Present: Lascelles C.J. and De Sampayo A.J. 1913.

RAE SANDS *v.* KADIBHOY.

69—D. C. Colombo, 31,050.

Sale of rubber shares—Contract silent as to time for delivery of documents—Time for payment stipulated for—Sale of Goods Ordinance—"Goods."

In the case of a sale of shares, where the time for payment is stipulated for, but the contract is silent as to the time for delivery, the seller is bound to deliver forthwith or within a reasonable time before payment, unless his obligation is otherwise regulated by a binding usage or custom.

THE facts are fully set out in the judgment.

Bawa, K.C., for the defendant appellant.—No time was stipulated for the delivery of the scrip. In the state of the market at the time it was not possible to stipulate for delivery of the scrip at the time of payment. In the case of a contract to deliver, where no time is specified for delivery, a reasonable time will always be allowed for delivery (*2 Nathan 535.*) In considering what is reasonable time, regard must be had to the circumstances of the case. It would be impossible to lay down any hard and fast rule as to what constitutes unreasonable delay in the delivery of shares sold.

Even if the evidence does not prove a custom, it helps the Court to find out what is "reasonable time" in this case. Counsel cited *Benjamin on Sales 683 (5th ed.), Union Corporation v. Carrington,*[1] *Benjamin v. Barnett,*[2] *De Waal v. Adlar,*[3] *Field v. Lelean*[4].

Elliott (with him *Hayley*), for the respondent.—The case is governed by the Sale of Goods Ordinance of 1896. In the English Act the definition of the term "goods" specially excludes shares. In our Ordinance "goods" include all movables, except moneys. The ruling in *Croos v. De Soysa*[5] does not apply to this case. Under section 27 of the Sale of Goods Ordinance the custom pleaded by the appellant has not been proved. Moreover, the alleged custom is unreasonable. It is unreasonable to expect a man to pay money and wait for months to get the scrip.

[1] *(1902-3) 8 C. C. 99.*
[2] *(1903) 8 C. C. 244.*
[3] *(1887) 12 A. C. 141.*
[4] *(1861) 30 L. J. Exch. 168.*
[5] *(1903) 7 N. L. R. 32.*

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Bawa, K.C., in reply.—The case is governed by the Roman-Dutch law, and not by the Sale of Goods Ordinance. Section 27 applies to corporeal movables, and not to shares.

Cur. adv. vult.

May 14, 1912. LASCELLES C.J.—

The facts which have given rise to this appeal are shortly as follows. On March 31, 1910, the plaintiff received from Mr. L. C. Davies, a broker, a bought note advising him that he had bought on his account 165 shares in the Rubber Plantations Investment Trust Company from the defendant at 65*s*. per share. The bought note provided that payment should be made in ten days from date, but was silent as to the time for delivery of documents. On April 2 the plaintiff re-sold the shares to Somerville & Co. On April 10, 1910, the plaintiff wrote the letter P 2 to Mr. Davies asking him to forward transfer and scrip for the shares, on which he, the plaintiff, would give a cheque in payment. On the following day the defendant wrote to Mr. Davies demanding payment for the shares. On the same day Mr. Davies communicated to the defendant the plaintiff's letter P 2 asking for the scrip. Mr. Davies then, on April 12, received from the defendant the letter P 5 asking him to send a cheque to Messrs. Keel & Waldock, who, the defendant stated, would hand over the transfer and scrip. The defendant added that if the amount was not paid that day the defendant would consider the contract cancelled.

This letter was shown to the plaintiff, who, on the same day, wrote to Messrs. Keel & Waldock offering to send a cheque in exchange for the scrip. Messrs. Keel & Waldock on the 13th replied that they had not yet received the shares from another firm of brokers. On April 16 Mr. Davies wrote to the defendant that the plaintiff would hand him a cheque as soon as Messrs. Keel & Waldock were in a position to give the documents to the buyer.

About the end of May the plaintiff bought shares to fulfil his contract with Somerville & Co., and on June 11 the plaintiff, by letter P 13, formally demanded from the defendant the amount for which he now sues, which represents the difference between the price at which the plaintiff purchased the shares from the defendant and the price which he had to pay for them in order to complete his contract with Somerville & Co. It appears from the evidence of Mr. Keel that the shares in question had been bought by Messrs. Keel & Waldock from other brokers, who did not deliver the documents until August or September, so that, when the plaintiff purchased the shares, he could not have been given a delivery order, with which he says he would have been content. It further appears that the defendant sold the shares in question at 74*s*. on May 14, 1910, and so profited considerably by the transaction.

There has been some discussion whether this transaction is governed by the Sale of Goods Ordinance, No. 11 of 1896, and whether the English or the Roman-Dutch law is applicable to the transaction. The contention that the Sale of Goods Ordinance is applicable is founded on the difference between the definition of the word "goods" in the Ceylon Ordinance and the English Act. But in *Croos v. De Soysa*[1] it was held that the word "movables" in the definition of "goods" related only to corporeal movables. This decision, which is binding on us, and is certainly convenient, disposes of any doubt there may have been as to the non-applicability of the Ordinance to the sale of stocks and shares.

The legal principle relating to the time within which scrip should be delivered on a sale of shares appears to be clear, and it does not seem to be material whether the English or the Roman-Dutch law is applied. In *Field v. Lelean*[2] the bought and sold notes, as in this case, provided for the time of payment for the shares, but was silent as to the time for delivery. There it was held that the purchaser, apart from any special custom, would have been entitled to require the seller to deliver them forthwith or within a reasonable time before payment." In *Union Corporation v. Charrington*,[3] Bigham J. held that, as a general rule, where there is a sale of shares, "speedy, prompt, and proper delivery is essential," and this was approved in *Benjamin v. Barnett*.[4]

In *De Waal v. Adlar*,[5] which was a Natal case, presumably decided under the Roman-Dutch law, it was held that seller was bound to deliver the certificates within what would be a reasonable period in an ordinary contract for the sale of shares, and that the reasonableness of the time cannot depend upon circumstances which were unknown to the buyer.

It is not disputed that, as a general rule, the scrip should be delivered promptly on payment of the price by the purchaser, but the answer in paragraph 6 sets up a practice or usage alleged to obtain in Colombo, under which scrip is deliverable within a reasonable time after payment, and that owing to a boom in rubber shares the scrip relating to the shares purchased could not have been delivered within the time the plaintiff required delivery.

I entirely concur in the finding of the learned District Judge that no special usage or custom has been proved. Apart from the question whether Mr. Keel was in this case the proper person to prove the existence of the alleged custom, it is clear that his evidence falls far short of proving a notorious, certain, and reasonable usage or custom under which, on a sale of rubber shares, the delivery of scrip could have been indefinitely postponed after payment. Mr. Keel's evidence was to the effect that prior to 1910 the share market

[1] *(1903) 7 N. L. R. 32.*
[2] *(1861) 30 L. J. Exch. 168.*
[3] *(1902-3) 8 C. C. 99.*
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[5] *(1887) 12 A. C. 141.*

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in Colombo was comparatively small; that the business was transacted by firms who were produce brokers rather than professional share brokers; that before the Colombo Brokers' Association framed rules, which came into force on October 1, 1910, brokers and clients were in a somewhat vague state as to their rights in respect of share transactions; and that, when the rubber boom came, there was extraordinary confusion and great delay in the delivery of stock. This evidence clearly does not establish the existence of any special usage or custom in the Colombo share market. It points rather to temporary disorganization of the share market.

At the argument, the appellant somewhat modified the position which he had taken up in his answer. He did not rely so much on the alleged usage of the Colombo share market. The scrip, it was argued, was deliverable within a reasonable time, and having regard to the state of the Colombo share market, which was well known to the plaintiff, it was unreasonable to insist on delivery against payment. In other words, it was contended that although the plaintiff was bound to pay for the shares within ten days, the state of the share market in Colombo was such that the parties must be taken to have contemplated the delivery of scrip being indefinitely postponed. *Primâ facie*, it is highly improbable that the plaintiff would have entered into any such contract; that he would have bound himself to pay the purchase money without receiving in return either scrip or any negotiable document. But from the letter P 5, it is clear that the defendant, who had had little experience of such matters, on April 12, 1910, believed that his brokers were then in a position to hand over the scrip. In selling these shares to the plaintiff he had unwillingly placed himself in the position of selling what he was not in a position to deliver, and he must bear the consequences. The contention of the appellant is equivalent to saying that during a period of excessive speculation in shares sellers are released from the obligation which is ordinarily incumbent on them of delivering scrip or negotiable documents against payment. The contention is, in my opinion, as unsound as it is dangerous.

I think the decision of the learned District Judge is right, and I would dismiss the appeal with costs.

DE SAMPAYO A.J.—

I also think that the judgment appealed against is right. In the case of a sale of movables, unless otherwise agreed, delivery and payment are concurrent conditions. The case of *Field v. Lelean*[1] is an authority for the proposition that where, as in this case, the time for payment is stipulated for, but the contract is silent as to the time for delivery, the seller is bound to deliver forthwith or within a reasonable time before payment, unless his obligation is otherwise

[1] *(1861) 30 L. J. Exch. 168.*

regulated by a binding usage or custom. Accordingly the defendant in his answer pleaded a custom in these terms: "According to the practice and usage obtaining in Colombo among merchants and brokers scrip for shares sold is deliverable to the purchaser within a reasonable time after payment for such shares, unless it is expressly agreed that payment and delivery of scrip should be concurrent conditions." And the defendant proceeded further to plead that at the dates material to this action "there was a boom in rubber shares, in consequence of which such shares were freely sold and passed from hand to hand so rapidly that such documents as are referred to as necessary documents in the plaint could not and were not executed within such time as that within which plaintiff required transfers and scrip to be delivered as aforesaid, and the plaintiff made the said demand well knowing the circumstances herein set forth, and well knowing that the plaintiff could not comply therewith."

The District Judge at the trial stated issues as to the existence of the custom and as to its reasonableness and legality. To prove the custom pleaded defendant called Mr. W. E. Keel, a member of the firm of Messrs. Keel & Waldock, who carry on business as brokers in Colombo. Something was said at the trial and mentioned in the District Judge's judgment to the effect that Mr. Keel was not the best witness to be called on this subject, because it was Messrs. Keel & Waldock who had purchased the shares for the defendant, and because there was said to be some feeling about Mr. L. C. Davies (who had put through the present contract) not being at that time a member of the Brokers' Association. In my opinion Mr. Keel was a quite competent witness, and his evidence is reliable, but the question is what his evidence proves. I quote the relevant passages in his evidence. After speaking of the difficulty of obtaining scrip during what is called the "boom" in rubber shares, and how people used to buy and sell shares without scrip, he says, "We on behalf of the seller would not have undertaken to deliver the scrip by a certain date. We would deliver the scrip in such a case when it was received from the seller, provided that the buyer had paid for them. That was the general practice at that time. In such a case the contract note would provide for payment within a specified time, but would contain no reference to delivery of scrip. On such a contract as this one (in question) scrip would have to be delivered within a reasonable time soon after the seller received it. During the boom we would have delivered scrip or transfer and delivery order or certified transfer as soon as obtained by us, provided the buyer had paid for the shares. Anything between six months and a year would have been a reasonable time during the boom for delivery of scrip to a purchaser of shares. Mr. Sands (plaintiff) should have paid for the shares to the broker, L. C. Davies, within the ten days and waited till he got the scrip for the shares; that was the custom of the trade at the time."

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This evidence falls far short of proof of a binding custom. The so-called custom is too vague and indefinite and wholly unreasonable. It establishes no more than an extraordinary condition of business arising out of a particular emergency. As Mr. Keel himself says, "There was extraordinary confusion during the boom last year, and things came to such a pass that the Brokers' Association framed certain rules, which came into force on October 1, 1910, so that brokers and clients should know definitely what their rights are and order might be produced from disorder," and he adds, "A large number of purchasers kicked at the custom; there was an outcry, and it was found that the rules under which we were working were impossible." This is emphatic testimony to the unreasonableness of the custom and to its not being acquiesced in. It is interesting to note that the new rule framed by the Brokers' Association is modelled on that of the London Stock Exchange, and provides for settling days, namely, the second and fourth Friday in every month for both rupee and sterling shares, and enacts that on each settling day all shares sold prior to the Tuesday next preceding such settling day shall be paid for by the buyer and the necessary documents shall be delivered by the seller. The period thus fixed retrospectively shows the unreasonableness of a practice which would compel a purchaser who has paid for shares to wait for a year for delivery of scrip, or, even for a longer time if the seller should not himself have got them before, and which would practically leave the matter of delivery of scrip to the option and convenience of the seller.

It is true that, as a matter of fact, a series of transactions might take place during the boom without the scrip being available at any stage; but because at a time of wild speculation people were content to do business in that fashion, it does not follow that each seller in the series was not running the risk of being called upon to deliver the necessary documents promptly, and of being liable in law for a breach of contract in case of failure to do so.

Mr. Bawa, for the defendant-appellant, did not rely so much upon the custom pleaded as upon the argument, that in entering into the contract both parties contemplated the actual condition of business in the share market, and that, having regard thereto, it was an implied term in the contract that the defendant-appellant should only deliver the scrip within a reasonable time after payment, which under the circumstances meant the indefinite period already referred to. This position cannot be sustained. In the first place, I do not think that you can thus annex to a contract a term which does not amount to a binding trade custom. In the next place, it does not appear, as a matter of fact, that either party had in view the peculiar circumstances of the time. The plaintiff positively denies it, and the defendant does not allude to it either in his correspondence or in his evidence. On the contrary, the defendant's attitude was that on the plaintiff paying him for the shares he

would deliver the scrip. His letter of April 12, 1910 (P 5), in reply to a demand for the scrip, seems to me to put the matter beyond doubt, for there he says, "I shall thank you to send me a cheque to Messrs. Keel & Waldock, who will hand you the transfer and scrip for the same," which appears to me not only to acknowledge his obligation to deliver the scrip concurrently with the payment, but to intimate that he was in a position to do so.

I agree that this appeal should be dismissed with costs.

Appeal dismissed.