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IN THE HIGH COURT OF AUSTRALIA

ROSENBLUM

v.

LEVITOFF AND OTHERS.

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY.

on MONDAY, 6th September, 1948.

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

C.12280/45

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ROSENBLUM V. LEVITOFF

JUDGMENT WILLIAMS J.

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JUDGMENT WILLIAMS J.

In this action the plaintiff, who resides in New South Wales, is suing the defendant, who resides in Victoria, for moneys alleged to be due to her from the defendant under a written agreement made on 1st December 1945. It is agreed that the action cannot be finally disposed of at this stage and that unless the parties can agree an account will have to be taken. But it is also agreed it will be convenient to decide as a preliminary to the taking of the account whether the agreement made on 1st December 1945 is contained in a document expressed to be a deed of agreement and a second document as the plaintiff contends or in those documents and a further document as the defendant contends. If this question is decided in favour of the defendant, it will also be convenient to determine the meaning of the provision in the further document that the defendant shall be able to deduct from the money lent to him by the plaintiff any losses ordinarily incurred by him in his business activities under the deed of agreement.

The deed of agreement, which was for a term of two years, was an agreement by which the plaintiff agreed to lend the defendant the sum of £900 and to make further advances in her discretion so that the total sum advanced should not exceed £5,000 to finance the defendant in his business of an entrepreneur impressario and theatrical agent and the defendant agreed that he would arrange a tour of at least two overseas artists per year during the continuance of the agreement and that these artists should give a minimum of twenty concerts each in Australia and New Zealand. The plaintiff was not to receive any interest

on her money but in lieu thereof was to receive a share of the net profits of these tours. Clause 4 enumerated the items that should be deducted from what are called the gross profits, which I think must mean total receipts, in order to ascertain the net profits. These items included a salary of £10. 0. 0 per week for the defendant from 1st December 1945 until his return to Australia and thereafter £15. 0. 0 per week. The original deed of agreement, which was signed by the defendant and the husband of the plaintiff on her behalf but not witnessed, was produced by the defendant. The duplicate which was signed by the defendant and witnessed by Miss Hyland was produced by the plaintiff. I shall call these documents the first and second documents respectively.

A third document which was signed by the defendant and witnessed by Miss Hyland dated 1st December 1945 was produced by the plaintiff. This document, which was addressed to the plaintiff, provided that in consideration of the plaintiff having procured for the defendant a loan of £900 and further and future advances not to exceed a total sum of £5,000, as mentioned in the deed of agreement and of the plaintiff agreeing to release the defendant from the performance of the obligations set out in clause 8 of a previous deed of agreement dated 31st January 1945, the defendant agreed to pay to the plaintiff ten per cent of the total net profits mentioned in clause 1 and defined in clause 4 of the deed of agreement of 1st December 1945 during the continuance of that deed and any extension thereof in addition to the 40 per centum of the net profits therein mentioned.

The fourth document, which was also produced by the plaintiff and around which the dispute mainly centres, was a document dated 1st December 1945, signed by the husband of the plaintiff and addressed to the defendant, which provided that in consideration of the defendant allowing the plaintiff 50 per cent of the net profits as set out in the deed of agreement of

1st December 1945, the plaintiff agreed that the defendant should pay her back the money lent to him under that deed less £750 and that he should be able to deduct from the money lent any losses ordinarily incurred by him in his business activities under the deed of agreement.

It is common ground that Mr. Rosenblum, who is a solicitor of the Supreme Court of New South Wales, was acting as the agent of and solicitor for the plaintiff who is his wife in her dealings with the defendant, and that these four documents were signed in the course of interviews which took place between him and the defendant in his office on 1st December 1945. The defendant was not represented by a solicitor. The plaintiff alleges that the first three documents were signed early in the afternoon and contends that the contract between the parties was then complete so that there was no consideration for the agreement contained in the fourth document which was prepared and signed later in the afternoon. It is therefore the plaintiff who relies particularly on the sequence of events. Rosenblum was by interest and training the person most likely to be able to give a clear account of the order of events at these interviews and it is regrettable that he did not consider that it was his duty as a solicitor to give evidence and assist the Court. In the absence of his evidence I must find the facts as best I can from the evidence of Mrs. Orr, who was called by the plaintiff, and the defendant and the help afforded by the documents themselves. I accept both Mrs. Orr and the defendant as honest witnesses who gave their evidence to the best of their ability but they were both somewhat confused and I am not prepared to rely entirely on the recollection of either of them. [There was an interview in the morning when Rosenblum produced the first three documents. The defendant and Rosenblum signed the first document but the defendant refused to sign the other two because there was no document providing that he should

receive £750 for what he called his goodwill, that is the reputation he had acquired over a number of years amongst overseas artists as an organiser of tours, and that losses should be deducted from the moneys lent. Rosenblum had therefore to prepare an additional document to cover these matters, and a further interview took place in the afternoon about 3 or 4 o'clock. After a break this interview was resumed soon after 5 o'clock. An additional document was produced at the commencement of this interview. It was probably the document produced by the plaintiff and shown to Miss Hyland in the witness box which she said covered the same ground as the fourth document but contained additional words. This was probably the same document as that which the defendant described in his evidence as a draft which was not correct so that another one (which I take to be the fourth document) had to be prepared. Mrs. Orr, who was before her marriage Miss Hyland, said that she was employed by Rosenblum as a stenographer and typist in 1945 and that she typed the four documents, the first three before or on the morning of 1st December 1945, and the fourth document about 5 o'clock that afternoon. She said that she was called into Rosenblum's office in the afternoon to act as a witness, that in her presence Rosenblum and the defendant signed the first document, that the defendant signed the second and third documents and that she then witnessed the defendant's signature on the second and third documents. The defendant denied that the third document was signed at this time and said it was signed at the same time as the fourth document i.e. after 5 o'clock. But I am satisfied that the defendant is mistaken and that the third document was signed at this time. I am not satisfied that Mrs. Orr was correct when she said that she saw Rosenblum and the defendant sign the first document, because I cannot understand why she did not then witness the signatures on this document at the same time as she witnessed the signatures of the defendant on the second and third documents.

As I have already said, I believe that this document was signed before lunch. [But it is to my mind immaterial whether the first document was signed before lunch or in the afternoon because, whichever is correct, it was obviously signed as a step towards its completion as a deed and not otherwise. In my opinion the first document was never completed and delivered as a deed and never became an operative document. Paragraph 3 of the statement of claim pleads the deed of agreement as an agreement under seal. Sec. 38(1) of the Conveyancing Act 1919 provides that every deed shall be signed as well as sealed, and shall be attested by at least one witness not being a party to the deed. Sec. 38(3) provides that every instrument expressed to be a deed which is signed and attested in accordance with this section shall be deemed to be sealed. The first document was not witnessed and was therefore never completed as a deed. Further, delivery is essential to the operation of a deed and it was never in a form in which it could be delivered. The second document is not sealed but it is signed and attested and must therefore be deemed to be sealed in accordance with sec. 38(3) of the Conveyancing Act. The delivery of this document as a deed has not been put in issue. But I am satisfied that it was only delivered at the time it was signed and attested subject to the condition that a further document to the effect of the fourth document should be prepared and signed by Rosenblum on behalf of the plaintiff. No agreement was therefore completed between the plaintiff and defendant until the fourth document had been signed by Rosenblum. The agreement was then contained in the second document which is a deed as varied by the third and fourth documents. The second document was not executed by the plaintiff but she was named as a party to the deed and a party who takes the benefit of a deed is bound by it though he does not execute it. Norton on Deeds 2nd Edit. p.26.

Even assuming, contrary to my own opinion, that the first document operated an an agreement from the time it was

signed, I would still not be prepared to uphold the contention of the plaintiff that the agreement between the parties was complete upon the signature of this document and the third document. It is the duty of the Court to ascertain as best it can from the whole of the evidence whether the agreement of the parties is wholly in writing or partly in writing and partly oral and if in writing whether it is contained in one or more documents. The third and fourth documents each refer to the first document and are each supplemental thereto. It is the third document and not the first which provides that the plaintiff shall receive an additional 10 per cent of the net profits making her share 50 per cent, so that the third and fourth documents are also complementary to each other. The third document provides that the consideration for the plaintiff receiving this additional ten per centum is that she has procured a loan of £900 and promised to make further advances in the future not exceeding £5,000, and has released the defendant from clause 8 of the deed of agreement of 31st January 1945. This was an earlier agreement between the plaintiff and the defendant of the same nature as the first document, clause 8 of which provided that at any time before 1st April 1946 the plaintiff upon giving one months notice in writing to that effect should be entitled to enter into partnership with the defendant upon the basis that the net profits should be distributed between them, 60 per cent to the defendant and 40 per cent to the plaintiff. The duration of the partnership was to be for one year with an option of a further period of one year, and the plaintiff was to bring in the sum of £700 as her share of the capital. The plaintiff had already agreed to advance the sum of £900 and to make further advances in the first document, so that the only fresh consideration in the third document is the agreement to release the plaintiff from this clause . But

it is obvious that this consideration is wholly illusory because it would be quite impracticable to constitute such a partnership when the parties had already entered into the agreement of 1st December 1945. There must therefore have been some other real consideration for the defendant agreeing to pay the plaintiff an additional 10 per cent of the net profits. I have no doubt that the real consideration was contained in the fourth document and that in whatever order the documents were executed this document forms part of the entire agreement of the parties. For these reasons I am of opinion that I should answer the first preliminary question in favour of the defendant.

It is therefore necessary to determine the meaning of the provision in the fourth document that the defendant shall be able to deduct from the money lent any losses ordinarily incurred by him in his business activities under the deed of agreement. Losses ordinarily incurred must refer, I think, to losses incurred by the amount expended in earning income exceeding the income earned by that expenditure and therefore to losses shown upon the taking of a profit and loss account. It was contended for the plaintiff that in ascertaining whether an individual has made such a loss in his business, it would not be proper to charge against revenue any payments for his services. It was therefore contended that it would not be proper for the defendant to make such a charge in the present case. On the other hand it was contended for the defendant that, although this proposition might be correct as a general proposition, it was necessary in the present case to ascertain the meaning of the provision in question in the light of the documents as a whole and that the loss referred to was a loss shown upon the taking of a profit and loss account in accordance with clause 4 of the deed of agreement. This clause specifically provides that the wages which can be charged against the gross profits as an item in determining the net profits shall include a salary payable to the defendant for his services of £10 per week from 1st December

1945 until his return to Australia and thereafter a salary of £15 per week. After specifying this and a number of other items, the clause concludes by referring to the other working expenses and outgoings usually deducted in ascertaining the net profits in similar businesses. A salary for the defendant is therefore defined by the clause to be an outgoing usually deducted in ascertaining the net profits of his business. The fourth document does not define the manner in which the account is to be taken in order to ascertain whether the defendant has incurred a loss in his business activities under the first document. But these activities are the very activities of engaging overseas artists and managing their tours in Australia and New Zealand which give rise to the gross profits and the expenditure referred to in clause 4. This is the only clause in the entire agreement between the parties which provides for the taking of an account and defines the manner in which that account is to be taken. It is a profit and loss account which will show whether a net profit or a loss has been made out of these activities. There is no implied contract that an active partner may charge the sleeping partners for his services in conducting a partnership business. But it is usual in partnership agreements to make express provision for this purpose. The position of the defendant was analogous to that of an active partner carrying on business on behalf of himself and a sleeping partner. I think on the whole that the contention of the defendant is right and that in ascertaining whether the defendant has incurred a loss within the meaning of the fourth document, it was intended that the account should be taken in accordance with clause 4 of the first document. If the provision in question is ambiguous, seeing that the plaintiff was represented by a solicitor and the defendant was not, the case appears to be peculiarly one in which the defendant is entitled to invoke the maxim verba chartarum fortius accipiuntur contra proferentem. For these reasons I am of opinion that the

second preliminary question should also be answered in favour of the defendant.

I therefore declare that the agreement between the plaintiff and the defendant is contained in exhibit B as varied by exhibits C and D. I also declare that the losses referred to in exhibit D mean any losses that are shown upon the taking of an account in accordance with clause 4 of exhibit B. I adjourn the further hearing of this action with liberty to either party to make such application with respect to the further hearing or otherwise as she or he may be advised. I reserve all questions of costs.