R. P. BAKER (PLAINTIFF) ..... APPELLANT;

AND

GUARANTY SAVINGS & LOAN ASSOCIATION (DEFENDANT) ..... } RESPONDENT.

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*Oct. 10.
*Dec. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Consensus ad idem—Application for shares in association operating under Savings and Loan Associations Act, B.C., 1926-1927, c. 62—Issue of certificate for shares—Class of shares—Representations to applicant as to shareholder's rights—Materiality—Inducement—Onus of proof.

The defendant association, under the *Savings and Loan Associations Act*, B.C., could issue four classes of shares, including "instalment shares" and "savings shares." Its agent, C., obtained from plaintiff an application, on defendant's printed form, for an "instalment savings certificate," and defendant issued to plaintiff a certificate for "instalment shares." It had no power to issue an "instalment savings certificate." Plaintiff, after ascertaining his rights and obligations under the certificate issued to him, sued for cancellation of the application and certificate and for return of moneys paid, on the grounds, (1) that the application was a nullity; (2) that it was for a savings certificate, and, in view of the kind of certificate issued, was not accepted; and (3) misrepresentation by C.

*PRESENT:—Anglin C.J.C. and Duff, Lamont, Smith and Cannon JJ.

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Held: The application should be declared null and void unless it was clearly established that by "instalment savings certificate" both plaintiff and C. meant a certificate for a certain specific kind of share which defendant could issue; and the onus of establishing that their minds were *ad idem* as to this rested on defendant. The evidence established that the contract offered by C. to plaintiff was one allowing plaintiff to mature his shares in five years, and, according to the defendant association's rules, he would have such right only as a holder of savings shares; the class of shares, therefore, which plaintiff and C. had in mind when the application was signed was savings shares. There was no consent by defendant's directors to a right in plaintiff to mature his shares in five years. The right was important; and, although plaintiff had not complained with respect to it before bringing action, his immediate quarrel being with respect to other privileges alleged to have been represented, this did not justify the inference that such right was not one of the causes inducing him to sign the application or that he did not rely upon it; the onus of showing that the representation was not relied on rested on defendant; and there was no evidence that it was not relied on or was waived. Defendant had failed to establish that plaintiff intended to subscribe for instalment shares, and, as defendant had no intention of accepting, and did not accept, an application for savings shares, their minds were never *ad idem*, there was no contract, and plaintiff was entitled to recover his moneys paid.

APPEAL by the plaintiff from the judgment of the Court of Appeal of British Columbia affirming the judgment of Fisher J., dismissing his action, in which he asked that the application made by him for shares in the defendant association and the certificate for shares issued to him be cancelled or declared null and void, and that he recover the moneys ($1,500) paid by him to defendant in respect thereof. Fisher J. held that there was an actual concluded contract between the parties for 700 Class "E" Instalment Shares of the defendant association (Class "E" to be substituted for Class "F" by rectification); and he also dismissed the claims of plaintiff based on alleged misrepresentations.

The material facts of the case and issues in question are sufficiently stated in the judgment now reported. The appeal to this Court was allowed, and it was directed that judgment be entered for the plaintiff for $1,500 and costs throughout.

W. N. Tilley K.C. for the appellant.

W. F. Chipman K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—In this action the appellant seeks to recover the sum of $1,500, being the amount of three payments of $500 each made by him to the respondent, hereinafter called the "Association," under a supposed contract between himself and the Association.

The Association is a corporation under the *Savings and Loan Associations Act* of British Columbia (ch. 62, Statutes of 1926-1927) formed for the purpose of raising a fund by the sale of its shares and making loans to its shareholders upon the security of real estate in British Columbia or upon the security of shares in the Association other than guarantee shares. The Association, under the Act, was permitted to issue four classes of shares: guarantee shares, investment shares, instalment shares and savings shares. The first two of the above classes had to be paid for in full at the time of subscription; the last two were payable by instalments. On or about November 28, 1927, an agent of the Association, one Christie, who had previously had one or two conversations on the street with the appellant, called upon him in his office and asked him if he would open a savings account with the Association. The appellant expressed his willingness to do so. After matters in reference thereto had been discussed between them for a short time, Christie handed the appellant an application form which the appellant signed and handed back to Christie with his cheque for $500. The application reads as follows:—

GUARANTY SAVINGS & LOAN ASSOCIATION 7748
543 Pender Street West,
Vancouver, B.C.

Initial payment $500.00. Certificate No. 3264
Date Nov. 28, 1927.

I, R. P. Baker, hereby make application for a $70,000.00 Class "F" Instalment Savings Certificate of the GUARANTY SAVINGS & LOAN ASSOCIATION payable in 114 months at $490.00 per month, commencing the 15th day of November, 1927.

It is understood that I am to have withdrawal privileges plus interest in accordance with the Rules of the Association and the Charter granted under the "Savings and Loan Associations Act" of the Province of British Columbia.

I hereby appoint Geo. S. Harrison, the Managing Director for the time being of the Association, as my proxy to vote for me at all annual and special meetings of the Association hereafter held at which I may not be present.

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On November 29 the application went before the directors of the Association and, according to the evidence of one of them, was accepted, although the minutes of the meeting do not shew any resolution to that effect. On the following day the Association forwarded to the appellant by mail a pass book together with a certificate, under the corporate seal of the Association, which certificate reads as follows:—

INSTALMENT INVESTMENT CERTIFICATE 3264 GUARANTY SAVINGS & LOAN ASSOCIATION

Vancouver, B.C.

This certifies that in consideration of the payment to the Association of Four Hundred and Ninety Dollars, payable on or before the 15th day of each month for the full term of one hundred and fourteen months, unless sooner matured, R. P. Baker, of 522 Pender Street West, Vancouver, B.C., is the owner of seven hundred Class "F" Instalment Shares numbered 61414 to 62113 inclusive of the GUARANTY SAVINGS & LOAN ASSOCIATION of the par value of One Hundred Dollars ($100.00) each, transferable only upon the books of the Association upon the surrender of this Certificate properly assigned.

UPON all payments having been made the GUARANTY SAVINGS & LOAN ASSOCIATION will pay at its office, Vancouver, B.C., on the 15th day of May, 1937, unless matured at an earlier date, the sum of Seventy Thousand Dollars, together with the surplus then apportioned to the shares represented by this Certificate to the then legal holder upon the surrender thereof.

THIS Certificate is issued and accepted by the holder hereof subject to the conditions contained in the application and those endorsed hereon, and the Rules of the Association.

On the back of the above the following among other conditions were indorsed:—

2. Payments are to be made on the 15th day of each month, provided that any proportion or the entire amount of the instalment required may be paid in advance until with interest thereon to be compounded semi-annually at Five per cent. (5%) per annum on the amount paid up thereon the shares have reached the matured value of One Hundred Dollars ($100.00) per share.

4. There shall be no withdrawals other than the advance payments within one (1) year of this contract, and until twelve (12) monthly payments have been made.

6. This contract shall mature as soon as the payments, together with accrued interest, shall total the maturity value of the contract.

The appellant says that when he got the pass book he just looked to see if he had been credited with the $500 and then put it in the drawer of his desk. On December 4, 1927, and January 9, 1928, the appellant made two more payments of $500 each. Then he went to Honolulu with

his family and did not return until March, when he received a letter from the Association stating that it had not yet received "the February deposit on your savings account." The appellant did not make any further payments, giving as a reason that either he overlooked the matter or else did not have the money. In June he wrote the Association stating that when he opened the account he had been told by the Association's representative that the funds he deposited would be available for his use at any time provided he left a balance of $200; that he desired to temporarily use $1,200, and to let him have that amount. The Association refused to allow him to withdraw the money, claiming that, under his contract and the rules of the Association, such right of withdrawal did not then exist. He then consulted his solicitor, and got for him the pass book, and it was then that he discovered the certificate in the back of the pass book. This certificate when folded is just the size of the leaves of the pass book. Up to that time the appellant says he had not read the certificate. After ascertaining the rights granted to him and the obligations imposed upon him by the application and its acceptance in the terms of the certificate, the appellant brought this action and asked for the cancellation of the application and the certificate, and a return to him of the money paid, on the grounds: (1) that the application was a nullity inasmuch as the Association had no power to issue the "Instalment Savings Certificate" applied for; (2) that his application was for a Savings Certificate which the directors did not accept but, in pretended acceptance thereof, issued to him an Instalment Investment Certificate, and (3) if the application and certificate constituted a contract, he was induced to sign the application by the misrepresentation of the Association's representative, Christie. The trial judge gave judgment in favour of the Association which was confirmed on appeal.

Referring to the contention that the application was a nullity, as being an application for an Instalment Savings Certificate, the learned trial judge held that the Association had not the power to issue such a Certificate if each of the words "Instalment" and "Savings" was to be given the special and technical meaning imparted to it by the rules and interpretive sections of the Act when used with

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the word "share." He, however, denied the appellant relief for the reason which he states as follows:—

> I do not think, therefore, that in negotiations preliminary to or amounting to a contract even with regard to shares the word "Savings," when used, as here, in conjunction with the word "account" or "certificate" and not with the word "share" should be interpreted as having the special or technical meaning imparted to it, when used in immediate conjunction with the word "share," by statutory or constitution definitions which neither party might have in mind and which would make the expression used in the written application self-contradictory. I think it is a fair inference that the word "Savings" was used with its ordinary rather than with any such special or technical meaning. I find therefore that both parties understood that the application was for Instalment Shares.

The application signed was a formal printed one placed by the Association in the hands of its agents for the express purpose of enabling them to obtain thereby subscriptions for shares in the Association. This application with its acceptance was intended by the Association to constitute a binding contract. The certificate which the Association intended should be issued pursuant to the acceptance of the application was a certificate that the appellant was the holder of 700 of the Association's shares. As the Association considered the application for a certificate to be an application for shares, the word "Savings" in the application must, in our opinion, be given the same meaning as it would have borne if the word "Shares" had been substituted therein for the word "Certificate." The language of the application was the language of the Association and, in case of ambiguity arising from the use of particular words, these must be construed most strongly against it. It is admitted that the Association had no power to issue an "Instalment Savings Certificate." The application, therefore, must be declared null and void, unless it is clearly established that by the phrase "Instalment Savings Certificate" both the appellant and Christie understood and meant a certificate for a certain specific kind of share which the Association had power to issue. The onus of establishing that their minds were *ad idem* as to this, rests on the Association.

The real contest in this case is as to the kind of share the appellant was applying for. As a business man of large affairs, desirous of establishing with the Association a fund of $70,000, he must, in our opinion, be held to have contemplated depositing that sum under some contract

which it was in the power of the Association to make. As the fund was to be accumulated by monthly payments, his choice of contracts was limited to two classes: a contract for Instalment Shares and a contract for Savings Shares. In the Act these are defined as follows:—

"Instalment Share" means a share in an association on which payments of a like amount are required to be periodically made as specified in the rules.

"Savings Share" means a share in an association on which any payment of not less than 25 cents may be made at any time.

Turning to the rules, however, we find in Clause 3, sub-clauses 4 and 5, the following:—

4. Instalment shares shall be payable as follows: * * * Class "E", in monthly instalments of Seventy cents ($0.70) per month per share for one hundred and fourteen (114) months; * * * provided that with the consent of the Directors any proportion or the entire amount of the instalments required may be paid in advance.

5. Savings shares shall be payable as follows: Payments may be made thereon at any time and in any amounts of not less than twenty-five cents ($0.25) per share; provided that the holder of savings shares must maintain an average payment per share per month according to the class of share for which he subscribes as follows: * * * Class "E", Seventy cents ($0.70) per month per share for one hundred and fourteen (114) months; * * *

By Clause 4, sub-clauses 7 and 8, both classes of shares entitle the holder to a dividend of 5 per cent. per annum compounded semi-annually.

Sub-clauses 10 and 11 in part read:—

10. Instalment shares shall mature upon the required number of monthly payments being made as required by the investment certificate * * * In the event of the Directors allowing any instalment shareholder to make payments in advance, such payments shall not mature the shares with respect to which they are made before their regular maturity, except with the consent of the Directors.

11. Savings shares shall mature when the payments made thereon, together with the interest credited thereon, compounded semi-annually at Five per cent. (5%) per annum, shall reach the sum of One Hundred dollars ($100.00) per share * * *.

Clause 5, sub-clause 3, sets out the holder's right of withdrawal thus:—

3. Instalment and savings shares shall have no withdrawal or loan value until after One (1) year from the 15th day of the month for which the first payment applied, and until One (1) full year's payments have been made; provided that the said term of One (1) year may in the discretion of the Directors be reduced to a period not less than Three (3) months from the date of issue of the said shares.

and sub-clause 5 reads:—

5. In the event of the withdrawal of instalment or savings shares before maturity, the owner shall only be entitled to receive the annual

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amount paid in, less membership fees, plus interest at the rate of Four per cent. (4%) per annum compounded semi-annually.

From these rules it will be seen that the differences between " instalment shares " and " savings shares " are: (1) With respect to instalment shares the unpaid balance may be paid up only with the consent of the directors, whereas on savings shares such payment may be made as a matter of right, for although the proviso in Clause 3, sub-clause 5, states that the holder of a savings share must maintain an average payment per share per month, such requirement cannot be read as interfering with the holder's statutory right to make thereon, at any time, any payment of not less than twenty-five cents. (2) Payments in advance on instalment shares, when allowed by the directors, do not mature the shares so as to enable the certificate holder to obtain the return of his money before the maturity date of his shares, unless the directors so consent. In the case of savings shares, if the unpaid balance is paid in advance the shares automatically mature when the sums paid, together with the interest credited thereon, amount to $100 per share. The certificate holder may then withdraw the full maturity value of his shares.

The question then is, on the material before us, has the Association established that the appellant intended to contract for instalment shares as it alleges? The contention of the appellant is that he had no intention of contracting for instalment shares, and that the representations made to him by Christie establish that Christie had no intention of selling him such shares. The representations relied on are: (*a*) that he could deposit as much as he wished at any time; (*b*) that the policy could be matured in five years, and (*c*) that he could withdraw moneys from time to time so long as he kept a balance with the Association of $200. The appellant testifies that each of these representations was made to him by Christie and points out that the rules in force shew that such representations were wholly untrue as applied to instalment shares. With reference to these representations Christie gave the following testimony:—

Q. * * * You told Mr. Baker he could deposit as much as he liked at any time and when the deposits with the interest reached $70,000 although it took less than 114 months, but not less than five years the policy would mature?—A. Yes.

Q. You told him that?—A. Yes.

Q. There is no question about that. Now, I think you have told me, Mr. Christie, that you asked Mr. Baker if he wanted to open a savings account. Did you make that statement?—A. Open a savings account?

Q. Or an account for himself?—A. Yes, sir.

Q. And that he could deposit as much as he liked at any time. You have told me that?—A. Yes.

Q. And in the event of withdrawals his interest would decrease from 5 to 4 per cent. Did you tell him that?—A. I don't recollect whether I did or not.

* * *

Q. You do not dispute that was said, do you?—A. No.

With reference to the right to withdraw sums deposited, Christie said:—

I told him there was no withdrawal privilege for a year and then down to 2 per cent. of the maturity value of the account.

He also gave this testimony:—

Q. Did you or did you not familiarize yourself with the rules and constitutions?—A. No, I didn't read over the rules and constitution.

Q. You didn't read them over?—A. No.

Q. How did you explain matters to prospective clients?—A. Took what we were told at the office and what there was on the savings certificate itself.

* * *

Q. So you got all your information from the officers of the Association and from the certificates?—A. Quite.

This evidence establishes beyond question that the contract which Christie was offering the appellant was one which permitted him, as a matter of right, to deposit as much as he wished at any time and that, if the sums he paid plus the interest amounted to $100 per share, he could, at the expiration of five years, withdraw the whole deposit. Such right the appellant would have only under a certificate for savings shares, as the rules above quoted shew.

The learned trial judge held that, although the right to pay instalments in advance under the certificate issued by the Association could only be exercised with the consent of the directors, yet, as the Association did accept $10 in addition to the $490 specified in the application on each of the occasions on which payments were made, he thought the representation could be considered " true for all practical purposes as the directors had apparently given their required consent to the payment of instalment shares in advance." This conclusion, in our opinion, is not consistent with the attitude taken by the directors when they were considering whether or not they would accept the application, as appears from the evidence of Mr. Allen, the

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manager of the Association. Mr. Allen, in answer to a request to tell just what had occurred, said:—

> The application was read by Mr. Harrison to the directors, and they discussed whether or not to accept the application, due to the amount of it. It was finally pointed out by one of the directors that inasmuch as this application would require our paying $70,000 on a specific date, we would have a period of time in which to prepare for the payment of this sum, and we could plan sometime before the maturity date.

This statement shews that the directors not only had not consented but also that they had no intention of consenting to any payments in advance which would enable the appellant to obtain his money before the date specified in the contract. Even if the Association accepted an advance payment of $10 on the three occasions on which money was paid, that would not give the appellant a right to demand its acceptance on any other occasion. No payment of any kind had been made when Christie made the representation. To a business man accumulating as large a sum as $70,000, it is easy to understand how important it might be for him, after the expiration of five years, to have a right to pay in the amount of the unpaid instalments and then be able to draw out at once the whole fund, and, from the evidence of Mr. Allen quoted above, it appears to have been likewise a matter of importance to the Association that, in the case of so large a sum, the contract holder should not have the right to call upon it to pay over the fund before its maturity date. On behalf of the Association it is said that the right to mature the shares in five years was not a matter of which the appellant had complained. It is true he had not said anything about it before action brought. His immediate quarrel with the Association was in respect of their refusal to allow him the withdrawal privileges which he claimed he had been told his contract would give him. The fact that up to the time he brought his action he had complained only in respect of the withdrawal privileges, does not justify the inference that the right to mature the shares in five years was not one of the causes inducing him to sign the application, or that he did not rely upon it.

Where such an untrue representation has been made, the onus of shewing that it was not relied on rests upon the party who made it. In view of the importance which it might have for the appellant to be able, by paying up the

unpaid instalments, to withdraw his investment at the expiration of five years, we are of opinion that it cannot be said that this was an unimportant representation. There is no evidence that it had been waived, or was not relied on.

We find it unnecessary to express an opinion as to the effect of the alleged representation that the appellant would have the right, under his contract, to withdraw all sums deposited down to $200, or the effect of describing, in the application, the shares applied for as Class "F" shares, when the rules shew that a share payable in 114 months was a Class "E" share. As to the materiality of the latter there may be room for doubt.

We are, therefore, of opinion that, as the rights which Christie admitted he stated would flow from the acceptance of the appellant's application would belong to the appellant only in case he became a holder of savings shares, the class of shares which both the appellant and Christie had in mind when the application was signed was savings shares. The Association has, therefore, failed to establish that the appellant intended to subscribe for instalment shares and, as it had no intention of accepting, and did not accept, an application for savings shares, there was no contract between them. The minds of the parties were never *ad idem*.

The appeal should be allowed, the judgment below set set aside and judgment entered for the plaintiff for $1,500 with costs in all courts.

Appeal allowed with costs.

Solicitors for the appellant: *Fraser & Murphy.*

Solicitors for the respondent: *Burns, Walkem & Thomson.*