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REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1910-1911.

[HIGH COURT OF AUSTRALIA.]

JOHN McLAUGHLIN . . . . . APPELLANT;
DEFENDANT,

AND

LOUISE GUERRY DE LAURET . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 18, 21.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Contract—Performance—Principal and agent—Sale of shares by broker—Time bargain—Evidence of demand—Notice that plaintiff was prepared to take delivery and pay for shares.

Upon a sale of shares for future delivery, delivery and payment are concurrent conditions. The obligation of the seller is to deliver to the buyer, or to a person known by the seller to be the buyer's agent, on demand, at or soon after the stipulated time, upon tender of the contract price.

In an action for damages for non-delivery of shares contracted to be sold at three month's delivery, the jury returned a verdict for the plaintiff.

Held, upon the evidence, that the plaintiff should have been non-suited, as it had never been brought to the knowledge of the defendant that the plaintiff was prepared to pay for the shares and take delivery.

Decision of the Supreme Court, 23rd May 1910, reversed.

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APPEAL by the defendant, by special leave, from the decision of the Supreme Court refusing to enter a verdict for the defendant or to grant a new trial, upon the ground that the plaintiff had failed to prove any breach of the contract sued upon on the part of the defendant.

The facts are sufficiently stated in the judgment of *Griffith* C.J.

Windeyer, for the appellant. There was no evidence of any breach of contract by the defendant. Tilley had no authority to demand the shares on behalf of the plaintiff. If he had, he made no demand upon the defendant as the ostensible agent of the plaintiff, that is to say, his authority was never communicated to the defendant. Tilley had been agent for both parties in the purchase of the shares. After the purchase his agency was at an end. When he made the demand upon the defendant he did not state that he was acting for the plaintiff. The defendant stated that he was willing to deliver the shares if he got gold in exchange, or if he were asked to do so by the plaintiff. The plaintiff has failed to show readiness and willingness on her part. [He referred to *Benjamin on Sales*, 5th ed., p. 595]. There was no evidence of a refusal to deliver, or repudiation of the contract by the defendant, quite apart from the question of agency.

Knox K.C. and *Ferguson*, for the respondent. The defendant proved that Tilley was only acting as broker for the plaintiff in this transaction. The defendant had told Tilley that he would not recognize a demand for the shares unless made on behalf of the plaintiff. After that Tilley made a demand, and the only objection then taken by the defendant was that the plaintiff had not paid the money, and the defendant said he would deliver if the money was tendered. He knew Tilley had no right to demand the shares except as agent for the plaintiff, and he did not ask Tilley for his authority. The jury were entitled to find that the defendant knew that the demand was made by Tilley on behalf of the plaintiff. The plaintiff was not bound to tender the money when making the demand. Tilley was agent for the plaintiff in the purchase of the shares. In all stock exchange transactions the authority of the broker is a continuous one.

Here the agency is proved in regard to portion of the same transaction. The defendant said in effect "I know you are agent, but I will not deal with anybody but the plaintiff."

Windeyer, in reply.

Cur. adv. vult.

Nov. 21.

GRIFFITH C.J. read the following judgment:—This was an action brought in a District Court by the respondent against the appellant for damages for non-delivery of 500 shares in a joint stock company. The contract of sale, which was made on 23rd June 1909, was "at three months delivery." On such a contract delivery and payment are concurrent conditions. Upon the evidence it appeared (as indeed might be inferred without express evidence) that on a sale for future delivery, spoken of as a time bargain, the practice is to deliver on demand at or soon after the expiration of the stipulated time. The defence set up at the trial, and to which all the evidence was directed, was that it was never brought to the knowledge of the defendant that the plaintiff was prepared to pay for the shares and take delivery. At the close of the plaintiff's case the defendant's counsel applied for a nonsuit, but the learned District Court Judge thought that there was evidence to go to the jury on the point. The jury found for the plaintiff, and an appeal brought to the Supreme Court was dismissed.

The only question for decision is whether there was any evidence on which reasonable men could find in favour of the plaintiff.

The sale was effected by a broker, Mr. Tilley, who appears to have been agent of both parties to make the contract. It appears from a letter written by him on 23rd September to the plaintiff, and put in by the plaintiff, that the sale was a sale direct from client to client, and he said in evidence that he had so informed the plaintiff at the time of the sale, but without disclosing the vendor's name.

Shortly before 23rd September, that is, when the time for delivery was approaching, Mr. Tilley reminded defendant that the shares were due, to which, according to Tilley's evidence, the

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defendant said: "It has nothing to do with you: Miss De Lauret is the principal: if the shares went down to a shilling or became valueless I could not come on you. I would have to look to her: therefore it has nothing to do with you. . . . After he told me that, I did not press the matter." In answer to the question put by plaintiff's counsel: "Were you prepared to pay for the shares if he handed them over?" he replied: "I was: only on my own account." So far there is nothing to show that Tilley was authorized by plaintiff to demand and pay for the shares, or that he professed to be acting on her behalf and to be willing to pay the price for her. If he was authorized to act for her and was in fact acting for her, the natural reply to make to the defendant would have been to tell him so. The statement that he was prepared to pay for the shares "only on his own account" is explained by the fact that he was personally responsible for the delivery of an equal number of shares in the company which he had sold for the plaintiff and which were not available for delivery, as appears by a letter from Tilley to her of 29th September.

In cross-examination Tilley said: "I informed Miss De Lauret that Mr. McLaughlin would deliver the shares if I were authorized to pay the money. I wrote to Miss De Lauret." The letter of 29th September was then shown to him, and afterwards put in evidence. In that letter Tilley, after reminding her of his liability to deliver the 500 shares sold for her, and informing her that he was being pressed for delivery of them, added: "I may say that Mr. McLaughlin informed me on one occasion that if you tendered gold to him he would be prepared to deliver the shares. I will be pleased to adopt this course on your behalf if you instruct me." To this letter no reply was sent. So far it would appear that at that time he was not authorized by the plaintiff to pay for the shares on her behalf. In further cross-examination Tilley said: "I was not the agent for Miss De Lauret to demand the shares from McLaughlin. She did not directly authorize me to demand the shares." He also said: "Under such a contract as this he is not bound to deliver the shares without the money. Mr. McLaughlin said he was willing to deliver the shares if he got the money. I had no reason to disbelieve him.

That was when he told me 'if the gold were tendered'": and again: "I subsequently (*i.e.* after the letter of 29th September) saw Mr. Arnold" (a witness who said he was the plaintiff's agent in the matter): "I informed him that Mr. McLaughlin was willing to deliver the shares if the gold were tendered. He did not authorize me on her behalf to make a tender of the money. They never put me in a position to tender the money by providing the cash." In re-examination he said: "Until I wrote the letter of 29th September Mr. McLaughlin never told me he would deliver if the gold had been tendered. He never offered to deliver the shares if he got the gold. He merely told me he would have done so some time in the past." This is, however, quite inconsistent with his written statement of the facts contained in the letter of 29th September. Mr. Arnold deposed that he was appointed by plaintiff to act generally in the matter, and that he told Tilley to demand the shares for her, adding: "I said 'You must go and get the shares: you have sold them: I told you at the time I had no shares to deliver.'" He also said, in answer to plaintiff's counsel: "I told Mr. Tilley several times to demand the shares: finally he said: 'I have seen Mr. McLaughlin.' I said: 'What did he say?' He said: 'If gold were tendered he would probably deliver the shares.' I said: 'Go and tender the gold.' He said: 'I do not think gold is necessary.'" In cross-examination he said: "I told Mr. Tilley to tender the gold before the letter of 29th September." Arnold did not, however, provide the gold. He also said in cross-examination: "I looked to him to get the shares" (*i.e.* the 500 which plaintiff had to deliver). "I did not care where he got them from. I told him all the time he would have to supply them."

I have, I think, read all the relevant evidence in support of the plaintiff's case. The defendant's evidence, if accepted, clearly established the defence set up, but contained nothing to help the plaintiff.

In my opinion, upon the evidence which I have read there was nothing to show any refusal up to 29th September by the defendant to perform the contract by delivery of the shares on payment of the price. On the contrary it appeared that at that date the matter was regarded by all parties as still open.

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Whether Arnold did or did not appoint Tilley to be agent for the plaintiff for the purpose of demanding and paying for the shares, it does not appear that Tilley informed the defendant that he made the demand on her behalf, or that the willingness of the plaintiff to pay for the shares (if she was willing) was ever communicated to him, either directly or by implication. It was contended for the plaintiff that by denying Tilley's authority to demand delivery defendant waived the necessity for payment or offer of payment. But that is not so. He was not bound to deal with a person whom he did not believe, and had no reason to believe, to be acting for the plaintiff. Upon the plaintiff's own evidence I think that the only conclusion to which reasonable men, understanding the question which they had to decide, could come was that the defendant was always ready to deliver the shares on payment, and that he was never informed by any one even professing to act for the plaintiff that she was ready to pay for them.

After 29th September there was no communication from the plaintiff to the defendant except a letter of 17th November from the plaintiff's solicitor threatening an action, which was brought shortly afterwards.

The rules of the stock exchange to which the contract was made subject were referred to, but in my opinion they have no bearing on the case.

Under these circumstances I think that the non-suit should have been granted, and that the appeal must be allowed.

BARTON J. This was an action upon a time bargain sale of shares, dated 22nd June 1909, at three months delivery. In such a contract delivery and payment are concurrent conditions: see *Benjamin on Sales*, 5th ed., pp. 595, 678. It is not the duty of the seller of the shares to seek out the buyer for the purpose of delivering the share certificates. It is sufficient if he is ready to make delivery when the buyer attends to pay. Mr. Tilley, the broker on the stock exchange, who sold the shares for the appellant, gave the following evidence on this point:—" When there is a contract to deliver shares on a certain date, the practice of the stock exchange is to deliver, not on the due date, but when it is

demanded. A contract to deliver on 23rd September means to be delivered when they are asked for. You can demand any time after that date." The buyer may claim delivery through an agent. But the seller is not bound to deliver to anyone except the buyer, unless the person seeking delivery has become known to him to be the buyer's agent to take delivery. He cannot be expected to make delivery to a person of whose right to receive the shares he is not aware. The witness Arnold acted for the buyer, the present respondent, in the purchase of these shares. He says that shortly before the contract date, presumably with her authority, he told Tilley to demand the shares for her. There is no evidence that at that time either Arnold or Miss De Lauret knew that the appellant was the seller. Indeed Arnold says that he did not know until after 23rd June that McLaughlin was the principal. He says that he held Tilley responsible, and that he said to Tilley: "You must go and get the shares: you have sold them: I told you at the time I had no shares to deliver." He also says that he told Tilley several times to demand the shares, and that finally Tilley said he had seen McLaughlin, who said that if gold were tendered he would probably deliver, and Arnold asserts that he then said to Tilley, "Go and tender the gold." The gold, however, appears not to have been provided, Tilley told Arnold that he did not think the gold was necessary, and Arnold appears not to have insisted further on the tender. Nor does he say anything at any time to Tilley about payment except as last stated. This conversation was after the due date, probably the next day. It cannot well be inferred from it either that there had been any previous refusal to deliver (though there had been no delivery), or that the failure to obtain delivery was through any fault of the seller. Tilley, it may be mentioned, does not say anything about any instructions from Arnold at any time, before or on 23rd September, to demand the shares. He says that in the original sale the appellant was his client, and in this he is supported by Arnold's evidence, Arnold being a broker, that it was he who acted for Miss De Lauret. From the evidence before us it cannot be inferred that Tilley was the appellant's agent to give delivery, or that he had any right to take any part in the obtaining of delivery, unless in the meantime he was ap-

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pointed agent for the other side, and this agency was brought to McLaughlin's knowledge at or before the time of demand. It is true that he says "I would make a demand in the ordinary course of my business," but he also says that he was only prepared to pay for the shares on his own account, having previously sold them on behalf of Miss De Lauret, and McLaughlin had expressly told him that he had nothing to do with the matter, that Miss De Lauret was the principal, and if the shares went down in value, or became valueless, he would not look to Tilley, but must look to her. And Tilley goes on to say that after this intimation he did not press the matter. Though McLaughlin refused to recognize Tilley in the matter, he was never informed either by Tilley or by the purchaser, or any one on her behalf that Tilley had authority from the purchaser to demand the shares. He, however, always said that he would deliver the shares if the gold were tendered. But payment was never tendered or offered either in gold or otherwise. Nor did Tilley evince to McLaughlin any readiness to pay on account of the respondent.

After giving every possible weight to the evidence for the plaintiff, from which I do not think it necessary to quote at greater length, in view of what I have stated and of the passages which the Chief Justice has quoted, I have come to the conclusion that there is no evidence of an effective demand, or of any refusal to deliver in breach of the contract, and I think there should have been a non-suit at the trial. It may be added that no evidence was given on the part of the defendant, the present appellant, which would make good the deficiency in the plaintiff's case. I am of opinion that the appeal should be allowed, and that a non-suit should be entered.

O'CONNOR J. concurred in the judgment of GRIFFITH C.J.

ISAACS J. read the following judgment:—The evidence establishes beyond question that a demand of the shares by or on behalf of the respondent was essential to her cause of action. And as the contract provides nothing to the contrary, payment of the price and delivery of the shares were concurrent rights. Therefore payment or a tender of the price was a condition pre-

cedent on respondent's part before she became entitled to possession of the share certificates: *Grice* v. *Richardson* (1).

It was agreed on both sides that the learned Judges of the Supreme Court decided in favour of the respondent because they thought there was sufficient evidence of demand to go to the jury, inasmuch as it was sworn that Tilley in fact made a demand for the shares, and also that Arnold, acting for Miss De Lauret, had in fact authorized Tilley to make it. I will assume there was evidence of actual authority.

Where, as here, a personal demand is contemplated with immediate compliance, the law requires something further.

If the principal chooses to make the demand by an agent, he must reasonably inform the person on whom it is made that the person actually making it is authorized by him to do so. That is only common-sense, otherwise how is the other party to know whether he would not be committing a greater wrong by compliance than by refusal? This is a risk to which he ought not be exposed.

The matter is covered by the highest authority. *Moore* v. *Shelley* (2) was determined by the Privy Council, on appeal from the Supreme Court of New South Wales, and their Lordships approved of and acted on the statement of the law by *Cockburn* L.C.J. in *Toms* v. *Wilson* (3) in these words:—"When, as here, the person making the demand is not the person entitled to the money, but his attorney, the person on whom the demand is made must have a reasonable opportunity to inquire into the authority of the person making the demand. The attorney may send a bailiff to make the demand and authorize him to receive the money, but the mere demand by that bailiff does not intimate to the plaintiff that payment to him will suffice; *that fact, at least, ought to have been communicated to the plaintiff.* And even if that fact had been communicated to the plaintiff, still, if he *bonâ fide* doubted the truth of the statement, he would have been entitled to some opportunity to inquire into its truth before the defendants would be entitled to seize his goods."

And on that basis in *Moore* v. *Shelley* (4), the Privy Council

(1) 3 App. Cas., 319, at p. 323.
(2) 8 App. Cas., 285, at p. 293.
(3) 4 B. & S., 442, at p. 453.
(4) 8 App. Cas., 285.

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held the mortgagor entitled to succeed in an action of trespass, for a seizure by an agent who was in fact authorized by the mortgagee, and who so intimated in the written demand for payment, but, as the circumstances showed, the mortgagor had no opportunity to inquire into the truth of the agent's statement, it was held that the non-payment of the money when the notice was left with the mortgagor's wife at the place agreed on—namely, the station—did not constitute a default. The passage quoted definitely answers the argument raised for the respondent that the mere fact of the demand being made by a stranger was sufficient intimation that it must have been made as agent for the party entitled.

The present is an *a fortiori* case, as it is admitted that Tilley did not even inform the appellant that he was authorized by respondent. Mr. *Knox* contended that in the circumstances that must have been implied. But it is clear Tilley's situation was such that it was at least consistent that he wanted to get the shares to escape from his own personal embarrassment, and as the appellant had previously warned him he would not deliver to him personally, but only to Miss De Lauret or someone representing her, and repeated this on 23rd September, it behoved Tilley if he were acting as respondent's agent to have stated so. This "at least," to use Lord Chief Justice *Cockburn's* words, "should have been communicated." As Tilley did not so understand his position he of course could not say so, but if he had, probably McLaughlin would then have doubted it, and if so I think the circumstances would have entitled him to a reasonable opportunity to test it.

Consequently there was not sufficient evidence of a demand by Miss De Lauret.

The absence of payment or tender is equally fatal; and there was no dispensation. The judgment appealed from appears to have overlooked this feature also, and as the rules of the stock exchange have no relevancy to either of the questions I have referred to, I agree that the respondent has altogether failed and that judgment should be entered for the appellant.

Appeal allowed.