No. 25 of 1946

IN THE HIGH COURT OF AUSTRALIA

HAYES

V.

COURT & ANOTHER.

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Wednesday 2nd April 1947

H. E. Daw, Gov. Print., Melb.

C.12280/45

HAYES v. COURT & ANOR.

JUDGMENT.

RICH J.

DIXON J.

McTIERNAN J.

WILLIAMS J.

HAYES V COURT AND ANOTHER.

O R D E R.

Appeal allowed. Order of the Full Court of the Supreme Court discharged and the order of Gavan Duffy J. restored. Order respondent Court to pay costs of the appeal to the Full Court and of the appeal to this Court.

HAYES v. COURT & ANOR.

This is an appeal from an order of the Full Court of the Supreme Court of Victoria reversing a judgment of Gavan Duffy J. His judgment was pronounced on the trial of the action and was for the defendant. In the action the plaintiffs sought a declaration that the defendant was a mortgagee of a piece of land which he had acquired. They sought relief by way of redemption. Alternatively, they asked for a declaration that the defendant held the land in trust.

Briefly stated, the plaintiffs' case was that the plaintiff Court was entitled to exercise an option of purchase obtained in the name of the plaintiff Robins, that since acquiring the option he had expended money on improving the buildings upon the land to which the option related, that, being unable to find the purchase money required for the exercise of the option, he sought the assistance of the defendant, who found part of the money, the plaintiff Court finding the other part, namely £725, that he put the defendant in a position to exercise the option and obtain a contract, a transfer and possession of the property, and that the estate in fee simple which the defendant thus acquired was held by him by way of security for the purchase money he had advanced. This was the way in which the plaintiffs had first put their case, but they have since developed an alternative case to the effect that, even if the plaintiff Court found no money, nevertheless the transaction began as a security and that it had not been established that the equity of redemption was ever destroyed or was acquired by the defendant, who therefore holds the land by way of security and as the plaintiffs' mortgagee.

The two plaintiffs are Keith Forbes Court, who in some of the documents is described as an investor but who appears to have engaged in a variety of peculiar transactions hardly to be dignified by the name of investment, and Gwendolyn Robins, who is associated with him both as his nominee and otherwise. The defendant is John Joseph Hayes, who is also formally described as

an investor, but who is or was a starting price bookmaker, a pursuit from which his right to that description may have grown.

On 19th May 1941 the plaintiff Gwendolyn Robins entered into a tenancy agreement with some landlords named Judd. The subject of the tenancy was a residence named "Artema", in St. George's Road, Toorak. The rent was £20:8:2 a month; the term was one year from 16th June 1941. She and the plaintiff Court occupied the premises as a residence, but it is not disputed that in the transaction she was a mere nominee of Court.

The tenancy agreement contained an option to purchase the property at the price of £4,250. It required a payment of £500 as the price of the option, £250 of which was to be paid on the signing of the agreement and £250 in 30 days. The option was exercisable within 12 months, that is to say, at any time before 19th May 1942. If it was exercised the £500 paid as the price of the option was to be treated as part of the purchase money. The residue of the purchase money was payable, as to £1000, on the date of exercising the option, as to the residue, £2750, within 12 months of that date, bearing interest at 5% per annum in the meantime payable quarterly. An express provision in the agreement enabled the tenant to nominate any person to exercise the option. Payment of the amount of £500, the price of the option, was completed by 16th July 1941, but the payment was not made out of the private resources either of the plaintiff Court or the plaintiff Robins. The money was raised by a loan in the name of a solicitor, Mr. E.E. Davies, who was in fact representing a client named Healey, who was the real lender. To secure the land Court, by an instrument bearing date of 16th July 1941, assigned to Davies (a) the balance of purchase money owing to Court upon certain contracts for the sale of land, (b) his one-third share in an estate agency business, (c) his interest in certain shares. Gwendolyn Robins joined in the instrument and guaranteed payment of the debt. Also she assigned the option of purchase taken in her name. All the assignments were subject to a proviso for redemption. There was a covenant to repay on 16th July 1942 the £500 lent, together with £75 interest, making in all £575.

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The defendant Hayes made Court's acquaintance, according to the former's evidence, in December 1941, and according to the latter's evidence, in May 1942. Miss Shaw and the defendant Hayes went to live at the house "Artema" with the plaintiffs Court and Robins. The defendant Hayes gives the date as February or March 1942, but the plaintiff Robins says it was between 14th and 16th May 1942. In the meantime, the plaintiffs had caused some alterations and improvements to be made to the dwelling upon which they had spent from £850 to £1000. In May 1942 the option was on the point of expiring. The parties to the tenancy agreement, however, although mistakenly, seemed to have regarded the expiry date as 16th June, and on 19th May 1942, according to the plaintiff Court, the agent for the lessors, one Hume, said that the lessors would accept £500 instead of £1000. Court, who seems to have been always in pecuniary difficulties, sought to borrow the required amount from the defendant Hayes.

Court's story, shortly stated, is to the following effect. He says that Hayes agreed to help provided he, Court, would get all he could himself towards paying the amount required, that Hayes said that he did not want to see Court lose his money to Davies, and that he, Hayes, only wanted his money back and did not want the house, which he described as a mass of pantries and passages. Court says that on the following day, which he fixes as 18th May, he proceeded to raise money on his car. He did so by a transaction which involved the sale of his car to an acceptance company (as it is called) for £600. He owed £77 on the car and received a cheque for £523. At the same time he repurchased his car, paying £250 to the acceptance company. He says that he gave Hayes the cheque for £523, together with £2 in cash to bring the sum to £525, that Hayes gave him Hayes' cheque for the £250 due to the acceptance company, thus leaving Hayes in credit £275. Court says that on or about the same day he obtained another £300 from a man named Lamont, from whom a sum of money was about to fall due to Court. He gave Lamont's cheque to Hayes. He says that later, namely on 16th June, when the option was exercised, he gave

another /

another cheque to Hayes which he had obtained from a third party. That cheque was for £150. Thus, he swore, he contributed £725.

If Court represented these payments as contributions on his part towards the exercise of the option of the purchase of the property, Hayes places an entirely different complexion upon them. Hayes' story is that Court had been borrowing money from him and cashing cheques with him. As a starting price bookmaker Hayes claims to have had large sums of cash ready to hand. He says that the cheque for £523, although received by him, was satisfied by the crossed cheque of £250, by a payment in cash of all but £50 of the balance and by his retention of the £70 on account of past indebtedness on the part of Court. Thus Court contributed nothing towards the exercise of the option or the purchase money of the house.

The story of the transaction which Court told or intended to tell, when he gave evidence, was to the effect that he had informed Hayes of the loan by Davies of the initial £500, that Hayes had agreed to find another £500 for the exercise of the option if the purchasers would accept that sum in lieu of the £1000 provided for by the agreement, and that when it was ascertained that they would not do so Hayes agreed to find the £1000. It does not clearly appear whether it was Court's view that Hayes was to pay off the loan made by Healey through Davies or in some other way take over that liability, but that would seem inevitable. Be that as it may, Court says that Hayes was to take by way of security an assignment from Miss Robins of the option. In fact a short assignment by the plaintiff Robins to the defendant Hayes was prepared by Hume, the agent. It is on his office paper and dated 23rd May. It takes the form of a nomination of Hayes under the provision in the option and a transfer of all of the plaintiff Robins' rights and interests to him of the option. Hume was called as a witness for the plaintiffs, but he said that, so far as he was concerned, the loan from and the assignment to Davies were not disclosed to him. He also said that Hayes had given him as agent for the Judds, the lessors

granting /

granting the option, a cheque for £500 and another cheque for £500 post-dated, that Hayes had said that if he did get the money back within a few days from Court he, Hayes, would stop the post-dated cheque. Hume said that he had then prepared the assignment of 23rd May from Robins to Hayes. He further stated that, when on 16th June, or as on that date, the documents by which the option was exercised were signed, a bank cheque, presumably for £500 and adjustments, was substituted and the post-dated cheque torn up.

The story told by Hayes completely contradicts that of Court but it conforms with Hume's so far as this part of Hume's evidence goes. Briefly, Hayes' account was that Court had asked him to lend him the money without disclosing the loan of £500 from Davies or the giving of a security to him, but, on the contrary, saying that Davies held some land of Court's which he, Davies, would not allow Court to sell so as to realise the money he needed for the exercise of the option. Court asked him to lend him £1000, explaining that it was to enable him to exercise the option. Later he said that £500 would do, that he would give his interest in "Artema" as a security for the loan of that amount. Hayes says in effect that eventually he gave way and paid £500 to Hume, who prepared the assignment already mentioned, dated 23rd May 1942, from Robins to Hayes. Hume, however, told him that another £500 was needed. Hayes then said he would give a post-dated cheque to Hume. He says that that was after he paid the first cheque. He saw Court and told him that there must be £1000 and that £500 was no good and said that he would give Hume a post-dated cheque for the further sum but that if Court could pay it to him before July 1st then his post-dated cheque need not go through. To that, according to Hayes' evidence, Court assented.

So far, Hayes said, no disclosure of the prior assignment to Davies had been made. Hume, however, told him that some rent was owing and, apparently because of that news he went to see Davies, asked him why he and Court were at variance, and

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said that when he learned that rent was owing he did not feel happy about his £500. In response to Davies' enquiring what he had done he told him that he had obtained the option of purchase as his security. Davies then told him that it was not worth the paper it was written upon because he already held the option and had obtained it a year before. Hayes then consulted his solicitor, Mr. T.A. Kennedy, who proceeded to search the title. On returning to the house "Artema" Hayes says that he reproached Court and accused him of trying to rob him. At length it was agreed that they should both go to see Mr. Kennedy. At the interview Kennedy said that a caveat had been lodged and that Davies held the option. Afterwards Kennedy advised Hayes that there was nothing he could do to protect himself except to become the purchaser of the property. Hayes says that he said to Court "Kennedy's advice is that there is only one thing to do and that is that I must purchase the property outright", as Court had no interest in it and Davies was the interested party. He says that Court agreed that he should do this and said "At least it is better for you to have it than Davies". They went again to Kennedy's office and there, according to Hayes, Kennedy said to Court "I understand that Mr. Hayes is to become the outright purchaser of this property from the Judds", and Court said that that was right, that Hayes was to be the purchaser. Kennedy gave evidence. His version varied by leaving out the word "outright" and by putting in the words "direct from the Judds".

The transaction thus compendiously described was carried out by two documents. A contract of sale was prepared between the Judds as vendors and Hayes as purchaser. It was dated 16th June 1942. The purchase money was £4,250 as in the option, payable by a deposit of £1500, of which the sum of £500 was acknowledged as already paid, and the residue, £2750, in three years, bearing interest at 5% in the meantime.

A document was prepared to deal with the outstanding prior assignment to Davies of the option. This instrument, which also was dated 16th June 1942, was an indenture to which Court and

Gwendolyn Robins were the parties of the first part, Davies of the second part, Hayes of the third part and Healey of the fourth part. It was described as supplemental to the prior assignment, which has the effect, under sec. 58 of the Property Act 1928, of placing the prior assignment in recital but, we think, no further effect. It recited that Davies entered into the prior assignment as a trustee for Healey, to whom the £500 secured belonged. It then proceeded to recite that Gwendolyn Robins, since her execution of the prior assignment, had assigned to Hayes absolutely her option over "Artema", but that Healey claimed that the assignment of the option to him had priority over the assignment to Hayes. It recited that the amount owing was £506:1:10. It does not appear when or how the balance of the £575 had been paid, a thing which may be a matter of comment because for Court to make any payment to anybody seems to have been quite exceptional. The last recital was to the effect that Healey had agreed to the exercise of the option by Hayes and to the Judds entering into the contract of sale to him subject to Court and Hayes entering into a covenant to pay him the sum of £506:1:10 and Hayes assigning his interest in the contract to him by way of security. The operative part of the instrument then proceeds to reassign to Court the interests other than the option which he had assigned to Davies by way of security which, of course, did not include the option, which had been assigned not by him, but by Gwendolyn Robins. The instrument expressed an assignment to Hayes of that option at the request of Gwendolyn Robins as directing party. It released Gwendolyn Robins from her liabilities. Then, in consideration of these releases and assignments, Court and Hayes jointly and severally covenanted to pay the £506:1:10 before 30th September 1942, together with certain interests. As security to Healey for the repayment of that sum the instrument expresses an assignment by Hayes as beneficial owner to Healey of the contract between Hayes and the Judds and of all his estate, interest or right in the property contracted to be sold, subject to a proviso of redemption on repayment of the debt. Hayes then gave covenants to carry out

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that contract and various powers were conferred upon Healey.

This document appears to be in no way inconsistent with Hayes' story. It is clearly a document directed to securing Healey's interests and that is its dominant purpose. The fact that the recital describes the assignment by the defendant Robins to Hayes dated 23rd May 1942 as an absolute assignment may be explained by its form, which is absolute, or it may be that at this date the parties preferred to regard it as absolute, in view of the frustration of the original purpose for which it was given and the change in the nature of the transaction as it was carried out. The joining of Court in the covenant to repay the debt to Healey is relied upon as confirming his story, as he retained an interest in the property. But it may just as well be explained by the fact that he had incurred the original liability and that Davies was not prepared to advise Healey to relinquish his obligation, worthless as it may be imagined to be. But though Kennedy, and to a very limited extent, Hume confirmed the story told by Hayes, nevertheless in his answers to the plaintiffs' interrogatories, Hayes gave a different version and that is the chief difficulty in accepting his account of the transaction. According to these answers, which are set out in the transcript of his cross-examination, at their dwelling he and the plaintiff Court on or about 17th May 1942 orally agreed that the plaintiffs should assign the option to Hayes or cause it to be assigned to him or nominated him as the purchaser of the property, that the option when so assigned and the benefit of the contract to purchase when entered into by Hayes was not to be held by him as security for moneys lent by him to Court, and on the same date they agreed that the option should be exercised on the terms subsequently reduced to writing and stated in the indenture of 16th June 1942.

In answer to an interrogatory enquiring whether any consideration was given for the assignment of 23rd May, Hayes had said that the plaintiffs had informed him that they were in arrears with the rent under the lease and were being pressed for payment and that they would have to find £500 and interest thereon to pay

Davies /

Davies under the assignment to him of 16th July 1941 and legal costs payable to Davies and that they were unable to meet these liabilities, and they asked him if he would agree to pay off those liabilities if they assigned to him the option to purchase, and that he agreed to do so and that he did what he agreed to do. In cross-examination he said that this version was erroneous and attributed it to confusion.

After 16th July 1942 the four parties dwelt together for some time but eventually quarrelled and the rift between the respective parties led to the departure of the plaintiffs Court and Robins, not, however, before a notice to quit had been served upon them by the defendant. The plaintiff Robins gave evidence supporting her co-plaintiff's evidence to some extent, and one Murray, practising as an accountant, also gave some supporting evidence.

Gavan Duffy J., who tried the action, completely disbelieved Court's evidence. He placed no reliance upon Murray and extended his disbelief of Court to Gwendolyn Robins, though perhaps with a little less confidence in her want of credit. A perusal of Court's evidence clearly explains why the learned judge felt that nothing he said should be affirmatively believed. Hayes appears to have given his evidence well and intelligently, but there is much in the general atmosphere of the case and in the substance of what he said to make one pause in attaching great credit to him as a witness and his answers to interrogatories naturally arouse caution, if not misgiving. Gavan Duffy J. seems to have been alive to most of the criticisms which suggest themselves, but nevertheless came to the conclusion that he should accept the substance of Hayes' version. His Honour at the conclusion of an oral judgment said that he must find as a fact that the first arrangement was that the defendant was to have a transfer to him of the option to purchase by way of security for what money he had lent or might lend for the purpose of the purchase of the property, that afterwards when the defendant had discovered that he had been tricked by the

plaintiff Court not disclosing to him the fact that there was a prior assignment of the option to purchase to Davies, he proposed a new arrangement whereby he was to take over the property in his own right free from any trust or liability and that the proposal was accepted by the plaintiff Court and that the property was purchased in pursuance of that undertaking and the transfer to the defendant Hayes of the property was a transfer to him as beneficial owner free from any liability.

This judgment was reversed in the Full Court upon grounds that must be considered. But before dealing with THEM, it is convenient to state independently the grounds for adhering to the findings of Gavan Duffy J. and to his conclusion that judgment should be entered for the defendant. In the first place, it will be seen from the foregoing account of the case that the matter depends in the main on the belief of one story rather than the other. The manner in which the witnesses gave their evidence and their personalities as they appeared in the witness box must form a most material consideration, and this no less so because none of the chief witnesses appears to come with a high degree of intrinsic credit. Further, it is quite clear that Hayes' account of the story, if it were not for the answers to interrogatories, would be much the more cogent and not the less probable of the two. The argument that the enhanced value of the property caused by the expenditure upon the improvements makes it improbable that Court would part with his option without recoupment or payment has, of course, some weight, but, having regard to Court's difficulties, to the other relations of the parties and to the period (May 1942), it is not very cogent. The question to what extent Hayes' answers to interrogatories were to be attributed to a change of ground or how far they were to be explained by the confusions and misunderstandings to which the transaction may have given rise in the minds of his legal advisers is prima facie one for the judge at the trial. From first to last it appears to us that the burden rested upon the plaintiffs of proving that the transaction embodied in the contract of sale from the Judds to Hayes and the subsequent transfer

to Hayes and in the indenture of 16th June 1942 was a transaction by way of security or mortgage. It is true that the admission in Hayes' evidence that the assignment of 23rd May 1942 from the plaintiff Robins to him was, when it was made, intended to be by way of security, is a cogent piece of evidence helpful to the plaintiffs, but in our opinion it did not turn over the legal presumption and place the burden of proof upon the defendant. The transaction in pursuance of which it was made did not stand. It was an assignment of the option, according to Hayes' story, on the footing that no prior assignment had been made and that the plaintiffs had found £500 out of their own resources as a first payment towards the acquisition of the land. The foundation of the assignment failed when it was disclosed that a prior assignment existed, that the plaintiffs had not found £500, but that £500 remained payable, that is, to Davies although not to the Judds, and that it must be discharged before any part of the purchase money could really be considered as having been paid up or cleared off. The whole transaction was invalidated by which Hayes agreed to advance the £500 and further moneys on the security of the option. Hayes was entitled to countermand his instructions to Hume and as between Hume and the plaintiffs, subject to any duty of Hume to the Judds, he was entitled to obtain repayment of the money. No question therefore arose of the defendant Hayes acquiring an equity of redemption in the option still outstanding in the plaintiffs and of his giving or paying consideration for it. He was entitled to insist on a re-arrangement. All he had obtained by the assignment was a second charge or mortgage over an option of purchase, which must be exercised immediately or not at all. Except by paying off the prior assignee or mortgagee he could not exercise it,and even then he would be involved in the payment of the full purchase money. The rearrangement by which he became the purchaser amounted to a substituted agreement, a novation. In any event in assuming the responsibility as a purchaser, as a necessary consequence he released the plaintiff Court from his

obligation /

obligation to repay the sum of £500 to him, which had become an immediate obligation. He thus gave all the consideration that could be required. It would therefore appear that the learned trial judge had ample ground for declining to find affirmatively that the plaintiffs had made out their allegation that the ultimate transaction was entered into by Hayes as a mortgagee or lender so that he took whatever interests he acquired in the property only by way of security.

An argument was addressed to us that, even though Hayes' version was accepted, it might be read as meaning no more than that he was to take the position of purchaser vis-a-vis the Judds while still remaining a lender vis-a-vis Court or, at all events, that this was the meaning which Court might be supposed to have attached to what was said to him by both Hayes and Kennedy. This argument is not really consistent with the evidence as recorded in the transcript and it is certainly inconsistent with the meaning assigned to the evidence by the learned judge and, as one would gather, by all parties at the trial.

In the Full Court His Honour the Chief Justice was impressed by the view that the defendant must show that he had acquired for consideration the plaintiffs' equity of redemption in the option, by the absence of any explicit reference to the consideration and of any plain expression of it, and His Honour thought that the inferences from the conversation deposed to were not clear. He laid emphasis upon the absence from the indenture of 16th June 1942 of any release to Hayes of the equity of redemption; that is, as we understand it, of the equity of redemption arising from the assignment of 23rd May. For the reasons already given, these considerations do not appear sufficient to warrant the disturbance of the trial judge's conclusion.

As far as the indenture of 16th June is concerned, it may as well be said that if the plaintiff Court wished to retain an equity of redemption it is remarkable that neither was there any mention of it in that document nor was there any collateral document.

As a general observation it may be added, it is alleged, that a transaction absolute on its face is in fact one by way of security the court may well look for evidence of the terms upon which the supposed loan secured was to be repaid and with what interest. In this case there is a singular absence of evidence upon this point. Indeed, it is not pretended that any arrangement for interest was made.

It is true that Hayes and Miss Shaw dwelt with Court and Miss Robins at "Artema" , but Court in his evidence did not rely on this fact to explain why interest was not reserved. It would have been quite easy to express in writing the arrangement between the two parties that Hayes should hold the contract of purchase as a security. Instead, upon the documents Hayes is represented as the absolute owner and there is no writing supporting Court's contention. The conversations deposed to by Hayes by the standards of lay discussion of such matters seem explicit enough, and can hardly bear any other construction than that Hayes was to displace Court as purchaser and Court was to lose all interest in the property. Hayes deposed to conversations with Court on and after 16th June 1942 in which they discussed whether Hayes would resell to Court and on what terms.

Lowe J. was of opinion that the true construction of what took place amounted only to communings between the parties for an agreement afterwards brought about and set out in the indenture of 16th June, and that the court had to make up its own mind as to the effect of that document. But that document is absolute in the terms of its assignment of the option to Hayes and places him in a position to purchase the property without any hint of any covenant to reconvey to Court or any obligation to do so. There is nothing in that document to support the plaintiff's claim. It is the plaintiff who must rely upon an oral agreement or understanding leaving him in the position of a borrower. It is not the defendant who must show that he was absolutely entitled.

The reasons of Martin J. place the onus upon the defendant, but the legal onus of establishing a mortgage transaction must rest upon the plaintiffs though, as has already been pointed out, the admission of Hayes that the assignment of 23rd May was by way of security would, if the matter stopped there, support the plaintiffs' case and authorise the conclusion that the subsequent documents were also by way of security. But the matter does not stop there and the explanation reduces the document of 23rd May 1942 to the status of a bare piece of evidence in the narrative. His Honour thought that counsel had failed to show any consideration when pressed to point one out; that is, a consideration for the agreement by which the assignment of 23rd May 1942 was put on one side. It was, however, a re-arrangement of the parties' rights and liabilities arising from the failure of the initial transaction and not the purchase of an equity of redemption. The consideration appears to be quite adequate, consisting as it clearly did of the discharge of the plaintiffs' liability to Hayes for the £500 and its application as part payment of Hayes' purchase money. All three learned judges were impressed, and naturally impressed, by the defendant's answers to the plaintiffs' interrogatories, but this is a matter which, as has already been said, the trial judge took into account. On the whole case the plaintiffs' claim appears to depend on a pure question of fact which has been adequately disposed of by the learned judge who saw and heard the witnesses. For these reasons the appeal should be allowed, the order of the Full Court discharged and the order of Gavan Duffy J. restored. The respondent Court must pay the costs of the appeal to the Full Court of the Supreme Court and of the appeal to this court.