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Cunneen v Shaw

Reasons for Judgment

30? July 1931

CUNNEEN V SHAW. (Gavan Duffy, C.J.?)

The existence of the agreement alleged in the first count was negatived by the verdict of the Jury, and Mr Loxton's main aggument has centred around the facts of the case in their rela tion to the second count of the declaration.

Construing the second count most favourably to the appellant, it alleges an agreement to employ the respondent as solicitor for two purposes, first, to perfect the title of Watts, the purchaser, so as to carry out the obligations imposed on the appellant by the contract of the 12th February 1923 and/or the conveyance of 19th March 1923; and, secondly, to protect the appellant against the making of any claims by Watts for damages for breach of warranty or fraudulent misrepresentation.

In my opinion the first of these two contractual obligations must be taken to have been substantially performed by the respondent in November 1928, when he conveyed the pustanding interest to Watts. And we must take the Jury's verdict as affirming that the alleged agreement to carry out the second obligation, was not made.

This last answer is sought to be met by the contention that the respondent was guilty of a breach of his duty as solicitor to the appellant when, in November 1928, he did not fully protect the latter from all claims based on fraud or breach of warranty.

But this is an allegation of negligence; and it was not relied upon in the pleadings or particulars or mentioned at the trial. When a juryman made an observation, not obscurely suggesting liability in negligence, the learned trial Judge pointed out very emphatically that this question was not raised. No objection was taken to his doing so. This is not surprising because liability for negligence is not absolute but relative to changing circumstances; and the field of admissible evidence would have been greatly altered if negligence had been pleaded.

In this view there is no inconsistencey between the verdicts under the second and third counts. Under the latter count the respondent successfully set off against the appellant certain monies expended on his account in and about the procuring of the interest outstanding. This finding helped no doubt to establish the existence of the first

obligation alleged in the second count, but this fact has been assumed in the appellant's favour.

In my opinion therefore the judgment of the Supreme Court must be affirmed.

C U N E E N

v

S H A W

J U D G M E N T

RICH J.
STARKE J.
DIXON J.
McTIERNAN J.

C U N E E N v S H A W

This is an appeal from a judgment of the Full Court of New South Wales discharging a rule nisi for a new trial of an action in which the jury found a verdict for the defendant.

On I2th February I923 the plaintiff,as vendor,entered into a contract with one,Watts,as purchaser for the sale of certain land. The contract of sale was prepared by a firm of solicitors of which the defend ant was a member. It provided for a conveyance to the purchaser and a mortgage back to the vendor to secure the balance of purchase money. A condition of sale contained in the contract expressed an admission by the purchaser that he was aware that the estate which the vendor possessed consisted of no more than the life estate of the tenant for life under th

will of a testator,who in fact died on I2th October I876, and the estate in remainder of the only child of the life tenant under a devise to the children of such life tenant and the condition stated that the vendor accepted the risk of further children being born to the life tenant.

The will devised a vested remainder to the children of the tenant for life in equal shares and unfortunately the supposition that only one child had been born to the life tenant was ill founded. In fact a second child had been born but had died at the age of two or thereabouts on I9th April I886.

In intended completion of the contract a conveyance of the land by the plaintiff,the vendor,to the purchaser and a mortgage by the

purchaser to the vendor were executed on I9th March I923. These instruments were prepared by the defendant's firm.

On I9th November I923 the tenant for life died.

About september I924 the attention of the solicitors was directed to the fact that he had a second child. There was no doubt that this child had taken a vested legal interest as a tenant in common in equal half shares in the inheritance,but some doubt existed whether the beneficial interest in this share had not come to reside in the plaintiff who had taken an assurance of the land from the tenant for life,the father and next of kin of the infant remainderman. This was disputed by the other remainderman,the surviving son of the tenant for life who set up a claim to take under

his father. Representation was obtained for the estate of the dead infant remainderman, and the defendant out of his own pocket paid £500 to the surviving child through the representative of the deceased child so constituted and got in the outstanding interest. He took the conveyance in his own name. His firm had acted in the preparation of the contract and assurances for both vendor and purchaser. Before the interest had been got in in this manner the purchaser had begun but had discontinued a suit in equity against the vendor, the present plaintiff appellant, praying rescission of the sale.

On 20th June 1928 the parties to the transaction, the vendor

i.e. the plaintiff appellant, the purchaser and the defendant respondent, met and almost arrived at a compromise by which the whole estate should be revested in the vendor, but at the last minute this attempt at an agreement broke down. At length on I3th November I928 the defendant and the purchaser made an agreement by which the defendant agreed to convey the interest he had got in to the purchaser and to pay the purchaser £437.2.0 in settlement of any loss and damage sustained by reason of the interest not having been got in earlier, and the purchaser released the defendant from all claims and demands. On 2Ist November I928 this agreement was carried out by a conveyance, but forthwith the purchaser turned round and made a claim upon the vendor, the plaintiff appellant, for further damages.

On 25th January I929 the purchaser commenced an action of damage against him alleging breach of warranty and deceit. This action was settled at the trial on I4th October I929. On 6th December I929 the vendor brought the action against the defendant which is the subject of this appeal. In it he seeks to recover as damages the loss he sustained by reason of the defence and the compromise of the action brought against him by the purchaser. But his declaration exhibits a regretful consciousness of the lapse of six years from the execution of the contract and assurance of I923. In each of the first two counts negligence is charged against the defendant's firm in respect of the preparation of these instruments,but the charge is made,

not as part of the cause of action,but only as a part of the statement of matters of inducement.

The first count set up a special promise by the defendant " that he would within a reasonable time set matters right so that the " said sale should be carried to completion and the said James Watts " the purchaser should have no claim against the plaintiff for " rescission of the said contract or for damages." This special promise is said to have been made at the end of July 1928. The count was supported by evidence given by the plaintiff of a conversation with the defendant which was left to the jury as enough,if believed, to warrant them in finding an absolute undertaking by the defendant to " set matters right " and to secure immunity for the plaintiff from suits and demands by the purchaser. But the jury declined to make

such a finding.

The second count alleged that the plaintiff retained the defendant for reward as his solicitor to set matters right within a reasonable time, so that the sale should be carried to completion and the purchaser should have no such claim against the plaintiff, and that the defendant accepted the said retainer. This allegation would not appear to set up an insurance by the defendant, an undertaking absolutely to secure the completion of the contract and the immunity of the plaintiff,but rather to allege an employment of the defendant as a solicitor for the purpose of obtaining so far as the exercise of proper care and skill and the use of reasonable exertions could do so,

the completion of the contract and the discharge or immunity of the plaintiff. But the breach alleged by the count is not that he failed in the exercise of care and skill,or the use of reasonable exertions, or that he broke any implied stipulation of the retainer whether by conveying to the purchaser without a release of the defendant or otherwise, but simply that he did not set matters right so that & c.

Evidence was given of a conversation between the plaintiff and the defendant's managing clerk in April 1925 which was left to the jury as amounting,if believed,to an acceptance of an employment to perform at the defendant's peril the task of " setting matters right " whatever that means, and the count was treated as alleging a contract

of which the breach was properly laid as a failure to set matters right. But again the jury negatived such a contract.

In his cross examination the defendant was asked " Do you deny " that you were retained some time either in I925 or I926 to get that " particular interest in ? ". He answered " I deny absolutely that I " was retained in the form as is set forth in that declaration " " Do you deny that you were retained to perfect that title ? " " We were employed to endeavour to get that title in. "

This view of the matter the jury were amply justified in adoptin

But it leaves the plaintiff without any allegation of breach of the stipulations and duties involved in such an employment.

If the employment,as the jury considered,was no more than this, the gist of the plaintiff's complaint must be that when the outstandir

interest of the infant remainderman was conveyed by the defendant to the purchaser,no sufficent protection from further claims and demands on the part of the purchaser was obtained for the plaintiff. The conveyance itself was in furtherance of the contract of sale and in fulfilment of the plaintiff's own obligation thereunder. But to sustain such a complaint,the plaintiff would need to establish that the circumstances called upon the defendant to obtain such a protection and that he was able to do so. No such case was made before the jury, and no such case could have been made without an amendment of the pleadings which was not suggested much less sought.

The learned Judge dealt with the case according to the pleadings,and,in our opinion, his charge was not calculated to

mislead the jury either as to the nature of the case made, or as to the evidence which they might consider in deciding it.

We see nothing inconsistent in the verdict upon the third count with that upon the first and second.

The appeal must be dismissed with costs.