

(2)

IN THE HIGH COURT OF AUSTRALIA

Preston

v.

Emmett

ORAL.

REASONS FOR JUDGMENT

Judgment delivered at *Sydney*
on *Thursday 21st November*
1946.

JUDGMENT:

LATHAM, C.J.

THE CHIEF JUSTICE: It was suggested by Mr. Shand that this application might be treated, if the Court were disposed to grant leave to appeal, as the hearing of the appeal. Mr. Collins has not expressed any view upon that. I might say, in fairness to him, that the Court would be disposed to regard the argument which has taken place as the argument on the appeal, or would you desire to have further time for argument?

MR. COLLINS: With respect to the Court, if the Court was of the opinion that in view of the form of the contract I could not succeed, I would not like to put my client to the cost of a further appeal to this Court, so therefore I will agree to this matter being treated as the hearing of the appeal.

THE CHIEF JUSTICE: This is an application for leave to appeal from an Order for a new trial in an action in which a hotel broker sued for agent's commission. Various points have been taken. The agent was entitled to commission upon effecting a sale of a hotel and furniture. He grounds his case upon a document which was signed by at least a proposing purchaser, W.W. Lappin. That document relates to both the hotel which was held under lease, and to furniture and fittings. That which is sold is, as far as the furniture is concerned, furniture as per schedule attached to the contract.

There is a condition in the contract, presumably inserted in view of the provisions of the Stamps Act, making an appropriation of £1600 of the ^{consideration to} furniture fittings etc. in the schedule attached hereto. The contract which is relied upon as the basis of the Plaintiff's case is therefore a contract for selling not only the licence and goodwill of the hotel, but furniture as per schedule attached; and no schedule was attached. The alleged contract was therefore incomplete in an essential particular and did not amount to a contract in respect to any identifiable furniture. It therefore cannot be said that the Plaintiff had effected a sale of hotel and furniture.

Upon this ground, apart from other matters which have been argued, the Plaintiff must necessarily fail in any proceedings to recover commission. I am therefore of opinion that leave to appeal should be granted, and the respondent to this application consenting to this application being treated as the

hearing of the appeal, the Order of the Full Court for a new trial should be set aside and the Judgment of His Honour. Mr. Justice Owen restored.

RICH, J: I agree.

STARKE, J: I agree.

DIXON, J: I agree.

WILLIAMS, J: I also agree.

THE CHIEF JUSTICE: On the matter of costs the Judgment of Mr. Justice Owen will remain as to costs. Then as to the proceedings in the Full Court, what do you ask for?

MR. SHAND: I ask for the costs of those proceedings in addition to setting aside the Order of the Full Court an Order should be made in these proceedings.

THE CHIEF JUSTICE: In addition to setting aside the Order of the Full Court you ask for an Order to be made to give you the costs of the motion for a new trial?

MR. SHAND: Yes.

MR. COLLINS: I submit the Court will not allow those costs. It is true that my friend asked a question as to the inventory, but the form of the contract was the thing objected to and not the absence of the inventory. I submit if that point had been put as it has now been put to this Court, the Court might not have ordered a new trial, and I submit that the Court will allow both parties to abide by their own costs before the Full Court.

MR. SHAND: I am informed by my learned junior that he did mention that point before the Full Court and attempted to argue it, but in any case the Plaintiff took the point on appeal that there was cross-examination as to this particular matter which could have only been for one purpose.

WILLIAMS, J: This would have been one of your points and would not have been set up on appeal.

MR. SHAND: The cross-examination was obviously for one purpose.

THE CHIEF JUSTICE: The majority of the Court are of the opinion that on the whole the fairest Order to make is to give the present applicant, that is, the defendant, the costs in the Full Court but

no costs in this Court.

The Order in the Full Court will be set aside and an Order will be made that the Defendant have the costs of the motion for a new trial. There will be no Order made as to the costs in this Court.

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