

[HIGH COURT OF AUSTRALIA.]

NEAL . . . . . APPELLANT ;  
PLAINTIFF,  
  
AND  
  
AYERS . . . . . RESPONDENT.  
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

H. C. OF A. *Fraud—Contract—Illegality—Purchase of hotel—Takings—Fraudulent misrepresentation—“ After-hour ” trading.*  
1940.

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SYDNEY,  
Aug. 7;  
Sept. 2.  
—  
Starke, Dixon  
and Evatt JJ.

The plaintiff sued the defendant for damages for deceit in respect of the purchase from the defendant of the lease, licence, goodwill and furniture of a hotel. The plaintiff alleged that she was induced to enter into the contract upon the defendant's false representation that the hotel takings were about £100 a week, of which at the most the takings derived from after-hour trading were £15 or £20 a week. On an application for nonsuit the trial judge found that the defendant had so represented the takings and that the plaintiff “ took on that representation knowing and intending to continue at any rate for even as little a time as possible with the after-hour trading,” and entered a judgment of nonsuit upon the ground that the action was based on illegality, although illegality had not been pleaded.

*Held*, on appeal, that the cause of action was not founded on illegality : The representation was material as an inducement to a purchaser buying the hotel rather for the sake of lawful than unlawful trading ; the subject matter of the contract was the sale and purchase of a hotel in the ordinary course of business ; the fact, known to the vendor, that the plaintiff intended to continue for a time the practice of unlawful trading was not enough to stamp the whole transaction with unlawfulness ; and, therefore, the appeal should be allowed and a new trial ordered.

Decision of the Supreme Court of New South Wales (Full Court) : *Neal v. Ayers*, (1940) 40 S.R. (N.S.W.) 16 ; 57 W.N. (N.S.W.) 45, reversed.



APPEAL from the Supreme Court of New South Wales.

An action in deceit was brought in the District Court of New South Wales by Alma Phyllis Violette Neal to recover damages on account of a fraudulent misrepresentation alleged to have been made by Maud Alice Ayers in connection with the sale of a hotel.

The particulars of claim set forth that the defendant represented to the plaintiff that the average weekly takings of the hotel during legal trading hours amounted to £85 and charged that the takings during such legal trading hours did not amount to such sum but to a much lesser sum as the defendant well knew. The grounds of defence as stated at the hearing of the action were: (a) that the defendant did not make any of the representations as alleged; (b) that the representations, if any, were true; and (c) that the plaintiff did not suffer any damage.

The evidence showed that it was brought to the knowledge of the plaintiff that part of the takings of the hotel resulted from trading after legal hours; but she, being anxious, as she said, not to have an "after-hour place," asked how much of the takings were from "after-hour" trading. The defendant replied that the takings were £100 weekly and that not more than £15—or to be on the safe side, £20—came from illegal trading. The plaintiff swore that on this representation she bought for £950. The contract showed that the plaintiff bought the existing lease, the licence, stock-in-trade, furniture and goodwill of the hotel. The furniture was valued at £450. The evidence showed that the takings subsequent to the purchase were not less than £100 per week but that at least £40 per week came from trading during illegal hours.

In cross-examination the plaintiff said that she bought the business knowing that she would have to do some after-hour trading, and that she was prepared to serve some people after hours; her purpose was to reduce and ultimately to terminate such trading.

The evidence of an expert witness was that if the trade was 80 per cent legal and 20 per cent illegal the price would be £250 more than if the trade was 60 per cent legal and 40 per cent illegal.

On an application for a nonsuit made at the close of the plaintiff's case, the trial judge found that the representation made by the defendant was that the takings were £100 a week or more, made

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up of £15 or £20 after-hour trade, and that the plaintiff "took on that representation knowing and intending to continue at any rate for even as little a time as possible with after-hour trading, but hoping to delete it and so build up the so-called legal takings." His Honour found that the contract was based on illegality to which both parties were *in pari delicto*, and, although illegality had not been pleaded, he directed a nonsuit.

An appeal by the plaintiff to the Full Court of the Supreme Court was, by a majority, dismissed : *Neal v. Ayers* (1).

From that decision the plaintiff appealed, by special leave, to the High Court.

*Webb* (with him *Carson*), for the appellant. If it is not necessary for a plaintiff to rely on illegality, then the illegality is immaterial; it does not prevent the claim from being litigated (*Gordon v. Chief Commissioner of Metropolitan Police* (2)). The appellant's cause of action did not depend upon an illegality; it was not necessary for her case to show any illegality. Whether or not she intended to carry on the after-hour trading was immaterial to her case. The contract between the parties was not tainted with illegality as in *Pearce v. Brooks* (3); therefore that case is not applicable. The contract was for the sale and purchase of the lease, licence, furniture, stock-in-trade and goodwill of a hotel and as such it was within the law. The action arose out of misrepresentations made by the respondent in the course of a legal transaction whereby the appellant was induced to pay as the purchase price considerably more than the true value; therefore damages will lie (*Smith's Newspapers Ltd. v. Becker* (4); *Wilkinson v. Sporting Life Publications Ltd.* (5)).

[EVATT J. referred to *Dott v. Brickwell* (6).]

There was not a common purpose between the appellant and the respondent to do something which was illegal.

*Cassidy* K.C. (with him *Parker*), for the respondent. The parties entered into a contract for the purpose of carrying out an illegal

(1) (1940) 40 S.R. (N.S.W.) 16; 57

W.N. (N.S.W.) 45.

(2) (1910) 2 K.B. 1080.

(3) (1866) L.R. 1 Ex. 213.

(4) (1932) 47 C.L.R. 279.

(5) (1933) 49 C.L.R. 365.

(6) (1906) 23 T.L.R. 61.



object. The contract is therefore void for illegality and as such is covered by the decisions in *Pearce v. Brooks* (1) and *Smith v. White* (2): See also *Halsbury's Laws of England*, 2nd ed., vol. 7, p. 172, par. 246. The finding of the trial judge that the contract is illegal is conclusive; the facts show an illegal purpose and intention on the part of the appellant, and therefore she is not entitled to the aid of the court (*Berg v. Sadler and Moore* (3); *Alexander v. Rayson* (4); *Lightfoot v. Tenant* (5); *Langton v. Hughes* (6)). Part at least of the consideration for the contract was illegal (*Halsbury's Laws of England*, 2nd ed., vol. 7, p. 149, par. 211); therefore the whole contract is tainted with illegality. The lease, licence, and furniture were intended by the appellant to be used for the illegal trade, and the persons who usually resorted to the hotel after hours were part of the goodwill.

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[DIXON J. referred to *Pollock's Principles of Contract at Law and in Equity*, 1st ed. (1876), p. 294.]

The appellant is not repudiating the contract; on the contrary she relies upon it, and therefore *Taylor v. Bowers* (7) is not applicable.

[DIXON J. referred to *Mulcahy v. Hoyne* (8).]

*Webb*, in reply. *Berg v. Sadler and Moore* (3) is distinguishable. In that case it was necessary for the plaintiff to raise the point of illegality. Here, the raising of that point was not necessary to the plaintiff's case.

*Cur. adv. vult.*

The following written judgments were delivered:—

Sept. 2.

STARKE J. Appeal by special leave from a judgment of the Supreme Court of New South Wales.

By an agreement made in 1939, the plaintiff—the appellant here—purchased from the defendant—the respondent here—the lease, licence, goodwill and furniture of a hotel for a sum of £950. She brought an action for deceit against the defendant in the District Court alleging that she had been induced to purchase the hotel

(1) (1866) L.R. 1 Ex. 213.

(2) (1866) L.R. 1 Eq. 626.

(3) (1937) 2 K.B. 158.

(4) (1936) 1 K.B. 169.

(5) (1796) 1 B. & P. 551 [126 E.R. 1059].

(6) (1813) 1 M. & S. 593 [105 E.R. 222].

(7) (1876) 1 Q.B.D. 291.

(8) (1925) 36 C.L.R. 41, at p. 56.



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upon the representation of the defendant that the average weekly takings of the business during legal trading hours amounted to £85 per week whereas they were a lesser sum, as the defendant well knew.

Evidence was adduced at the trial that the defendant had represented to the plaintiff that the weekly takings were about £100, of which £15 or at most £20 came from after-hour trading, which of course was in contravention of the *Liquor Act* 1912. Evidence was also adduced that the takings of the hotel during lawful trading hours were about £60 per week and during prohibited hours about £40 per week. The learned judge of the District Court nonsuited the plaintiff. Shortly, he found that the defendant represented that the takings of the hotel were £100 per week or more made up of £15 or £20 after-hour trading and that the plaintiff knew that after-hour trading was being carried on in the hotel and intended to continue it, at any rate for as "little a time as possible but hoping to delete it" and build up the takings during legal trading hours. Therefore the learned judge concluded the cause of action sued upon was "based on an illegality to which both parties were *in pari delicto*." An appeal from this decision was dismissed by a majority in the Supreme Court and, as stated above, this appeal is by special leave from that decision.

No doubt "a contract, lawful in itself, is illegal if it be entered into with the object that the law should be violated; if, as it is expressed in *Pearce v. Brooks* (1), it is done for the very object of satisfying an illegal purpose, or, as it is expressed in *M'Kinnell v. Robinson* (2), 'for the express purpose of a violation of the law' " (*Waugh v. Morris* (3)). But was the purpose or object of the agreement in this case to violate the law? Its real purpose and object was the sale and purchase of a hotel in the ordinary way of business. The disposition of the property was not made to enable the plaintiff to violate the law nor was the purpose of the plaintiff herself to acquire a hotel so that she might violate the law. No doubt the defendant had contravened the provisions of the *Liquor Act* in her conduct of the hotel, and the plaintiff was unwilling or unable wholly

(1) (1866) L.R. 1 Ex. 213.

(2) (1838) 3 M. & W. 434 [150 E.R. 1215].

(3) (1873) L.R. 8 Q.B. 202, at p. 207.



to alter that method of conducting the hotel, as both the parties to the agreement knew. But it is not, I think, a right conclusion that the disposition of the hotel property was for an illegal purpose because liquor would be sold in the hotel during prohibited hours or that other offences against the liquor laws might be committed. The acquisition of hotel property lends itself to contraventions of the liquor laws. Such contraventions are common incidents in the conduct of hotel businesses in New South Wales and the other States and always taken into account, I should think, in negotiations for the sale and purchase of hotels. But the purpose of the disposition and acquisition of the hotel property in this case was not for any illegal purpose but for the ordinary business purpose of acquiring and conducting a hotel.

The principle upon which damages should be assessed if the representation relied upon were made is stated in *McConnell v. Wright* (1). But it must not be assumed that any damages could be recovered if the representation relied upon were that the takings from after-hour or unlawful trading were less than the amount stated in the representation.

The case must therefore go down for rehearing.

DIXON AND EVATT JJ. This is an appeal from an order of the Supreme Court upholding a nonsuit in the District Court in an action of deceit. The nonsuit was granted at the close of the plaintiff's case and the defendant did not go into evidence.

The action was brought by the purchaser of a lease of licensed premises in which the vendor, the defendant, was accustomed to sell liquor not only within lawful hours of trading but also outside those hours illegally. According to the evidence called for the plaintiff, the plaintiff did not desire to conduct an after-hour trade, but sought to buy a hotel which did actually, or could under her management be made to, depend for its profits upon lawful trading.

The evidence, if accepted, showed that upon the treaty for the purchase the defendant had represented to her that the weekly takings of the hotel were, upon an average, £100, of which no more than £15 or £20 arose from illegitimate trading.

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The evidence, so far as it had gone, also supported the conclusion that the representation was false to the knowledge of the defendant inasmuch as the weekly takings, though averaging £100, consisted of a much higher proportion of unlawful revenue. That is to say, that of the £100 about £40 a week was derived from "after-hour" trading. This is the deceit complained of.

When the plaintiff entered into possession and carried on the business she did not stop the trading after hours, but she says that it was her purpose to reduce and ultimately to terminate that business.

The chief question for decision is whether, in view of the element of illegality entering into the value of the hotel and the plaintiff's readiness to continue for some measure of time the practice of "after-hour" trading, she is disabled on the ground of illegality from complaining in a court of law of the fraudulent misrepresentation inducing her to enter into the transaction. A question is also raised as to the sufficiency of the evidence of actual damage.

In an action of deceit a plaintiff seeks to recover the money or money's worth with which he had been induced to part by the fraud of which he complains. If, in return for what he has paid or handed over, he has received some value, that value must be deducted from the amount of his expenditure made on the faith of the misrepresentation and his loss will consist in the excess: See *Holmes v. Jones* (1), *Hardman v. McLeod* (2) and *Munro v. Dunn* (3). The foundation of the action is therefore the expenditure of money or parting with money's worth under the inducement of a fraudulent representation. At what points may the illegality of the nature or ultimate purpose of the transaction touch such a cause of action?

In the first place, if the representation could be material as an inducement only to a representee who contemplated some unlawful course of conduct, it would seem that the law would not countenance a complaint by him that it had operated as a fraudulent inducement. If, for instance, the misrepresentation had consisted not in understating but in overstating the profits from unlawful trading, it might

(1) (1907) 4 C.L.R. 1692.

(2) (1926) 26 S.R. (N.S.W.) 578;  
43 W.N. (N.S.W.) 194.(3) (1925) 25 S.R. (N.S.W.) 209; 42  
W.N. (N.S.W.) 53.



be said that the overstatement would be material only to the mind of a purchaser intent on conducting an unlawful business. But in the present case the misrepresentation has the opposite tendency. It would operate as an inducement to a person who wanted a hotel rather for its lawful business.

In the second place if the subject matter of the contract was itself unlawful it might well be that none of the money expended for the purpose of obtaining it could be recovered, even against a fraudulent wrongdoer. In order to bring the case under this head it was contended that part of the subject matter of the contract of sale was a goodwill founded in some degree on illegality. It was said that to some extent the expectation that customers would resort to the site for the purchase of liquor after hours increased the price which the plaintiff agreed to pay. Even so we do not think that the contract of sale could be regarded as unlawful or as relating to an unlawful subject matter. It is after all a contract for the sale and purchase of the lease, licence and furniture of a hotel. These are assets of an ordinary character, and the fact that the vendor during her period of possession did break the licensing law and the purchaser intended during her period of possession to follow her example could not make the subject matter of the contract an unlawful one.

In the third place, if the common purpose of the parties in entering into a contract is that the subject matter should be used for an unlawful purpose, the transaction may be unlawful and it may follow that an action of deceit may not be maintained to recover any part of the consideration paid, in the guise of damages. The recent case of *Mason v. Harry Parker Ltd.* (1) is perhaps an illustration. There *Stable J.* decided that a principal was unable to recover money which he had entrusted to an agent with a mandate to apply it to an unlawful purpose, notwithstanding that he was induced to do so by the agent's fraud. Examples of transactions of a contractual nature stamped with illegality or immorality because of the express purpose for which they were undertaken are to be found in *Gas Light and Coke Co. v. Turner* (2), *Pearce v. Brooks* (3) and *Upfill v. Wright* (4), all of which are discussed in *Alexander v. Rayson* (5). But in our opinion the present case cannot be brought within such a doctrine. The substantial purpose of the contract was to transfer

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(1) (1940) L.T. Jo. 377.

(2) (1840) 6 Bing. N.C. 324 [133  
E.R. 127].

(3) (1866) L.R. 1 Ex. 213

(4) (1911) 1 K.B. 506.

(5) (1936) 1 K.B. 169.



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the property on which a business was carried on and was to be continued. The fact that on and from the property the purchaser intended for a time to exceed the limits within which she could lawfully trade, could not invalidate the whole transaction, notwithstanding the vendor's knowledge of her intention. Her intention to continue for a time the practice of unlawful trading does not go to the substance of the transaction. It is an incident which provided none of the inducement for her to enter into it, if her evidence is to be believed. It appears to us to be extrinsic to the dealing which forms the foundation of the contract and of the inducing causes and therefore not to corrupt the contract.

For these reasons we are unable to agree in the conclusion of the majority of the Supreme Court that the plaintiff's case failed on the ground of illegality.

The subsidiary question whether the plaintiff adduced any proof of damage depends on the evidence. It is suggested that upon her own case it does not appear that the value of the property she received in lease, licence and furniture was not as great as, or greater than, the amount she paid. Without discussing the evidence, it is enough to say that, as the case was left, in our opinion a prima-facie inference arose that the value was less than the price paid.

In our opinion the appeal should be allowed. The order of the Supreme Court should be discharged and in lieu thereof it should be ordered that the nonsuit should be set aside and a new trial had between the parties. The respondent should pay the costs of this appeal and the appeal to the Supreme Court.

*Appeal allowed with costs. Judgment of the Supreme Court of 15th March 1940 set aside. Judgment of District Court directing nonsuit discharged. Order that action be remitted to District Court for retrial. The respondent to pay appellant's costs of appeal to the Supreme Court and of the hearing before the District Court.*

Solicitor for the appellant, W. C. Moseley.

Solicitor for the respondent, W. Parker.

J. B.