

IN THE HIGH COURT OF AUSTRALIA.

BARTUM

V.

PERPETUAL EXECUTORS & TRUSTEES
ASSOCIATION OF AUSTRALIA LTD.
& ORS.

REASONS FOR JUDGMENT.

High Court of Australia.
Principal Registry

7 MAR 1945

Judgment delivered at MELBOURNE

on 7TH DAY OF MARCH, 1945.

BARTRUM

v.

PERPETUAL EXECUTORS & TRUSTEES ASSOCIATION OF AUSTRALIA LTD. & ORS.

REASONS FOR JUDGMENT.

LATHAM C.J.

This is an appeal from the Supreme Court of Victoria dismissing a counter-claim in an action brought upon an agreement for the purchase by the appellant, Sydney Roe Bartrum, from the executors of John Ebenezer Leckie deceased of shares owned by Leckie in a company, R.G. Wilson & Co. Pty. Ltd. The claim made by the executors upon the agreement for the purchase of the shares was admitted and the controversy at the trial was limited to the counter-claim. By counter-claim the defendant claimed damages for fraud, or alternatively, for breach of warranty.

The late John Ebenezer Leckie owned 19,998 shares out of the 20,000 in R.G. Wilson & Co. Pty. Ltd., and the other two shares were held by his nominees. The agreement in question in relation to which the litigation arose was for the purchase of all the shares owned by him, and the vendor undertook to procure the transfer to the nominees of Bartrum of the other two shares. Therefore, as he was buying in effect all the shares in the company, he was, from a business point of view, buying the assets of the company.

In the course of the negotiations Mr. Russell, the Manager of the Perpetual Executors and Trustees Association, one of the respondents, produced to the representative of Bartrum a document - Exhibit 2. That document set out various particulars of assets and liabilities of the company (R.G. Wilson & Co.). The statement of assets includes figures relating to book debts, trade debtors and other matters, and is followed by this:-

"Less Liabilities:-

Sundry Creditors	£1188
Trade Creditors	2946
Customers' Credit Balances	24
Provision for Income Tax	1700 "

It is this last statement in this exhibit which is the source of litigation - "Provision for income tax - £1700". It

is contended in the first place that that was a fraudulent representation upon which the defendant acted, in consequence of which he suffered damage, and, alternatively, that it amounts to a warranty, and that the warranty has been broken. The object of the handing over of Exhibit No. 2 by Mr. Russell to Bartrum's representative was plainly to give an indication of the net value of the assets of which the purchaser would become the owner if he bought all the shares.

The income tax payable by the company depended upon the application of sec. 104 of the Income Tax Assessment Act 1936-1942 to the undistributed profits of the company. The amount assessable under that section and payable by the company would depend upon the rate of taxation paid by the shareholders in the company, that is, substantially or almost entirely by Leckie. Mr. Russell handed Exhibit 2 over on 20th January 1943. On this date neither the executors of the deceased Leckie nor the directors of the company knew what the tax on the company in respect of undistributed profits would be. In fact the amount ultimately assessed in respect of the period ending 31st July 1942 was £2424.

Now the appellant has relied on answers to interrogatories as showing that the directors had no honest belief that the £1700 was a provision for income tax for the company.

Interrogatory No. 2 is:-

"On or about the 20th day of January 1943 did each or any of the Plaintiffs know the amount of the unpaid tax on the said 20th day of January 1943 assessed or to be assessed upon the income earned up to the said date including any additional income tax upon any undistributed profits earned up to the said date"

The answer is "No", and the answer is "No" also to an interrogatory enquiring as to whether each or any of the plaintiffs had any belief as to the same matter.

It was impossible at that date for anybody to have a reasonable belief as to what the tax would be in respect of the period ending on 20th January 1943 because that date is in the middle of an income tax year. There is no evidence that any person /

person had any belief as to that income tax. It was held by the learned Judge that Exhibit 2 related only to the period ending 31st July 1942. It was the end of the accounting period of the company accepted by the Commissioner of Income Tax. The evidence supports this finding.

The answers to interrogatories accordingly do not establish any absence of honest belief as to the tax payable in respect of the period ending 31st July 1942. There is no evidence that any of the respondents knew that £1700 was a false estimate or that any of them had no honest belief in it as an estimate. The Accountants of the executors, Messrs. Valentine & Co., had made an estimate that £1700 would suffice, but had in effect informed the directors of the company that an accurate estimate was impossible, so that they had made no provision for income tax in the accounts of the company. It was a rough estimate - to be taken for what it was worth - but in my opinion there is no evidence that it was not a bona fide estimate, and accepted as such by the executors.

There is no evidence that Mr. Russell, who handed over Exhibit 2, did not believe in it as an honest estimate. There is no evidence at all with respect to the belief of the other executors, except that Miss Reid gave evidence that she did not ever discuss with anyone the question of undistributed profits tax. It is also, I think, a material matter that before the defendant on 10th February 1943 handed over his signed copy of the agreement, and by that act became bound (receiving in exchange the copy signed by the executors) his accountant Burman had been shown various books, including the minute book of the board of the company, and the minute book contained an entry stating that the directors, owing to difficulty of assessing tax to be paid, decided to make no provision for taxation.

The onus is on the person who alleges fraud to prove it. Upon these facts, in my opinion, it cannot be held that there was any fraudulent misrepresentation.

The case is also put on the ground of collateral warranty. The tendency to rely upon representations made in the course of negotiations leading up to a contract as collateral warranties has been checked by the decision of the House of Lords in Heilbut, Symons & Co. v. Buckleton, 1913 A.C., 30. It has been determined that the decision as to whether a statement amounts to a warranty is a matter of the intention of the parties, and all the circumstances of the case must be considered.

In my opinion there is no evidence that either party intended the statements in Exhibit 2 to create contractual undertakings. On the contrary, the evidence shows that Bartrum was to satisfy himself as to the figures in the statement. This fact alone, in my opinion, shows that the parties did not intend to contract as to any of the figures contained in Exhibit 2. The contract of the parties is to be found in the written documents which they signed - Exhibit 4 and Exhibit A.

In these circumstances there is, in my opinion, no evidence to support the proposition that it was intended that the statement as to £1700 income tax should operate contractually. In my opinion, therefore, the appeal should be dismissed.

Rich J. The appeal has been argued very carefully by Mr. Ashkarasy but he has failed to convince me that there is any evidence in the transaction of fraud or of collateral warranty. Exhibit 2 was not proffered as a precise or exact amount of unpaid tax. It is at most a mere estimate and not a representation of any kind. Moreover, it does not involve the representation pleaded in paragraph 4 of the Counterclaim and as I have already said there is no evidence of warranty.

I agree that the appeal should be dismissed.

Starke J. I also agree. The argument has satisfied me that the plaintiff has not established any fraudulent representation or any warranty.

Dixon J. I agree.

McTiernan J. I agree.

Williams J. I agree.

Order.

The appeal is dismissed with costs.
