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Malpas

v

Case

MALPAS V CASE.

Judgment. Knox C.J.

The respondent sued the appellant in Equity (1) for a declaration that an agreement of the 14th of April 1921 was not binding on the appellant and had been duly rescinded or in the alternative for rescission of the agreement by the Court, and (2) for repayment of £3000 paid by the respondent to the appellant in pursuance of such agreement. The ground alleged for relief was that the repondent had been induced to enter into the agreement by representations of fact which were untrue. The agreement in question is in the words following viz:- "Memorandum of agreement made the 14th day of April 1921 between Edward Malpas of Darlinghurst Sydney gentleman (hereinafter called vendor) of the one part, and Walter Tucker Case, of Darling Point Sydney, builder (hereinafter called purchaser) of the other part Whereas the said Vendor is interested under a certain memorandum of agreement dated 30th March 1921 and made between the said vendor of the first part Alec.Lorimore of the second part and Harry Fremantle Davis of the

third part for the sale of a secret process for tanning hides sheep & lamb skins and fur skins and known as the "Damas" process now it is agreed as follows:- That the said vendor shall sell and the said purchaser shall purchase one fourth share of the vendor's interest under the said agreement in the said process for the sum of £3000. Such sum to be payable on the signing hereof."

The sum of £3000 was paid by the respondent to the appellant on the day on which the agreement was signed.

The interest of the appellant under the agreement between Lorimore, Davis, and himself was a one-fourth share in the worlds right of a certain secret process known as the Demas process, and by that agreement Lorimore and Davis undertook certain obligations with a view to the use of the process in Australia and the sale of the right to use it elsewhere The ground of defence principally relied on was that the agreement ~~was~~ in question was made in part performance of another agreement between the parties for the sale by the respondent to the appellant of certain

land and buildings, that the two agreements were dependent upon one another, that after knowledge of the untruth of the representations the respondent completed the agreement for sale of the land and building, and that he was therefore not in a position to sue for rescission of the other agreement. At the hearing Street C.J. in Equity made a decree for rescission of the contract and repayment to the respondent of £3000 with interest. The decree was based on the following findin viz:- (1) That material misrepresentations were made

(2) That such misrepresentations formed a material part of the inducements on which the respondent acted in entering into the agreement.

(3) That the agreement which the respondent sought to rescind was separate from and independent of the agreement for the sale by the respondent of the land and building, and that the adherence of the respondent to the latter agreement did not prevent him from obtaining rescission of the former.

(4) That the respondent had not waived his right to rescind the

agreement relating to the process.

(5) That the respondent was not estopped by his conduct from obtaining the rescission claimed by him.

It was not alleged that the misrepresentations complained of were untrue to the knowledge of the appellant or were made fraudulently, and the case was throughout treated as one of innocent misrepresentation. On the hearing of the appeal Mr Loxton for the appellant contended that even if the agreements above referred to were separate and independent the respondent was not entitled to a decree for rescission because the agreement for sale of the process was not executory but had been completely executed. This defence was not specifically raised on the pleadings and Mr Maughan for the respondent insisted that it had not been raised on the hearing of the suit in the Supreme Court. We have been favoured with a copy of the learned Judges notes of argument from which if appears that Mr Loxton argued that whether there were two transactions or one the suit must fail and that if the transactions were separate the only remedy was by action for deceit. It is clear that if the

point was taken, it was not seriously pressed on the attention of the Court for Mr Loxton admits that no authorities were cited in support of his contention. It is apparent however that in the Supreme Court counsel argued that whether the transactions were separate or dependent on one another the suit could not be maintained on the ground of innocent misrepresentation and in my opinion this argument was well founded. The agreement which the respondent sought to have rescinded was clearly executed and not executory - there was nothing remaining to be done under it. The consideration £3000 had been paid and nothing further was necessary to pass to the respondent the interest which the appellant agreed to sell to him. On the signing of the contract and payment of the consideration the respondent became entitled to one-fourth share in the interest of the appellant under his agreement with Lorimore and Davis in the secret process and nothing remained for the appellant to do which would more effectually vest in the respondent what he had bought. The agreement being executed and not

executory the decision in Seddon v N.E.Salt Company Limited (1905) 1 Ch. 326 which was not cited in the Supreme Court, shows that it cannot be rescinded or set aside on the ground that it was brought about by an innocent misrepresentation. Where a contract has been completely executed there cannot be rescission for misrepresentation unless fraudulently made. Leake on Contracts 6th ed. at p, 260 see also Halsbury Laws of England XX pprs. 1751,1752.

Assuming therefore in the respondents favour the correctness of the finding that this was a separate and independent agreement I think the fact that the agreement was fully executed precludes the responden from obtaining a decree for rescission. The view which I take on this point make it unnecessary for me to express an opinion on the other questions argued before us.

In my opinion the appeal should be allowed and the suit dismisse

High Court of Australia.

Court Copy.

(pp 1 to 11)

MALPAS V CASE.

JUDGMENT. ... MR JUSTICE ISAACS.

MR JUSTICE RICH.

MALPAS v CASE.

JUDGMENT ... ISAACS J

HIGH J

The nature and facts of this case may be succintly stated. Case, a builder and contractor, was erecting a block of flats in Rushcutter's Bay, which, when finished would cost him between £13,000 and £14,000 He had arranged a building loan of £6,000 on the mortgage security of the property, to be advanced as the building progressed. The flats were being erected for sale in a completed state. Malpas had retired from business in 1916. He had money of Mrs Malpas invested to some extent in Broken Hill shares, which, in 1920 were a source of anxiety. He had personally acquired from a man named Davis, certain interests in a secret leather tanning process, now known as the Damas Tanning Pro-cess. Malpas & Davis agreed with a man named Lorimore that he should have a half-share in the World's Rights in the process, he under-taking in consideration therefor, to secure sufficient working capi-tal in a certain limited company owning the Australian Rights, and to hand over to Malpas and Davis respectively 20,000 shares in the company.

But Malpas and Davis each retained a quarter share in the Worlds Rights of the project, and,therefore,Malpas had a quarter share to deal/with as he pleased. The process was said to be one to tan and dress leather in hours instead of weeks, and in days instead of months. The secret recipe was deposited in a sealed envelope in a Bank.

In 1920 Mr and Mrs Case became friendly with Mr Malpas and Mrs Malpas Malpas mentioned to Case his interest in the process, and in the course of several conversations between them he stated that Lorimer was engaged in certain negotiations for the disposal of the process, as to which it is unnecessary to say more than that in the first place t hese statements were intended to influence, and were calculated to influence, and did in fact influence Case to enter later into the transaction which ultimately emerged, in the second place, they were not true, and in the third place they were made in absolute good faith, Malpas honestly believing them to be true. In the meantime whoever initiated the project, it happened, as Street J has found,that in April/1921 Malpas "had money to invest on behalf of Mrs Malpas and he offered "to buy the flats for £15,000, if the plaintiff(that is Case) would "buy from him for £3,000 a fourth share of his World Rights in the

"leather process". This was agreed to on the 12th April, and it was agreed at the/same time on the defendants suggestion that two contracts should be drawn up. Very much turns on that circumstance that it was agreed that "two contracts should be drawn up".. Of course for some purposes the two contracts must be treated as separate, but does that mean they were separated for all purposes? Street J has determined they were, and his judgment on this point is contained in a few words. His Honor says:- "~~It was at the defendant's request that~~

"It was at the defendant's request that
"two separate agreements were made, and it was at his request
"that the agreement for the sale of the flats was made with
"Mrs Malpas and not with him. In these circumstances I do not
"think that he can now be heard to say that the contract with
"her/, which is unconditional in its terms, is so connected
"with the plaintiff's agreement with him that the plaintiff he
" having adhered to the former cannot now rescind the latter.
"The transactions must be looked at as separate transactions".

That appears to us to be unsustainable. It makes the result depend entirely on form and disregards/the substance. The true test for the purpose of the equitable interposition sought in this case is not in what form the parties resolved to record their mutual dealings, but what was the governing intention when proceeding to ~~marry~~ record the sever-al parts of the transaction.

A condition upon which a contract is ever to have effective opera-
-tion may even at law be extraneous to the written documents (Pym v
Campbell, 6 E and B. p. 370). Within their respective ambits the con-
-tracts here were of course to be distinct and in this respect their expressed terms must govern.
But they were to come into existence only as constituent parts of one transaction, which would
be incomplete if either were wanting. The promise by Case to pur-
-chase the process interest and the promise by Malpas to purchase
the flats were mutually dependent on each other being created. Once
the several contracts were launched they would severally pursue
their respective courses and bear their respective rights and obli-
-gations; but each pre-supposes the binding character of the other
to begin with, which is only another way of stating its existence
in law. Malpas, we must suppose, had sufficient business reasons for
requiring £3,000 to be provided by the process sale to furnish the
means of paying for the flats: and Case equally must be taken to
have needed the sale of the flats to enable him to purchase the
process interest. It consequently follows that the mere agreed
term of the combined transaction to segregate the two component
parts of it into two documents, each when once binding carrying its

own future operation separately, does not amount to an original independence of origin.

Then comes the next step. For reasons easily understandable Malpas and Mrs Malpas desired that the flats, which were to be mainly purchased with her money ~~on~~ the actual control of Malpas, who acted as her business representative, should be placed at once into her own name. To this Case assented without a single word to alter the fundamental basis on which the combined transaction had so far proceeded. If he had any intention to depart from that basis he should have stated it. Case must have known perfectly well that Malpas had no intention of departing from the dependent condition of the process purchase. The words of Blackburn J in Smith v Hughes (L.R. 6 Q.B. at.p.607) would apply even if there were nothing more. There it is said:- " If whatever a man's real "intention may be, he so conducts himself that a reasonable man "would believe that he was assenting to the terms proposed by the "other party, and that other party upon that belief enters into the "contract with him, the man thus conducting himself would be "equally bound as if he had intended to agree to the other party's "terms".

But there is very much more to bind Case. No one in his position

could have doubted that as far as intention went, neither Malpas nor Mrs Malpas, who was manifestly simply adopting all that Malpas was doing for her, intended to release Case from the cross obliga--tion of the other branch of the united transaction. And further, it is definitely established by Case's own acts and statements that he fully understood, and at the time intended that the original stipulation of mutual dependence was adhered to. That appears beyond question by the following pieces of evidence: First, Exh.D. in which Case in his own handwriting throughout says: " Received "of Edward Malpas Esqre the sum of three-thousand pounds(£3,000) "on account of Flats, New South Head Road Derling Point". The fact that he acknowledged he received the part purchase money from Mr Malpas and not Mrs Malpas indicates that he did not then regard Malpas as unconnected with the flats agreement. The sum of £3,000 so paid was not at that time due or payable under the flats con--tract. The way in which it was paid - or treated as paid - is con--clusive of the real intention of both parties.

Not only was it not then due to Case, but the method of conventional payment adopted was that Case drew his cheque for £3,000, handed it to Malpas who immediately returned it, and it was destroyed. Nothing was said about payment on account of Mrs Malpas, and so little impression did this simulated payment make on the mind of Case that he altogether forgot a cheque passed. He thought as he said in cross-examination that he had merely given a receipt for £3,000. This is his evidence:- Q. There was a cheque paid at this time was there not? A.No. Q.When did you pay your cheque for £3,000 for this interest. A: I did not pay a cheque. I gave M/alpas a receipt for £3,000 on account of the flats. Q: You understood when you did that,that that was carrying out the arrangement between you and Mr Malpas? A: Yes. Q: So that there is no question that this arrangement of yours being discharged from liability to put the £3,000 in in actual cash was in part payment of your flats? A:Yes.

A little further on:- Q: There is no question about this that so far as the flats were concerned - I mean at your first negotiations - it was quite clearly put to you I do not care which it was,but if you bought an interest in this process for £3,000, they would buy your flats. A:Yes. The same evening, April 14, Mr Malpas wrote

to Mr and Mrs Case "On the completion of the flats and the satis-
"-factory handing over to me of same I will hand you each a certifi-
"-cate for 1,000 shares in Supra Leathers Limited &c." That was purely
gratuitous but it shews that it was well understood that the mere
taking of the flats contract in Mrs Malpas' name - although no doubt
she could not deny liability as the contracting party to that agree-
- ment in no way destroyed the governing condition which Malpas
made as to the process agreement. Nothing can more strongly evidence
the fact that this idea of complete severance basically of the
two contracts, is of late origin than Case's own letter to Malpas
of August 11,1921 in which misrepresentation is alleged for the
first time. It is headed "Flats New South Road and Oswald Street"
and begins:- "Will be completed this week, you will remember when
"we made the agreement for sale as part payment for Flats you gave
"me an interest in the Worlds Rights in a secret process for tanning
"leather for £3,000. I gave you a receipt worded on Account of
"Flats for £3,000". He then recounts misrepresentations and says:-
"I am not prepared to sign the transfer of the Flats to you only
"subject to the following conditions". The conditions are:-"A third
"mortgage for £3,000 for 3 years, the first 14 months without in-
"-terest. After that to carry 7% and adds:- If the sale of the pro-
"-cess goes before, the second mortgage will automatically cut itself
"out". That is a clear admission that the process began was
really part of the consideration of the flats bargain, that its
value fixed at £3,000 was an agreed mode of discharging pro tanto

the price of the flats, that in substance the process interest was accepted in part payment and all the rest was formality. It follows that the process bargain being according to the actual intention of the parties, an integral and inseparable part of the transaction, Case, cannot treat it as if it were entirely independent, and disavow it while adhering to the flats contract. That would be appropriating and reprobating. An instructive case, the more so because it is at common law is Hayne v Cummings(16 C.B.(N.S)p.421).It is instructive for the sake of principle. There the Court construed the word "covenant" to mean "condition". That in itself is not in point,but the principle on which the Court acted is very relevant. Willes J,said(p.427) "any event " on the happening of which another event is to take place is a con- "-dition". Byles J, after stating that there was no covenant or con- -dition, strictly so called to which the proviso for re-entry could apply,said:- "What then are we to do? Are we to defeat the just in- -tention of the parties by a rigid application of the rules of law?" After quoting the celebrated observations of Lord Hobart commending judges who are astute to effectuate the just intention of the parties, the learned judge proceeded to construe the word covenant accordingly

in order to prevent it being inoperative. To set aside the process contract ab initio is to render the original condition altogether inoperative by treating the process bargain as if it had never been made. It is to leave the parties as if, after the flats con-tract was signed, Case, without any reason but his own will, refused to enter into the process agreement. Could he cling to one and re-pudiate the other? We think decidedly not, and to have attempted to do so would have been fraudulent. No ground whatever is made for ter-minating the flats contract. Mrs Malpas is not even joined as a party and if she were, the most formidable obstacles to rescission would exist. Restitutio in integrum being manifestly impossible even if it were offered. (See our judgment in Fullers Theatre v Musgrove, 31 C.L.R. at. pp. 541-543), the suit which is based entirely on innocent misrep-resentation must fail, even assuming the contract to be still executory.

As to the question of the application of the doctrine of Seddon's Case (1905.1.Ch.p.326), there are very interesting problems particularly as to the nature of the interest sold, which may, we think, ------

be more appropriately deferred until they become necessary to be considered.

The appeal should in our opinion be allowed with costs.