

*Judgment of the Lords of the Judicial Committee of  
the Privy Council on the Appeal of Eales v. Montefiore,  
from the Supreme Court of New South Wales;  
delivered 31st January, 1871.*

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Present:—

LORD CAIRNS.

SIR WILLIAM EREK.

SIR JAMES W. COLVILLE.

SIR JOSEPH NAPIER.

THEIR Lordships are clearly of opinion that the sale which was contemplated by the agreement set out in the declaration, was a sale in the ordinary sense in which that word is used with reference to real estate, that is to say, a sale in which the party selling immediately would become the vendor, the party purchasing immediately would become the purchaser, and the transaction would be completed within what would be a reasonable time, having regard to the nature of the property sold and the period requisite for making out an abstract of title and completing a conveyance. That is made very clear both from the general words used and from the particular stipulation that the Plaintiff, if he was going to make a claim against the Defendant, was to proceed to sell the property within a month after being requested so to do, for it would be very absurd to suppose that he was to be under an obligation to proceed to sell within a month, and yet to be at liberty to make a contract under which he could recover no part of the purchase money for three years, and not the whole for a period of five years. This last consideration becomes still more important if the agreement, on construction, should be held to mean, as the Appellant contends it does, that the Respondent was to guarantee to the Appellant not merely that a contract of purchase would be made, but that the purchase money would be forthcoming.

Now what has been done in this case with Mr. Kemp, is this. A contract has been made with Mr. Kemp by which Mr. Kemp becomes, in the first instance, tenant of the property. He is to be a

tenant of the property for two years. During that time he is to pay a rental, which on the purchase money is something like 9 per cent., and that rental is to be taken possession of by the Plaintiff without any reference whatever to the purchase money, or the interest on the purchase money. Having been in the enjoyment of this rent for two years, then the Plaintiff is to be at liberty to ask for the purchase money at some time before the end of the next year, and the purchase money is to become payable in three instalments running over two years from that time. Their Lordships are clearly of opinion that that is not a sale within the meaning of the agreement. It was, however, said that the general averment, at the end of the declaration, of performance of all things requisite to found the claim of the Plaintiff, would be enough to lead to the inference that the Defendant had been consulted under the clause at the end of the letter, which says, "in any sale of the property which you may make I am to be consulted," and to the inference that having been so consulted he had consented to this arrangement with Mr. Kemp. Their Lordships, however, observe that all the averment says is this, that "the Plaintiff did all things, and all things have been done, and all times elapsed necessary to entitle him to a performance by the Defendant of his said agreement." Now if, as their Lordships consider, that which was done with Mr. Kemp was not a sale within the agreement, the consent that must be averred and shown is not a consent on the part of the Plaintiff to the conditions precedent to the original agreement, but a consent on the part of the Defendants to an agreement altogether of a different character to a new agreement, and not the agreement set out in the declaration.

Their Lordships therefore, on this ground, think that the decision of the Court below, allowing the demurrer and giving judgment for the Plaintiff, was correct, but in putting the case upon this ground their Lordships do not at all mean to say that they differ from the Court below upon the other point on which they more dwell, namely, the construction of the word "realised" occurring in this agreement.

On the whole, their Lordships will humbly advise Her Majesty that this Appeal should be dismissed with costs.



