Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of The Alliance Contracting Company, Limited, and others, v. Russell from the Supreme Court of Victoria; delivered 22nd July 1899.

Present at the Hearing:
LORD WATSON.
LORD HOBHOUSE.
SIR EDWARD FRY.
SIR HENRY STRONG.

[*Delivered by Sir Edward Fry.*]

THE Plaintiffs, now Appellants, in this case sued the Defendant for specific performance of an agreement to be hereafter mentioned or in the alternative for damages for the non-performance of the same contract. The circumstances which gave rise to this action are shortly as follows:—In the year 1894 there existed in Melbourne a syndicate, or combination of persons known as the French Prospecting Syndicate, of which the Defendant Russell and one Leonce Cayron were members. The object of the combination was to make profits by dealing in gold-mining properties. In August 1894 Cayron left Australia for England and arrived in London on the 30th October in that year.

At the time of his leaving the Colony the Syndicate had not secured any mining rights, but they had miners in the Coolgardie district prospecting for gold; and in anticipation of the Syndicate obtaining some property of this kind a code for telegraphing had been arranged between Russell and Cayron. One word in this code is important as showing the manner in which it was anticipated that the sale might be carried

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into effect. The word "Neptun" was to signify "specimens and all documents will be sent you for floating Company in Europe."

The Syndicate subsequently obtained three leases or grants of mining rights known as the Liberty leases, which were vested in Russell, and on the 16th November 1894 Russell telegraphed to Cayron to the effect that a reef had been secured which was worth £100,000 and that the specimens and all documents would be sent to Cayron for floating a Company in Europe.

Thereupon a long correspondence ensued between Russell and Cayron who was engaged in negotiations with various persons for the sale of this property.

On the 12th February 1895 Russell executed a power of attorney to Cayron. By this instrument Russell appointed Cayron his attorney to enter into any contract for the sale and disposal of, and to sell and dispose of and concur with all proper parties in making sale and disposing of the three Liberty leases either together or separately and on such terms and conditions as to Cayron should seem expedient or desirable, with the usual powers of executing instruments to carry the sale into effect and with a power to enforce, remit, set off, compromise, or refer to arbitration any claim of Russell in respect of the premises.

A fourth lease having been obtained and vested in Russell, he on the 12th March 1895 executed another power of attorney to Cayron in reference to this new lease in terms similar to those of the earlier power. These powers of attorney reached the hands of Cayron some time before the 22nd March and the 3rd May 1895 respectively.

Both before and after the giving of these powers of attorney, a constant flow of telegrams and letters was passing between Russell in Melbourne and Cayron in England, with regard

to the sale of the mines; the Appellants have pressed this Committee with passages from this correspondence, as enlarging the authority conferred by the powers of attorney. Where a formal mandate has been given by a principal to his agent their Lordships do not think that its terms are to be lightly departed from by vague expressions in a correspondence; and that is all that is forthcoming in the present case, Russell expressing his confidence in Cayron in terms of satisfaction varying according to his reports of his chances of success. The authority to be gleaned from the whole of the correspondence does not in their Lordships' opinion vary from that found in the powers of attorney. The letters standing alone would have conferred upon Cayron an authority to sell the mines for money or shares upon such terms and conditions as he might deem expedient and no further authority to speculate or deal with the property of his principal.

After prolonged negotiations with various persons, Cayron at last concluded an agreement with the Plaintiffs, the Alliance Contracting Company, Limited. This was a Company formed in the previous September (September 1894) with a capital of 507*l.* and no more, divided in 507 shares of 1*l.* each, which were held by 12 persons and were fully paid up. The part which it played in the present transaction was that of promoters.

On the 24th May 1895 an agreement was made between Russell through Cayron as his attorney (described as the vendor) of the one part and the Alliance Contracting Company (described as the promoters) of the other part. It recited that a Company was about to be formed by the promoters, having for its object amongst other things the acquisition and working of the Liberty leases, and to be called the Liberty

Consolidated Gold Mines Limited, or some other name, with a nominal capital of 260,000*l*. divided into as many shares of 1*l*. each, and that by the Articles of Association it would be provided that the Company might immediately on its incorporation adopt with or without modification and carry into effect an agreement with the promoters for the acquisition and working of the premises. The agreement then provided in Article 1, that the vendors should sell and the promoters would cause the Company to purchase the Liberty leases together with the machinery and other effects belonging thereto. The 2nd Article provided that the gross consideration for the sale should be 225,000*l*., and should be paid or satisfied subject as herein-after mentioned as follows:—40,000*l*. in cash, 120,000*l*. in fully paid-up shares of the Company, 65,000*l*. in cash or fully paid-up shares or partly in one way and partly in the other, at the option of the Directors of the Company, making a total of 225,000*l*.

The clause then provided that, of the purchase consideration the vendor and the promoters should be entitled to the proportions set out in Clause 8.

The agreement then contains elaborate clauses for providing that the shares to be allotted as purchase consideration should be pooled during six months, and the application of the proceeds of the sale of these shares under which the new Company were to take 10 per cent. up to 15,000*l*., another 10 per cent. was to be applied in the purchase of shares of the Company and the balance of the proceeds of the sale of the shares was to be divided in the proportions of three-fifths and two-fifths between the vendors and the promoters. The complications thus introduced into the payment of the purchase money are made worse by a subsequent clause in the Agreement Clause 20 under which the share of the vendor in

the purchase money appears to be as follows:—128,000*l.* in fully paid-up shares, 2,000*l.* in cash, with a further sum for the up-keep of the mines.

Pausing to consider the effect of this agreement if it had stood alone, their Lordships regard the document as one of remarkable and probably of designed and studied obscurity. The gross consideration is mentioned, but it is nowhere said to whom it is to be paid, though the inference is that it was to be paid to the Alliance Company. The 2nd clause mentions the 40,000*l.* in cash and perhaps suggests that under the 8th clause it is to be divided between Russell and promoters in shares of three-fifths and two-fifths respectively; but the 8th clause deals only with the ultimate proceeds of the pooled shares after certain heavy deductions, and is silent as to the 40,000*l.*; and the 20th clause so far from giving Russell three-fifths of 40,000*l.*, gives him only 2,000*l.* in cash and the amount expended for up-keep of the mines. It is not easy then to say then how much Russell is to receive under the Agreement. But there are some things certain in regard to this remarkable document. It is plain that there is contained in it no contract by Russell to sell to the new Company, and no contract by any one to buy; there is a contract only by the Alliance Company that it will create a purchaser who shall buy. It is furthermore plain that whatever consideration is to come to Russell under the agreement, is so to come through the hands of the Alliance Company; that Russell will not have the ordinary rights of a vendor for the recovery of his purchase money, and that his purchase money is subjected to various onerous provisions, such as that his shares shall be pooled for six months, that a portion of the produce of his shares is to go to the new company to form its working capital, and that another portion is to be applied in the purchase of shares

in this Company. Their Lordships consider that Cayron's authority was to sell or dispose of the property in such a manner as to give to Russell the ordinary rights of a vendor against his purchaser, that this Agreement did not give to him such rights, and, therefore, that if it stood alone it would be beyond Cayron's authority.

It therefore becomes necessary to consider the subsequent transactions in order to see whether the difficulties created by the agreement of the 24th May have been removed.

On the 27th May an agreement was entered into between the Alliance Contracting Company, described as the vendors of the one part, and a certain Mr. Coxon, who was described as a trustee for and on behalf of the Company herein-after mentioned of the other part. It recites that under the agreement of the 24th May, Russell, by Cayron his Attorney, agreed with the vendors that they should have power to sell the leases in question, and then it recites that a Company was about to be formed under the Companies Acts, 1862 to 1893, having for its object amongst other things the acquisition and working of the premises to be called the Liberty Consolidated Gold Mines, Limited, or some other name, and then it recites the provisions of the Articles of Association with reference to the capital, and in the 2nd clause it states the consideration money in terms similar to those of the 2nd clause of the previous agreement.

Now it is to be borne in mind that here Russell is not either a party, nor is he mentioned in any other way except as the person who had entered into the previous agreement. What is more remarkable and more important is this, that whilst the consideration is openly made payable to the Alliance Company, the agreement is absolutely silent as to the manner in which the consideration is to be divided between the promoters and the vendor.

Then on the 29th May 1895 the Liberty Company was registered, and on the 1st June 1895 a meeting of the subscribers of the Memorandum of Association was held at which the agreement of the 27th May was approved and adopted.

The Company thus purported to adopt an agreement nominally entered into on their behalf two days before the Company came into existence. Having regard to what happened afterwards it is needless for their Lordships to consider the effect of this resolution, and whether or no it was valid as a ratification or as a new contract, though by so saying their Lordships must not be taken as expressing any dissent from the cases on this point cited at the Bar.

The Company had appealed to the public for support, and had received subscriptions to the amount of 9,500*l.*, a sum therefore in excess of the 7,000*l.* which was originally underwritten, as mentioned in the contract of the 24th May. Under these circumstances a new agreement, bearing date the 22nd June 1895, was entered into. It was made between the Alliance Contracting Company of the first part, Cayron, as attorney for Russell, of the second part, and the Liberty Consolidated Gold Mines, Limited, of the third part. It recited the agreement of the 27th May, and that that agreement had been adopted by the Company, and it stated further that it had been agreed between the parties that the consideration should be paid and satisfied in manner therein expressed instead of in the manner set forth in the previous agreement. It then went on to substitute a new consideration for the purchase, and that consideration was 225,000*l.* in the following way :—2,000*l.* in cash, 183,000*l.* in fully paid-up shares, and 40,000*l.* in cash or shares. The agreement then contained provisions under which there was a period of two months during which any money received by the

issue of shares of the Company should be applied towards the payment of the 40,000*l.* to be paid in cash or shares, and it also contained a provision that if there were no further subscriptions at the end of the two months the whole of the 40,000*l.* was to be taken in fully paid-up shares. Looking at the condition of things at that time it was therefore highly probable that the purchase money would be paid in this way:—223,000*l.* in fully paid-up shares of the Company, and 2,000*l.* in cash only. Now here several observations must be made. In the first place it is to be noted that although Russell, through Cayron as his attorney, is made a party, he takes no part in the operative portion of the agreement. He is not made in terms even to consent to the alteration. He does nothing. He enters into no contract. Then a further observation is this, that this agreement contains no reference to the mode in which the whole gross consideration is to be divided between the Alliance Company and Russell.

Assuming but not affirming that by virtue of the three agreements, 24th May, 27th May, and 22nd June, there is a contract between Russell and the Company, it is open to nearly all the objections which applied, as before observed, to the contract of the 24th May: nay, it is open to greater objections, because the contract of the 22nd June is far less favourable to Russell than that of 24th May, and because the contract of the 22nd June contains no stipulation whatever as to the proportions in which the gross consideration is to be divided between Russell and the Alliance Company; and it is impossible, on the construction of the documents, to say whether the provisions of the agreement of the 24th May as to the apportionment of the gross consideration are to be considered as introduced into this new contract, or how those complicated and perplexing arrangements are

to be applied to the new consideration under this agreement of June. There is, in their Lordships' Judgment, no pretence for saying that under the combined operation of the three documents Russell has any of those rights as a vendor which it was the duty of Cayron under his mandate to preserve for his principal, and without which Russell was not bound by Cayron's act.

It is a familiar doctrine that specific performance will not be granted of any contract which is wanting in certainty, and for the reasons already given, the contract sued upon in the present action is to an extraordinary extent deficient in that quality. This uncertainty is not confined to some single and separable clause of the agreement, but affects the contract in its most essential part, namely, the consideration to be paid by the purchaser to the vendor.

As their Lordships take the view which they have stated of the principal question in controversy it is needless to comment on other points which were raised on the part of the Respondent.

Their Lordships will humbly advise Her Majesty to dismiss this Appeal, and the Appellants must pay to the Respondent the costs of this Appeal.