IN THE HIGH COURT OF AUSTRALIA.

ORIGINAL

McAllister

V.

Richmond Brewing Company (N.S.W.) Pty. Ltd.

REASONS FOR JUDGMENT.

Delivered at Sydney,

on Wednesday, 21st April, 1943.

40358 A. H. Pettifer, Acting Govt. Print.

ORIGINAL

McALLISTER.

v.

RICHMOND BREWING COMPANY (N.S.W.) PTY.LTD.

ORDER.

Appeal dismissed with costs.

McAllister

V

RICHMOND BREWING COMPANY(N.S.W)
PTY. LTD.

REASONS FOR JUDGMENT

LATHAM C.J.
RICH J.
WILLIAMS J.

McALLISTER.

v.

RICHMOND BREWING COMPANY (N.S.W.) PTY.LTD.

REASONS FOR JUDGMENT.

LATHAM C.J.
RICH J.
WILLIAMS J.

This is an appeal from a refusal of the Full Court of the Supreme Court of New South Wales to grant a new trial in an action in which the appellant claimed damages from the respondent for deceit and, alternatively, for breach of contract. The jury found a general verdict for the defendant upon the first count; on the second count a verdict was given by direction for the defendant.

The plaintiff alleged that one Hood, the Manager of the defendant company, induced her to enter into a contract to purchase the Australian Hotel, Sydney, for £2000 by making a fraudulent representation that the takings of the hotel were £140 per week. At the time when the parties were engaged in the negotiations in the course of which the statement was said to have been made one Reynolds was in occupation of the hotel as licensee. He was in occupation for about 44 weeks to March 1940. The plaintiff succeeded him for 11 months to February 1941, and after the plaintiff left the hotel one McEvoy was in charge of it for 9 months from April 1941. The plaintiff gave evidence of her takings for the purpose of showing that the alleged representation that the takings were £140 per week was untrue. The defendant called McEvoy to give evidence that, although the takings were much lower than £140 when he undertook the duty of managing the hotel, within 9 months he had succeeded in working them up to about £140 per week. The first point for consideration upon the appeal is whether the evidence of McEvoy was rightly admitted.

The statement that the takings of the hotel were £140 per week must, in order to be the foundation for an action of deceit, be regarded as a representation of fact, that is, that the takings

were /

were during the relevant period £140 a week. [illegible]

The evidence as to the takings during the period while Reynolds was in occupation was therefore admissible in order to prove by direct evidence the truth or falsity of the alleged representation. The evidence of the plaintiff as to her takings was relevant for the purpose of showing that the representation made was untrue. Evidence of such takings could not be conclusive as to this matter, because difference of circumstances, including difference in personnel and method of management, and in trade conditions, might obviously affect the takings. It would be a matter for the jury to consider how far such proved differences affected the suggested basis of comparison. The evidence of the plaintiff as to her takings was challenged in cross-examination and the evidence of McEvoy was introduced for the purpose of showing that the plaintiff's management of the hotel did not provide a fair test of what might be called the capacity of the hotel. When McEvoy was in charge the hotel had been renovated and there had been changes in the price of beer and the size of glasses. These matters would certainly affect the weight to be attached to his evidence. But just as the evidence of Mrs. McAllister was relevant to assist in determining what the takings were during the period when Reynolds was in charge, so also the evidence of McEvoy was relevant for the purpose of helping to determine the weight to be attached to the evidence of takings during Mrs. McAllister's period. It is impossible to lay down an absolute rule with reference to the admissibility of evidence of this description. If the facts as to which it is sought to give evidence are such that in the opinion of the trial Judge they may form a reasonable basis for an inference with respect to a

fact /

fact which is in issue, the evidence should be admitted. It is difficult to add anything useful to the statement in Managers of the Metropolitan District Asylum v. Hill and Others, 47 L.T., at p.35, where Lord Watson, referring to the admissibility of evidence of collateral facts, said: "In order to entitle [a party] to give such evidence, he must, in the first instance, satisfy the Court that the collateral fact which he proposes to prove will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute".

In the present case the learned Judge warned the jury that evidence of takings at other periods than that in question was only indirect/and that the jury might, in all the circumstances, regard it as the weakest possible evidence, but that it was for them to attach such weight to it as, in all the circumstances, they thought proper.

In our opinion the evidence in question was properly admitted.

The next question discussed upon the appeal relates to the refusal of the learned Judge to direct the jury that they might find a verdict for the plaintiff if they were satisfied that Hood had made a statement which was untrue in fact, recklessly, not caring whether itwas true or false (Derry v. Peek (1889) 14 A.C. 337). This application was made when all the evidence had been taken, when Counsel had addressed the jury, and the Judge had summed up. Admittedly the case up to that time had been fought upon the basis that Hood had told a deliberate lie and not upon the basis that he had been guilty of reckless indifference to the truth. At the time when the application was made to the learned Judge, his attention was not directed to any evidence which would have supported a verdict for the plaintiff upon the ground suggested. His Honour refused the application because the whole case had been conducted upon an entirely different basis, namely that Hood had been guilty of deliberate lying, and also because no evidence was brought to his attention to support the suggested direction.

In /

In our opinion the learned Judge acted rightly in refusing to allow the plaintiff to put a new case at the stage of the trial which had been reached. There is no room for doubt that, if the case had been conducted upon what we may call a Derry v. Peek basis, evidence, both in examination and in cross-examination, would have been directed to the issue which would thereby have been raised. It would be most unfair to allow a party, after conducting the case upon one basis, to go to the jury upon a case which involved radically different considerations. Further we are of opinion that the evidence which, upon the motion to the Full Court and upon the appeal to this Court, was relied upon as evidence of reckless indifference to the truth, is not such as to support such a finding. This evidence consists in substance of a statement that Hood did not know what Reynolds' trading figures were. But the statement, considered in its context, is a statement that he did not obtain any figures from Reynolds, but that he knew, and that he placed before the plaintiff, the figures of a previous licensee named Brett, and that he had in his mind, not figures obtained from Reynolds, but figures with which, as manager of the brewery, he was acquainted, which showed that Reynolds' trading was something less than that of Brett, and it was upon this fact that he based his statement that Reynolds was taking £140 a week. As we have already said, in our opinion there is nothing in this evidence to support a charge of reckless indifference to the truth.

The next point which arises is based upon the refusal of the learned Judge to direct the jury that out-of-pocket losses incurred by the defendant in the course of her unsuccessful trading in the hotel could properly be taken into account in assessing damages. We agree with the contention for the appellant that such losses may be properly taken into account as directly due to deceit practised upon a plaintiff by a defendant where property purchased as a result of the deceit turns out to be completely valueless, so that the defendant has lost, not only what he paid for the property, but also the amount of wasted expenditure which he reasonably incurred

in /

in endeavouring to utilise the property before he decided to repudiate the dealing on the ground of fraud. In the present case the purchase price was £2000. There is evidence which might have been accepted by the jury that the plaintiff lost a sum of about £137 in carrying on trade in the hotel before she abandoned the enterprise. It is said for the appellant that the jury might have found that the alleged representation was made by Hood, that it was false to his knowledge, but that the appellant had suffered no damage because, paying £2000, she had received £2000 worth of value. Upon this hypothesis there would, in accordance with the direction of the trial Judge, be a verdict for the defendant, although, it is said, if a proper direction had been given, there could have been, and ought to have been, a verdict for the plaintiff for £137, or for so much of the £137 as the jury were satisfied represented a loss due to the deceit of the defendant. The reply to this contention is that the hypothesis conceived for the appellant is really an impossible hypothesis because it assumes that the value of the hotel was £2000, and the evidence actually before the jury showed that it could not have a value of £2000 unless the takings were at least £140 a week. If that were the case then the alleged representation would have been true and there would necessarily have been a verdict for the defendant upon this ground. Accordingly, in our opinion, the appellant fails with respect to this ground of appeal.

The only other question argued was based upon the contention that there was evidence upon which the jury could find a contract collateral to the contract of sale, that is, an agreement that, in consideration that the plaintiff would enter into the contract of sale, the defendant warranted to the plaintiff that the takings of the hotel were £140 a week. We agree with the learned trial Judge and with the Judges of the Full Court that this contention cannot be supported. The case is a quite ordinary case of negotiations in the course of which representations are made leading up to a contract, the particular representation in question not being embodied in the contract, and not constituting any ground of contractual obligation.

In our opinion the appeal should be dismissed.

McALLISTER

v

RICHMOND BREWERY COMPANY (N.S.W.) PTY. LIMITED.

JUDGMENT STARKE J.

This appeal should be dismissed.

Arguments were addressed to us in support of the appeal based upon well-established principles of law. All I desire to say is that those arguments had but little relation to the conduct of the case before the trial judge and less still to the realities of the case disclosed in evidence.