[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

RENOS DEMETRIADES,
Appellant-Defendant,

v.

CAXTON PUBLISHING CO. LTD.,
Respondents-Plaintiffs.

(*Civil Appeal No.* 4962).

Sale of goods by description—Entire contract—Part of the goods delivered not in accordance with the agreed description—Condition—Right of the buyer to repudiate the contract and reject the whole of the goods—Sale of Goods Law, Cap. 267, *sections* 13 (1), 15 *and* 37 (3)—*See further* infra.

Bills of exchange—Signed and accepted by the buyer of goods sold—In settlement of the agreed price as aforesaid—Goods subsequently rejected by the buyer as a whole because part of them did not correspond with the agreed description—The contract being an entire contract, said goods rightly rejected by the buyer—Consideration for the said bills totally failing in the circumstances—Bills, thus, becoming void—Cf. supra ; *cf.* infra.

Contract—Entire contract—Divisible contract—Legal effect of the distinction—In an entire contract complete performance by one party is a condition precedent to the liability of the other—Thus, in the instant case the sellers having delivered the goods part of which was not in accordance with the agreed description—The buyer was entitled to elect either (a) *to treat the contract as repudiated and rescind it ; or* (b) *treating the breach as a breach of warranty, to claim damages—The buyer in this case did the first* i.e. *he rejected, as he was entitled to, the whole delivery of the goods—Cf.* supra.

The Supreme Court held that in this case a contract of sale of goods was an entire contract (and not a divisible one) and that, therefore, the sellers having failed to perform completely their part of the contract—by delivering goods some of which were not in accordance with the agreed description—, the buyer was entitled to treat the contract as repudiated, rescind it in its entirety and reject the whole delivery ; and

that bills of exchange signed and accepted by him in settlement of the agreed price have to be discharged for total failure of consideration. The facts of the case are very briefly as follows :—

By a contract in writing the appellant (defendant in the action) agreed to buy from the respondent Company (plaintiffs in the action) eighteen volumes of the " New Caxton Encyclopedia ", five volumes of " Modern Knowledge " and an Oxford Dictionary in two volumes, for the sum of £108 payable by instalments, the buyer signing and accepting in respect of such price a number of bills of exchange. Some time thereafter, the Company delivered to him, instead of the " New Caxton Encyclopedia " as agreed, the new " Universal Library Encyclopedia " together with the agreed five volumes of " Modern Knowledge " and the two volumes of the Oxford Dictionary. Thereupon, the appellant (buyer) by his letter of June 8, 1967, rescinded the whole contract, demanded the return of the deposit and of the said bills of exchange stating that he is no longer bound by such bills.

The Company, in due course, instituted proceedings in the District Court of Limassol, claiming £80.400 mils sum payable under such of the bills of exchange which had by that time come to maturity ; and the defendant buyer counterclaimed, *inter alia*, for the return of all the bills of exchange in question and for a declaration that those bills were null and void for total failure of consideration. Dismissing the counterclaim, the trial Judge gave judgment for the Company for £80.400 mils as claimed on the said bills sued on. The learned trial Judge concluded his judgment as follows :—

" It follows that the plaintiffs partly performed the contract and that the defendant received a benefit from it in having part of the agreed goods delivered to him. The defendant did not satisfy me that the failure of the plaintiffs fully to perform the contract entitled him to repudiate the whole contract."

Particularly, regarding the bills of exchange the learned trial Judge had this to say :

" It is further clear that the bills were signed in settlement of the contract price referred to in the agreement. It follows that there was only partial failure of consideration of the bills. The defendant's claim is in my view untenable. The fact that there was only partial failure of consideration does not make the bills void."

It is against this judgment that the defendant took the present appeal.

Allowing the appeal and setting aside the judgment of the trial Judge, the Supreme Court :—

Held, (1). This was an entire contract, and not a divisible one ; and in an entire contract complete performance by one party is a condition precedent to the liability of the other, because the consideration is usually a lump sum which is only payable upon complete performance by the other party (Cf. *Hoenig* v. *Isaacs* [1952] 2 All E.R. 176, at pp. 180 and 181).

(2)—(*a*) Thus, the buyer (appellant-defendant) could in this case elect either (*a*) to treat the contract as repudiated ; or (*b*) treating the breach of condition (*i.e.* the non-delivery of the " Caxton Encyclopedia ") as a breach of warranty, to sue for damages. In the present case, the buyer did the first thing *i.e.* he rejected, and in our view justifiably rejected, the whole delivery of the goods once the sellers (plaintiffs-respondents) failed to replace, as suggested by the buyer by his aforesaid letter of June 8, 1967, the " Universal Library....." with the " Caxton....." ; and he rightly rescinded the contract on the ground that the condition of the contract to deliver the " Caxton Encyclopedia " had been broken by the sellers (Cf. sections 13(1), 15 and 37(3) of the Sale of Goods Law, Cap. 267).

(*b*) The mere fact that the appellant (defendant) did not specifically mention in his said letter to the plaintiff Company (*supra*) that he has also rejected the other books as well, *i.e.* the five volumes of " Modern Knowledge " and the Oxford Dictionaries (*supra*), does not justify the inference that he has accepted that part of the goods, once he made it amply clear that, because of the breach of the condition, he repudiated the contract as a whole. We think, therefore, that the buyer was entitled to reject the whole of the books, and the sellers were not entitled to insist upon the buyer accepting so much of the goods tendered or delivered as happened to correspond with the description.

(3) Regarding the bills of exchange, there is no doubt that at the time when the appellant (defendant) signed the bills in question the consideration was the delivery of the goods by the Company (plaintiff-respondent), but in our view, the entire failure of consideration has the same effect as its

original and total absence. Once, therefore, the defendant (appellant) was entitled to reject the whole of the goods and the sellers (the Company) were not entitled to insist upon the buyer accepting so much of the goods tendered or delivered as happened to correspond with the description in the contract, we think that since the goods were rejected as a whole, the consideration for the bills had totally failed and the bills are now void.

Appeal allowed with costs.

Cases referred to :

Bristol Tramways, of C., Carriage Co. v. *Fiat Motors Ltd.* [1910] 2 K.B. 831, at p. 836, *per* Cozens-Hardy M.R. ;

Bank of England v. *Vagliano Bros.* [1891] A.C. 107, at p. 144 ;

Margaronis Navigation Agency Ltd. v. *Henry W. Peabody and Co. of London Ltd.* [1965] 1 Q.B. 300, at p. 318 ;

Hoenig v. *Isaacs* [1952] 2 All E.R. 176, at pp. 180 and 181 ;

In re Moore and Co. and Landauer and Co. [1921] 2 *K.B.* 519, at pp. 522 and 523, *per* Bankes L.J. ; at p. 525, *per* Atkin L.J. ;

London Plywood and Timber Company Ltd. v. *Nasic Oak Extract Factory and Steam Sawmills Company Ltd.* [1939] 2 K.B. 343.

Appeal.

Appeal by defendant against the judgment of the District Court of Limassol (Vakis, D.J.) dated the 5th February, 1971, (Action No. 1000/69) awarding to the plaintiffs the sum of £80.400 mils plus interest, due on six bills of exchange and dismissing defendant's counterclaim for breach of contract.

A. Lemis, for the appellant.

C. Colocassides, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by :—

HADJIANASTASSIOU, J.: In this case the defendant appeals from the judgment of the District Court of Limassol dated February 5, 1971, awarding to the plaintiffs the sum of

£80.400 mils plus interest, due on six bills of exchange and dismissing his counter-claim for damages for breach of contract and for other consequential relief.

The facts are these :—Caxton Publishing Co. Ltd., the plaintiffs, an English company, are the publishers of the new Caxton Encyclopedia and the Universal Library and are carrying on business in England as well as in Cyprus, through agents who were receiving a commission on their sales. On March 2, 1967, the defendant, who is a merchant and a graduate of the American University of Beirut, entered into an agreement with the plaintiff company for the purchase of 18 volumes of the New Caxton Encyclopedia, (one volume of the Caxton Encyclopedia to be delivered each month), five volumes Modern Knowledge and two volumes Oxford Dictionaries, for the sum of £108, payable as follows :—£2.500 mils in advance and £3.000 for each consecutive 30 days thereafter until defendant paid the amount of £108 in full. The defendant further agreed to pay 350 mils per month for bank charges and administrative expenses. Then an important condition appears in the said agreement, which is this :—" This order is not cancellable and is not subject to alteration ".

On March 28, 1967, Mr. Michael Court (an agent of the company), delivered to the defendant in his house in Limassol during the evening, books in boxes.—The defendant signed the delivery order under the words " received by " without reading the words inserted " New Universal Library " (22 volumes), because he was under the impression that he signed for the Caxton ; and without opening the boxes in order to examine the books. Mr. Court, after the defendant signed the delivery note, asked him to sign the bills of exchange. The defendant agreed and he signed 18 bills of exchange in favour of the company for £6.700 mils each (value received in books). When Mr. Court and a lady who was with him left, the defendant opened the boxes and he noticed that the company delivered to him the wrong encyclopedia, that is to say, instead of the Caxton, the Universal Library was sent to him.

On the following morning, the defendant rang up and spoke to Mr. Court in the office of the company in Nicosia, and told him what had happened. The defendant was promised that he would call to see him in Limassol in order to exchange the Universal Library with the Caxton. As no-one called to see him, defendant visited the office of the company in Nicosia and complained to a person known as Mr. Shawcross. Apparently, because nothing was heard

again from that gentleman, the defendant on June 8, 1967, addressed a registered letter to the plaintiffs in these terms :

> " I refer to my telephone conversation with you and my visit to your office at Nicosia with regard to the Encyclopedia and your promise to accept back the 'UNIVERSAL LIBRARY ENCYCLOPEDIA' which you have delivered to me as the Agreement between you and me was to deliver to me the CAXTON ENCYCLOPEDIA and not the UNIVERSAL LIBRARY.
>
> I refer you to the contract which specifically mentions that you are bound to deliver to me the CAXTON ENCYCLOPEDIA.
>
> In breach of the above Agreement you have delivered to me the wrong Encyclopedia which I have never ordered or agreed to buy.
>
> As you refused to obtain back the said Encyclopedia and refund the deposit which I have paid or substitute with Caxton Encyclopedia I inform you that I shall not pay any amount or and I refuse the bills of exchange already signed by me in your favour with regard to the above encyclopedia and I shall call upon you to collect same and refund me the deposit within five days from today."

There was further correspondence between the parties as it appears from a letter dated September 21, 1967, and counsel on behalf of the defendant in reply to the letter of the company's advocate dated September 19, 1967 (not available in Court), said that his client denied the claim of the company and called on them within a period of 5 days to return to him the sum of £2.500 paid as a part payment, the bills of exchange as well as to collect from him the Universal Library. Nothing more was done, and on April 2, 1969, the company filed an action claiming the amount of £80.400 mils on 6 bills of exchange plus interest which became due and payable by the defendant to the company.

The defendant in paragraph 2 of his defence denied that the said bills of exchange were accepted by him for value received, and alleged that the said bills were signed without consideration and/or alternatively if there was such consideration, the said consideration had failed.

Regarding the question of delivery of the books, the defendant alleged in paragraph 3 (*g*) that the plaintiffs failed to disclose to him that the encyclopedia contained in

the said boxes was not the Caxton Encyclopedia, and he accepted the said boxes relying on one of the terms of the agreement, without opening them and examining the said encyclopedia ; and in paragraph 7 the defendant by his counter-claim claimed (*a*) the sum of £108.350 mils damages for breach of the contract of sale ; and alternatively the return of £2.500 mils paid by him to the plaintiffs ; and for a declaration that all bills signed by him in favour of the plaintiffs with regard to the agreement were null and void and without effect and/or an order for the return of the said bills of exchange by the plaintiffs to him.

The plaintiffs in their defence to the counter-claim denied the allegations of the defendant and particularly in paragraph 2 denied that there was no consideration to the bills of exchange accepted by defendant ; and also denied that if any consideration existed it failed and alleged that in exchange the defendant received from the company the books described in the contract dated 28.3.67 duly signed by the defendant. The company further alleged that defendant never protested to plaintiffs except in his defence for having failed to pay the agreed sums.

Regarding the delivery of the books, the plaintiff in paragraph 3 alleged :—

> " (*d*) That the books delivered to the defendant were not left with him in sealed boxes as he alleges in paragraph 3 (*d*) of his defence. The boxes were opened up in the presence of the defendant and each book taken out of them was individually checked up by the defendant himself and the delivery order signed by defendant came last to be signed by him after all the volumes delivered were properly and carefully checked up by defendant and found in good order by him and in conformity with the agreement ; thereupon the bills in question were also signed and not at the mere receipt of the unopened boxes as alleged by the defendant in paragraph (3) (*e*) ; and
>
> (*e*) that it was defendant's own wish to have the Universal Encyclopedia delivered to him instead of the Caxton Encyclopedia. That wish was expressed by defendant shortly before delivery of same to him and having had the proper checking as explained above, of each volume separately at the delivery, the defendant approved of each one such volume of the Universal Encyclopedia."

Although the plaintiffs have failed to adduce evidence in support of the defence to counter-claim, on February 1,

1971, they called as a witness Mr. Michael C. Griffiths who was trained in Cyprus in 1967, as a salesman, in order to show what was the practice followed regarding the delivery of books to clients. Counsel questioned the witness on these lines :—

" *Q.* Can you say what was the established practice of the company regarding deliveries ?

A. The practice was that on delivery we would meet the client, open up the box or boxes and show to the customer his books ; thereupon we would obtain his signature on a delivery order and then accept bills of exchange. I have never myself come across any exception to this practice. This is how I was trained."

This witness, after being cross-examined, he was re-examined by counsel on behalf of the company, and said :—

" During the period of March, 1967, onwards until 1969, there were technical difficulties in the printing and production of the Caxton Encyclopedia. Because of these difficulties, the company decided to present to customers when requesting the Caxton, the other (meaning the Universal) though it was more expensive."

The defendant having given evidence in chief in support of his allegations in the statement of defence, he was cross-examined by counsel on behalf of the plaintiffs on these lines :—

" *Q.* Did it occur to you to ask what the boxes contained ?

A. I asked and they told me it was CAXTON.

Q. But you were expecting only one volume.

A. Yes.

Q. It did not occur to you to read the delivery order ?

A. No.

Q. When signing the bills did you read the contents ?

A. I only saw the amount.

Q. You are an established merchant in Limassol ?

A. Yes.

Q. You did Economics at Beirut ?

A. Yes.

Q. I put it to you that it was explained to you that due to technical difficulties the CAXTON could not be delivered and they would deliver the other ?

A. No.

.....

Q. I put it to you that you accepted to change over to New UNIVERSAL LIBRARY after you were explained the advantages of having this one instead of CAXTON and upon this you signed *exhibit* 2 and the bills ?

A. I did not accept such a thing. Nothing was explained to me.

Q. I also put it to you that you were shown the contents before you signed ?

A. No this is not true."

Thus, in effect the defendant, although he was pressed in cross-examination, denied that he had agreed to vary or alter the terms of the contract of sale which contained an express stipulation that it was specifically not subject to alteration.

We think that we ought to state that the contract of sale of goods is one of the most common transactions of business. The law relating to it is founded on the Sale of Goods Act, 1893, which codifies the earlier case law on the subject, and has served as a model for similar legislation in most countries of the British Commonwealth of Nations and has contributed to the aim of achieving uniformity to law in mercantile matters. In our country, we have adopted and re-enacted the Act of 1893 with small variations to adapt it to local circumstances, and our own law now is the Sale of Goods Law, Cap. 267. As was pointed out by Cozens-Hardy M.R., in *Bristol Tramways, of C., Carriage Co. Ltd.* v. *Fiat Motors Ltd.* [1910] 2 K.B. 831 at p. 836 :—

> " The object and intent of the Statute of 1893 was, no doubt, simply to codify the unwritten law applicable to the sale of goods, but in so far as there is an express statutory enactment, that law must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law."

Lord Herschell, dealing with the Canons of Construction of a codifying Act, said in *Bank of England* v. *Vagliano Bros.* [1891] A.C. 107 at p. 144 :—

> " I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

We should have added that though Lord Herschell's observations referred to the Bills of Exchange Act they apply with equal force to the Sale of Goods Act. With this in mind, and fully realizing that our own Sale of Goods Law has served the Commercial Community well, I think we ought to state that regarding the question whether performance is sufficient, the Court must first construe the contract in order to ascertain the nature of the obligation (which is a question of law) and the next task is to see whether the actual performance measures up to that obligation (which is a question of mixed fact and law) in that the Court decides whether the facts of the actual performance satisfy the standard prescribed by the contractual provisions defining the obligation. See *Margaronis Navigation Agency Ltd.* v. *Henry W. Peabody & Co. of London Ltd.* [1965] 1 Q.B. 300 at p. 318.

In the case in hand, the trial Court, after evaluating the evidence and other material before it and having construed the contract of the parties in order to ascertain the obligation of the sellers (the plaintiffs) considered whether the actual performance in delivering the books and the Universal Library instead of the Caxton to the defendant, measured up to their contractual obligation and, had this to say in its judgment at p. 18 :—

> " ....it is clear that the plaintiffs failed to comly with their obligations under the contract to deliver the agreed books. On the other hand, it is equally clear that they only partially failed to perform their contract in that they delivered to the defendant part of the agreed books. It must also be stressed that nowhere in the pleadings or the evidence either the plaintiffs or the defendant stated what was the value of the books delivered or of those undelivered. The

plaintiffs' failure of breach of the contract consists in their delivering the Universal Library instead of the Caxton."

Later on the learned trial Judge said at p. 19 :—

"I have considered the whole matter and the arguments of plaintiffs' counsel, but I think it would be too far fetched to infer from the evidence as it stands, an agreement between the parties to the effect that defendant would accept or did accept the Universal Library instead of the Caxton Encyclopedia."

Finally, the learned Judge concluded :—

"It follows that the plaintiffs partly performed the contract and that the defendant received a benefit from it in having part of the agreed goods delivered to him. The defendant did not satisfy me that the failure of the plaintiffs fully to perform the contract entitled him to repudiate the whole contract."

Counsel on behalf of the appellant has contended that the finding of the Court that the contract of sale is a divisible one is wrong in law, because the said contract of the parties is an entire contract ; and in an entire contract, complete performance by one party is a condition precedent to the liability of the other.

The question whether a contract is an entire or divisible contract depends, in our view, on its construction in the light of all the circumstances. In an entire contract complete performance by one party is a condition precedent to the liability of the other, because the consideration is usually a lump sum which is payable upon complete performance by the other party. Cf. *Hoenig* v. *Isaacs* [1952] 2 All E.R. 176 at pp. 180 and 181.

Having construed the contract of the parties and in the light of all the circumstances, we find ourselves in agreement with counsel for the appellant that, the said contract is an entire contract and that a complete performance by one party is a condition precedent to the liability of the other. There is no doubt, in our mind, that the learned Judge must have had in mind also that this contract of sale is not severable into parts, so that different parts of the consideration could be assigned to severable parts of the performance, because clearly and distinctly he said so "that nowhere in the pleadings or the evidence either the plaintiff or defendant stated what was the value of the books delivered or not delivered". What is surprising, however, is that

although the learned Judge excluded the inference that the parties have made a fresh contract, under which the defendant would accept or did accept the Universal Library instead of the Caxton, nevertheless, he thought that because defendant received a benefit under the contract, *i.e.* from the delivery of the other books, that was sufficient to justify the inference that the defendant was not entitled to repudiate the contract. We would also add that nowhere does it appear that the defendant agreed to accept and pay for the partial performance of the contract and that he would be liable on a quantum meruit to pay a reasonable price for the goods actually supplied.

With the utmost respect to the view of the learned Judge, we find ourselves unable to agree with his view, because, in the case in hand the quantity of books fixed in the contract of the parties forms part of the description of the goods sold, and the tender of the books of a different description mixed with the other contract goods constitutes a breach of the condition implied by section 15 of our law, that the goods shall correspond with the description. However, pursuant to section 13 (1) where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated. Thus it appears that the defendant under this section could elect (*a*) to treat the contract as repudiated ; or (*b*) treating the breach of the condition (of non-delivery of the Caxton) as a breach of warranty to claim damages.

In *in re Moore and Co.* and *Landauer & Co.* [1921] 2 K.B.D. 519, a case dealing with the right of a buyer to reject the whole delivery of the goods tendered, when there was a breach as to part only, it was held—that the sale was a sale of goods by description, and as the goods contracted to be sold were mixed with goods of a different description, the buyers were entitled under s. 30 subsection 3 of the Sale of Goods Act, 1893, to reject the whole consignment.

Bankes, L.J., dealing with this point on appeal, and after finding himself in agreement with the view of Rowlatt J., (the trial Judge), said at pp. 522 and 523 :—

> " That question of law, in my opinion, admits of a very simple answer. If it is true to say, as I think it is, that is a sale of goods by description, and the statement in the contract that the goods are packed

thirty tins in a case is part of the description, there is, under s. 13 of the Sale of Goods Act, 1893, an implied condition that the goods shall correspond with the description. The goods tendered did not as to about one-half correspond with that description. The effect of that is stated in s. 30 sub-s. 3, which provides that ' where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole '. That was the buyers' position as defined by the Act, and they rejected the whole. The question of law, as stated by the umpire, admits, as it seems to me, of only one answer—namely, that the buyers were entitled to reject the whole."

Atkin, L.J. delivering a separate judgment in this case, had this to say at p. 525 :—

> " There is, therefore, an implied condition that the goods when tendered shall correspond with the description. That condition was broken, and there was a right to reject. It appears to me also to be plain that by reason of s. 30 sub-s. 3 of the Sale of Goods Act, 1893, the sellers were not entitled to insist upon the buyers accepting so much of the goods tendered as happened to correspond with the description. I think the buyers were entitled to reject the whole."

See also *London Plywood and Timber Company Limited* v. *Nasic Oak Extract Factory and Steam Sawmills Company Limited* [1939] 2 K.B.D. 343.

It is to be observed that subsection 3 of s. 30 of the Sale of Goods Act 1893 is identical to our own subsection 3 of s. 37.

In our view, going through the correspondence of the defendant, it is clear in our mind that the defendant had justifiably rejected the whole delivery of the books once the plaintiffs failed to replace the Universal Library with the Caxton, and he has rightly rescinded the contract on the ground that the condition of the contract to deliver the Caxton Library has been broken. The mere fact that the defendant did not specifically mention in his letter to the plaintiffs that he has rejected also the other books, *i.e.* the five volumes of Modern Knowledge and the two volumes of Oxford Dictionaries, does not justify the

inference that he has accepted that part of the goods, once he made it amply clear that because of the breach of the condition, he repudiated the contract. We think, therefore, that the buyer was entitled to reject the whole of the books, and the sellers were not entitled to insist upon the buyer accepting so much of the goods tendered as happened to correspond with the description.

The next contention of counsel on behalf of the appellant was that the finding of the trial Court that there was partial failure of consideration and not total, was against the weight of evidence and/or arbitrary.

The learned Judge dealing with the point of whether the bills of exchange were void, had this to say at p. 20 :—

> " It is further clear that the Bills were signed in settlement of the Contract price referred to in the agreement. It follows that there was only partial failure of consideration of the Bills. The defendant's claim is in my own view untenable. The fact that there was only partial failure of consideration does not make the Bills void."

There is no doubt that at the time when the defendant signed the bills of exchange the consideration was the delivery of the goods by the plaintiffs; but in our view, the entire failure of consideration has the same effect as its original and total absence. Once, therefore, for the reasons we have given earlier in this judgment, the defendant was entitled to reject the whole of the goods and that the sellers were not entitled to insist upon the buyer accepting so much of the goods tendered as happened to correspond with the description, we think that since the goods were rejected as a whole, the consideration for the bills had totally failed, in the circumstances of this case.

For the reasons we have given, we find ourselves compelled to the conclusion that the decision of the learned trial Judge was wrong because we are of the view that the said bills of exchange are void, and we would, therefore, allow the appeal with costs.

Regarding the part payment of £2.500 claimed by the appellant in his counter-claim, we think under these circumstances we would enter judgment in favour of the appellant for that sum.

Appeal allowed with costs.