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Commentary

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case, the claims sought to be enforced were direct claims by foreign governments for revenue, whereas in the case under review, the claim was indirect in the sense that it was based on a foreign judgment.

Viscount Simonds in his decision in the Taylor case pointed out, in reference to the rule of not recognizing foreign revenue legislation that:

... It is possible that the ... [principle] ... might, if applied without discrimination, lead to too wide an application of the rule; for as Lord Tomlin pointed out in In re Visser8 there may be cases in which our courts, although they do not enforce foreign revenue law, are bound to recognize some of the consequences of that law...9

Cartwright J. obviously preferred to accept the dictum of Kingsmill Moore J. instead of the comments of both Viscount Simonds and Lord Tomlin because he stated that it was the duty of our courts to go behind the form of the foreign judgment and determine the substance of the claim on which it is based.10

In conclusion, it is submitted that this decision which extends an old principle should be viewed with caution. It is further submitted that the reasons for the basic principle itself may be open to question in the future because the effect of the principle is to permit tax evasion by those people who are astute enough to flee a jurisdiction with their property before the revenue officials of that jurisdiction apprehend them or seize their property. Thus it would appear that the extension of the principle of not recognizing foreign revenue judgments, either directly or indirectly, is inconsistent with present efforts to encourage international co-operation in the field of taxation in particular and with modern views in the area of conflict of laws generally.

H.L.E.W.

D. CONTRACTS


Field had a business for the sale and distribution of welding supplies, which he sold to Zien. One term of the agreement was that on closing, the cash, accounts receivable and inventory of the business would exceed its accounts payable and accrued liabilities by at least $109,865. At the time of closing, the balance was about $14,000 less than that amount. Zien after being in possession of the business for eleven weeks, sued for rescission. This relief was granted at trial and affirmed on appeal. The defendant Field brought this appeal to the Supreme Court of Canada.

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8 [1928] Ch. 877 at p. 883.
9 Supra, footnote 4 at p. 505.
10 Supra, footnote 3 at p. 372.
Judson J. giving the judgment of the unanimous court allowed the appeal, holding that rescission was not a proper remedy in this case. The deal was closed on March 1, 1961 and the $14,000 deficiency was not discovered until the middle of May. On May 19, Zien gave notice of rescission and tendered the business back to Field. The tender was rejected, hence Zien issued his writ claiming rescission and the return of the part payment he had made in the contract, or alternatively, damages for breach of contract. The term being a covenant of the contract, the trial judge had granted rescission for its breach. Judson J. points out that this is not an automatic legal result, saying:

In deciding whether the remedy is rescission, with all its consequences or damages, the emphasis should be on the seriousness of the defective performance in the particular contract. Nothing in the way of clarity is gained by attaching a label to the clause.

Zien knew there had been recent material changes in the business involving non-recurring capital and operating expenses, such as obtaining new premises and hiring additional personnel, which contributed to the $14,000 deficiency. Hence Judson J. said that in the circumstances, the parties could not have intended that a breach such as this would give rise to the right of rescission. The commercial importance of the breach must be weighed in deciding on the remedy. The court concluded that the remedy in this case would be damages rather than rescission. Hence the balance owing by Zien under the agreement was reduced by $14,000, the amount of the deficiency. Judson J. concluded by saying "If Zien had wanted rescission for any deficiency in this account he could have stipulated for it and it would have been enforced."

Generally rescission is granted for breach of a covenant that is a condition of the contract. Whether it is desirable that this remedy be made to depend on the facts surrounding the making of the contract in each case is questionable because certainty in the law is a basic principle in the commercial area. Also questionable is the imputation of an intention as to remedies for breach when in all likelihood the parties did not consider the various legal possibilities. Had they done so, Zien might have stipulated for rescission as Judson J. suggested.

R.F.E.


The respondent (Wedlake) and E. (The late G. A. Elliott) were partners in a hardware business. They made an agreement in 1954 terminating the partnership and purporting to set up a limited partnership (under the Limited Partnership Act, R.S.O. c. 208). Recital 3 of the agreement was as follows: