

Field v. Zien, [1963] S.C.R. 632

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Commentary

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D. CONTRACTS

Field v. Zien, [1963] S.C.R. 632.

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.

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.

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