates to this premium, and there must be the usual set off of costs; and to declare that under and by virtue of the conveyance of the 4th April 1899 Martienssen became a trustee for the Company of the premium of 1,250*l.* payable by Corlett under his lease of the 8th April 1899, and became accountable to the Plaintiff Company for all sums received in respect of such premium and of interest thereon as and when received by him, and with this declaration to remit the action to the Supreme Court, with liberty to both parties to make such application to that Court or to take such other proceedings as they may be advised.

Their Lordships will therefore humbly give this advice to His Majesty, and the Respondent must pay the costs of this Appeal.

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