

IN THE HIGH COURT OF AUSTRALIA.

Henry D. York & Company
Proprietary Limited

v.

Banyard & Others

Oral
REASONS FOR JUDGMENT.

Delivered at Sydney
on 16th August, 1943.

ON APPEAL from the Supreme Court of New
South Wales in Equity in Suit No. 876
of 1941.

BETWEEN HENRY H. YORK AND COMPANY PROPRIETARY
LIMITED

Appellant

and

FRANCIS RALPH BANYARD ROBERT WEIR and
BRITISH ENGINEERING PROPRIETARY LIMITED

Respondents.

16th August 1943.

JUDGMENT.

HIS HONOUR THE CHIEF JUSTICE:

This is an appeal from the Supreme Court of New South Wales in Equity in a case in which the Chief Judge in Equity, Mr. Justice Nicholas, dismissed a suit seeking rescission of a contract for the sale of certain shares upon the ground of fraud. I preface what I am about to say by the statement that fraud, when alleged, must be strictly proved and, speaking generally, should be proved as charged.

In this case the agreement was for the sale of 1428 shares (49 per cent of the issued shares) which stood in the name of a man named Weir in a company called British Engineering Pty. Ltd. In fact the shares which stood in Weir's name were only nominally his shares, he holding them on account of the plaintiff Company. That that was the fact is not now challenged though at one time, in the course of negotiations between the parties, or in the relationship between the parties, there was some controversy about it.

The plaintiff Company and the defendant Company, of which F.R. Banyard was the Governing Director, were engaged in somewhat similar lines of business and the plaintiff Company acted as agent for the defendant Company in Melbourne. When it became ascertained - certainly in 1939, possibly earlier - by Banyard that Weir did not himself own these shares, Banyard expressed his dissatisfaction with a condition of affairs which had allowed Weir to have a large interest in the Company ostensibly on his own account but really on behalf of the plaintiff Company. Accordingly the parties met in order to see whether arrangements could be made for the purchase of the shares,

nominally Weir's but in reality the plaintiff Company's, by Banyard.

The fraudulent representations charged are alleged to have been made on the occasion of certain conversations between Banyard and York at one of which at least Mr. B.O. Smith an accountant was present, and also they are charged to have been made in writing. In the conversations of which evidence is given I can find no evidence of any representations at all. The effect of the conversations was that the parties agreed that the shares should be sold at what the parties were prepared to regard as par value, namely, 18/3 per share, together with some further moneys described as on account of undistributed profits. But on the occasion of the conversations no agreement was reached as to the amount to be paid in addition to the 18/3 per share. It was stated, however, that the auditors of the defendant Company, Messrs. Hungerford Spooner & Co., who acted in relation to the defendant Company through Mr. B.O. Smith, would write a letter on the subject and in this letter of the 12th. February 1940 the arrangements which had been reached as the result of the conversation, plus the result of the investigation of the books by Mr. Smith, were set out. After a correction or an explanation of figures is given the letter proceeds - "We confirm the following arrangements made with Mr. Banyard yesterday:- (1) That Henry H. York & Co. Pty. Ltd. be paid an additional amount of £382/3/3 in respect of estimated profits for the half year ended 31st. December 1939; and (2) that Mr. Banyard will make an initial payment of £2,000 in respect of the shares purchased and will arrange for the liquidation of the balance before 31st. December 1940". It is there stated that the £382 represents an estimate. The letter then proceeds:- "For your convenience, we now summarise the total amount payable in respect of the shares and the balance arising therefrom:- Amount paid up on shares £1314 (i.e. 18/3 per share); unpaid directors' fees as at 30th. June 1939 £1457/19/8". That is a sum ascertained as on a taking of accounts at 30th. June 1938. It was the practice of the Company not to pay dividends but to distribute profits as directors' fees and to hold in hand one year's distributable fees to be used as part of the working capital of the Company. The next figure is "Share of unallocated profits for the year ended 30th. June 1939 £764/6/7". This represents 49 per cent of £1571 which was a credit balance to profit and loss account ascertained as at 30th. June

1939. Finally there is this further item: "Agreed share of profits for the half year ended 31st. December 1939 £382/3/3".

The representations alleged to have been made and alleged to be false are as follows:-

(1) That the defendant Banyard represented to the plaintiff Company that the share of undistributed profits in the defendant Company as at 30th. June 1939 to which the plaintiff Company was or would be entitled upon a proper distribution of profits of the defendant Company was £1457/19/8 and no more; and

(2) That upon a proper division of profits of the defendant Company for the half year ended 31st. December 1939 the plaintiff Company was or would become entitled to a further sum of £382/3/3 and no more as its share of such profits. If these representations are interpreted strictly as set forth in the pleadings, then in my opinion the first representation is not shown to have been made. It is alleged in this form, that the share of undistributed profits as at a named date was £1457/19/8 and no more, whereas at that date it was agreed by the parties that there was a further sum, 49 per cent of which was £764, which at that time represented profits of the Company which had not been distributed.

As to the second representation, that upon a proper division of profits the plaintiff was or would become entitled to a further sum of £382 and no more, the letter shows - and the evidence of the conversations shows - that that sum was stated only as an estimate and not as an amount or a maximum amount to which the plaintiff Company would be entitled on a division of profits.

Further, the first representation as alleged appears to me to be, according to the evidence, a true representation except for the words "and no more" and the latter words may be disregarded for the reason already stated. The representation that the share of undistributed profits in the Company as at 30th. June 1939 to which the plaintiff Company was entitled was £1457 was accurate in fact. If, on the other hand, emphasis is placed upon the word "proper", the representation becomes very vague and embarrassing in its terms. It is very difficult to say what a shareholder is to be entitled to upon a "proper" distribution of profits. The words "distribution of profits" do not refer to a potential winding up but to a distribution of profits

in the course of the carrying on of business by the Company.

The Articles of Association leave this, as is ordinarily the case, to be determined in a particular manner, and here, in accordance with the course of business which the Company had adopted for many years, the directors had arrived at a decision as to the profits to be distributed. It is difficult to say that there is anything that was not "proper" in the distribution which was determined upon by the Directors and by the Company in general meeting in accordance with the Articles of Association. If the word "proper" means "fair" in a general way, then the whole representation is reduced to a representation as to opinion as distinct from a representation as to fact; then the question would be as to the honesty of the belief of Banyard when he made the representation so interpreted. The finding of the learned Judge as to the honesty of the statement which he made is in favour of the defendant.

If, however, the representations are regarded as representations of facts as to the profits of the Company, then it is necessary to consider the criticisms which have been made upon the accounts of the Company and the charges that the accounts falsely represent the position of the Company.

A great deal of evidence was given as to various matters of account. As to those matters, I think it may fairly be said that it is possible to accept the evidence of the defendant and to regard the facts which happened as not inconsistent with honesty. It is equally possible, in the case of some of them, to have suspicion and, if one were doubtful as to the character of the defendant, to regard them as evidence of fraud. In the present case the learned Judge, having had the benefit and advantage of seeing the defendant in the box, has said that he considers that his evidence was honestly given. The explanations which are given are not explanations which are either unintelligible, unreasonable or so out of the way as to be on their face unacceptable. It was open to the learned Judge to find as he did in relation to each of the matters mentioned.

It is not necessary to go into detail in connection with them. In the case of omissions and alleged under-valuations of stock explanations were tendered; in some cases the defendant stated he did not remember and he was unable to explain. Those matters would be

taken into account by the learned Judge in arriving at an estimate of the honesty and the credibility of the defendant.

In my opinion the criticisms with respect to stock are not of such a character as necessarily to demonstrate fraud. They are criticisms to which weight should be given but they are not inconsistent with the honesty of the defendant.

I make the same observation with respect to Langley & Sons' debt; Wilkinson's debt and "reserve for doubtful debts". It is unnecessary, I think, to go into the details of these matters, but explanations were given which, if accepted, - and they were accepted - are completely consistent with the honesty of the defendant though there may have been from time to time irregularities.

Similar observations arise with respect to the dividends from Australian Bobbins Pty. Ltd., the valuation fees and the payment of insurance premiums on a policy on the life of Banyard taken out in his own name, premiums for which, however, were paid by the Company. The premiums plainly were paid by the Company; the books of the Company show they were so paid. It might have been dishonest trickery, on the other hand it may have been, as the defendant said, a means of making it possible for the Company to pay out money on his account, if he died suddenly, without embarrassing the Company. The two explanations are open; the learned Judge, seeing the defendant, accepted the explanation of honesty.

In a case where fraud is alleged and the learned Judge finds against fraud it is, in my opinion, necessary to make out a very strong case indeed to induce a Court of Appeal to upset such a finding. I agree that such a finding is not beyond reach upon appeal but in this case there are no facts which are not consistent with the finding of His Honour. I should say that His Honour has considered the evidence not only of Banyard but of the witness Mr. B.O. Smith, a member of the firm of Hungerford Spooner & Co., and he has accepted that evidence as honest evidence.

The attention of the Court has not been called to any facts which in my opinion show that His Honour's decision was wrong, or even probably wrong. In my opinion the appeal should be dismissed.

ORDER: Appeal dismissed with costs.

HENRY H. YORK & COMPANY PTY. LTD.

and

FRANCIS RALPH BANYARD ROBERT WEIR and
BRITISH ENGINEERING PTY. LTD.

16th August 1943.

JUDGMENT

Mr. Justice Starke:

I agree and I agree with both contentions made by the learned Counsel for the respondents, firstly that the contract is that stated in the answers to the interrogatories, namely that Banyard should purchase the shares of the plaintiff Company at par together with all profits not distributed to which the plaintiff would be entitled such profits being ascertained up to 30th June 1939 and estimated as to the period 1st July 1939 to 31st December 1939 and not for a definite sum of £3918/9/6. That amount was to be ascertained and may still have to be ascertained but the contract was not induced by any representation as to the items making up the sum of £3918/9/6. put forward by Banyard or his accountants. And secondly if that view be incorrect and the contract was for a definite sum of £3918/9/6 I would agree that the contract had not been induced by any of the representations alleged in the statement of claim.

HENRY YORK & COMPANY PTY. LTD.

V

FRANCIS RALPH BANYARD, ROBERT WEIR

AND BRITISH ENGINEERING PTY LTD

Judgment

Williams J.

I agree. The appeal can be disposed of on the facts so that certain questions of pleading discovery and of company law which have been referred to during the argument do not arise. On the facts I agree substantially with the views which the Chief Justice has just expressed. I do not think, therefore, that it would be useful for me to take up time by adding anything further.