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IN THE HIGH COURT OF AUSTRALIA.

Kuenzli

v.

Moltschnie

REASONS FOR JUDGMENT.

Delivered at Sydney

on 12th December 1945

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KUENZLI V. WILTSHIRE

12th DECEMBER, 1945.

JUDGMENT.

LATHAM C.J.: This is an appeal from a decree of the Supreme Court of New South Wales in its Equitable Jurisdiction whereby it was declared that the plaintiff and the defendant were in partnership in the business of manufacturing and selling certain electrical meter components, that the partnership was dissolved on the 22nd February 1943 and that on the winding up of the partnership business there was due from the defendant to the plaintiff a sum of £1035/10/4. An order was made for the payment of this amount by the defendant to the plaintiff.

The defendant pleaded a counterclaim alleging an agreement of service between the plaintiff and the defendant, it being one of the terms of that agreement that the plaintiff should not compete with the defendant in the business in which they had been in some manner associated. By the counter claim the defendant sought an injunction and damages.

His Honour Mr. Justice Roper held that the plaintiff had established a partnership, that the parties had agreed to share profits equally but that the plaintiff had no right to share in the assets of the partnership. There was oral evidence as to the alleged agreement and evidence of accounts which were exchanged between the parties and accepted by them showing that the parties had agreed to be associated in the business upon the basis of sharing equally in the profits.

The dispute was whether the agreement between the parties amounted to a partnership or to some other form of agreement.

The Partnership Act provides in section 2 that the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business. There was that prima facie evidence in this case, but if there are other elements than that element the conclusion as to whether there is a partnership or not must be founded upon all the circumstances of the case. If the only circumstance which is proved is an agreement to share profits, then the conclusion is that there is a partnership, but other circumstances may prevent that conclusion from being drawn. In the present case the evidence is very clear indeed that the defendant objected to entering into any partnership with the plaintiff. He gave evidence, and his

evidence is supported by the plaintiff, that he had had previous unfortunate experiences of partnerships and that whatever he did, although he desired the skill and assistance of the plaintiff in his enterprise, he was not going to enter into a partnership.

The plaintiff is as clear on this matter as the defendant. For example, the plaintiff said in reply to this question "You agree I understand that you did not want to be and were not .... a partner? No, that was agreed, we did not want a partnership." The plaintiff objected to a service agreement and they went on under what is rightly described as a loose arrangement. They endeavoured to adjust their relations upon the basis of there being no partnership. This fact is important but is not a conclusive element. If an agreement entered into by persons makes them partners, that is to say if the relations between them are in law those of partners, then a declaration that they do not wish to be partners does not prevent that legal result from following. But in the present case we have not only the declaration by both parties that they did not desire to become partners but also an absence of anything showing mutual agency of one for the other or of acting as principals of a firm. Prima facie, the general rule is as set out in section 5 of the Partnership Act - "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership." Section 19 however provides that "the mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either expressed or inferred from a course of dealing."

As a general rule there is an element of mutual agency, a power and authority to act for the firm, and it has been declared in Hawksley v. Outram (1892 3 Ch. 359 at 377) - "The true test of whether a partnership was intended is this, whether there was a joint business, or whether the parties were intending to carry on the business as the agents of each other".

Upon all the evidence I am of opinion that there was no agreement for partnership in this case and that therefore the decree should be varied by striking out those parts of it which declare that there was a partnership.

The plaintiff however claimed alternatively on an agreement

for sharing half profits. It is possible to support this finding of an agreement without the element of partnership. An agreement to show profits was held to be established by the learned Judge and in my opinion there was evidence to support the finding and there is no reason for dissenting from this finding of the learned Judge.

The remedy upon the agreement as alternatively pleaded is in effect the same as the remedy upon the agreement for partnership as primarily pleaded, namely payment of half profits. That involves taking an account. In fact the parties agreed in the manner which I shall state on the amount of £1035/10/4 as an amount due, but subject to conditions, as to which there is a dispute between the parties. The question which arises is whether the Supreme Court in its Equitable Jurisdiction had jurisdiction to deal with the claim in view of that fact. The plaintiff claimed dissolution of partnership. The Court had jurisdiction to determine that claim; it was held there was a partnership and dissolution was decreed.

I have already expressed my opinion that there was no partnership and it follows that the Court could not give relief as in a partnership suit, but the plaintiff also claimed, in the alternative, that an account be taken under the agreement for payment to him for half share of profits. The plaintiff alleged that the accounts were intricate and voluminous and were such that they should be dealt with in the Court of Equity. The Court has jurisdiction in equity to deal with a suit in which such a claim is made.

The defendant denied the agreement to pay half the profits as alleged by the plaintiff and also denied that the accounts were intricate and complicated. He alleged in the defence that an account had been taken between the parties and that the sum mentioned, £1035/10/4, had been accepted by both parties. The defendant pleaded he was ready and willing to pay that sum subject however to the matters referred to in the counterclaim. In the counterclaim the defendant alleged an agreement of service and claimed an injunction against breach of that agreement and damages. The counter claim was dismissed. The result was that the account which the defendant claimed or admitted had been taken between the parties, and which was held by the learned Judge to have been taken, in fact was said by the defendant to be pleaded in relation to one agreement(that alleged

in the counterclaim) whereas it was held by the Judge that it was taken in relation to another agreement, which was not an agreement for service.

In the answers to interrogatories the defendant swore that he was not ready and willing to pay this amount to the plaintiff and had never offered to pay it to him.

In these circumstances the position, in my opinion, was that the Court had jurisdiction to try the issues between the parties. Accordingly in my opinion the suit was maintainable as a partnership suit or as a suit for an account unless it was shown that the account was settled. Mr. Weston claimed that it was settled only on the basis of the agreement alleged by the defendant in the counterclaim. That agreement was found not to have been made. Mr. Stuckey contended that upon any view that settlement had been repudiated by the defendant so that his client was entitled to obtain an order for an account.

In my opinion the latter view is correct. The plaintiff was prepared to accept £1035, the defendant was held by the learned Judge to have agreed to that amount as correct and it appears that he did so, even upon the contention put for the appellant, upon a basis which was consistent with the agreement alleged by the plaintiff.

In my opinion the strict position is that the plaintiff is entitled now to an order for an account unless he declares that he does not desire such an order and is content to accept £1035.

In my opinion the appeal should be dismissed but the order should be varied by striking out the declarations relating to the partnership and dissolution thereof. Further, as a condition of obtaining special leave to appeal the appellant paid the sum mentioned £1035, into this Court. That amount should be paid out to the respondent.

It has been argued by Mr. Weston that if the Court disagrees with the decision of His Honour Mr. Justice Roper in relation to the existence of a partnership agreement he should obtain his costs of the appeal, or at least should not pay them. In my opinion there is no reason for depriving the respondent of costs. The question as to whether the agreement amounted to a partnership

agreement or was an agreement for payment of half profits, being neither a partnership agreement nor a service agreement, was the substantial matter of discussion. All the evidence given was relevant in relation to each contention, and I can see no ground for depriving the respondent of costs.

Accordingly, in my opinion the appeal should be dismissed, the order varied in the manner stated, the respondent should have costs of the appeal and the amount should be paid out of Court.

What do you say as to the account, Mr. Stuckey? Do you ask for an order for an account?

MR. STUCKEY: We are prepared to accept the amount Your Honour has mentioned and I ask that the order you suggest should be made in those circumstances.

LATHAM C.J.: The view of the Court Mr. Weston, is that strictly Mr. Stuckey is entitled to an order for an account, unless you are prepared to agree that the sum mentioned is the correct amount. It would appear that there is no real object in having an account.

MR. WESTON: I should think not.

MR. STUCKEY: I was going to suggest that the formal order would be that the decree be varied by striking out the first three declarations which appear at p.458 line 22.

LATHAM C.J.: Strike out the declaration that the plaintiff and defendant were in partnership, the declaration that the partnership was dissolved and the declaration that on the winding up of the partnership a certain amount is due, but, subject to what we will hear in a moment from Mr. Weston, allow the next order for payment of the moneys to stand.

MR. STUCKEY: And substitute a declaration in the terms of prayer 6 of the amended statement of claim on p. 4 - that alternatively it may be declared the plaintiff was entitled to one-half share of the profits made in the said business up to the 6th February 1943.

LATHAM C.J.: Yes, I think that is right.

MR. WESTON: I do not wish to waste time. Perhaps Your Honour will allow me to intimate "Yes" or "No" to this matter when the Court resumes this afternoon.

LATHAM C.J.: Very well, there appears to be no substantial reason

for having the account.

STARKE J: So far as I am concerned I do not think the Court should order any account because I think the parties led Mr. Justice Roper to understand that the amount of £1035 was the amount due.

MR. LEAVER.: Mr. Kuenzli has expressed a wish not to proceed on any enquiry on accounts but will accept the figure of £1035.

LATHAM C.J.: That being so, the order of His Honour Mr. Justice Roper will be varied by striking out the three declarations with respect to the partnership and allowing the order to stand for payment to the plaintiff of £1035, an order will be made for payment out of that money and that payment will be in satisfaction of the liability declared.