(10

IN THE HIGH COURT OF AUSTRALIA

HARVEY

V.

McWATTERS.

ORAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on THURSDAY, 3rd AUGUST, 1950

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

C.12280/45

HARVEY V. MCWATTERS

ORDER

Appeal dismissed with costs.

HARVEY V. MCWATTERS

JUDGMENT (ORAL)

MCTIERNAN J.
WEBB J.
KITTO J.

HARVEY V. MCWATTERS

JUDGMENT (ORAL) MCTIERNAN J.

The nature of this suit and the issues which arose are shown by the pleadings. These have been read and I shall not recapitulate them. There is no doubt as to these matters. The evidence has been read from the Bar table and minutely examined. I have read the evidence carefully. We have the evidence well in mind.

The case depended upon a question of fact. The appellant asks us to reverse the trial judge's finding. The question was whether the amount of the consideration was £4,500 or £2,000. The appellant's case was that it was the latter sum. The trial judge found that it was the former amount. The question depended on oral evidence. There is an irreconcilable conflict between the evidence called on behalf of the appellant and that called on behalf of the respondent. The trial judge accepted the evidence given by the defendant, his accountant and his solicitor on the main issue - what was the amount of the consideration?

In regard to the onus. Mr. Justice Roper did not desert or misapply the principle that the party who alleges must in general prove the affirmative of the issue. Indeed Mr. Justice Roper said that the onus rested heavily on the defendant to prove that the document executed by both parties on 12th March did not truly express the amount of the consideration. Besides that document, the appellant put in evidence Promissory Notes and a Bill of Sale showing that her indebtedness was £2,000 whereas her case was that the balance owing did not exceed £500 because concurrently with the execution of the document she paid £1,500 on account of the consideration of £2,000. She also signed the Bill of Sale at the same time to secure £2,000 and subsequently signed Promissory Notes as security for the

payment of at least £2,000. The document signed by her on the 12th provided for a deposit of 10/-. The onus was upon her to prove that she made an arrangement inconsistent with the tenor of the Bill of Sale and the Promissory Notes and that when she signed the Promissory Notes they were delivered subject to a condition that they would be cancelled as they fell due to the extent of £1,500. It was a strange transaction to pay £1,500 and execute a Bill of Sale securing £2,000 and afterwards sign Promissory Notes for £2,000 if the amount of the consideration did not exceed £2,000. It would require more cogent and persuasive evidence to prove that these conditions accompanied the signing of the written agreement, the payment of £1,500, the signing of the Bill of Sale and the execution of the Promissory Notes, than to prove as the respondent alleged that the consideration was not £2,000 as stated in the written agreement but a greater sum.

Mr. Justice Roper was not wrong in saying that an onus rested on the appellant equally with the respondent and that may be it was a heavier one: her case was such that it was not wrong to say that her burden of satisfying the court of its truth was heavier.

The case came down to what side was to be believed. His Honour had to act upon the oral evidence which was given. He accepted in the main the evidence which was adduced on behalf of the respondent. He said that the respondent and his accountant were not witnesses of unimpeachable credibility; he did not say that either of them was a witness not entitled to be believed on his oath. His Honour said that he scrutinised every witness in the case and the evidence given by each witness; and that he considered the general probabilities of the case. His Honour also said that he observed the demeanour of the respondent's solicitor and going upon his observation of that witness he was content to accept his evidence. This evidence corroborated the respondent's evidence that the agreement was to sell the business

and chattels for £4,500 and that in addition to the amount secured by the Promissory Notes the appellant agreed to pay £1,000. The conclusions expressed in the judgment were reached upon the documents in the case and upon the oral evidence which His Honour accepted. It is not possible to say that any of these conclusions is contradicted by or not consistent with any governing fact.

The result of the conflict of the evidence was that His Honour had to be guided by the impressions he formed of the witnesses. He went upon those impressions and also guided himself by the probabilities. It is not too much to say that there is very good ground for the opinion that the story told by the respondent was more probable than the story told by the appellant. In a case like this, depending as it does so much on oral testimony, we should not reverse the findings of the trial judge unless we are convinced that they are wrong. I am not convinced that they are wrong. I agree with them.

In regard to the other question of the case. Even if there were no constitutional reason against looking at the so-called fresh evidence and upon that material making any of the orders for which Mr. Stuckey applied - a remission of the case to the trial judge or a reference for an inquiry into the credibility of a witness or a new trial, the application is a hopeless one, having regard to the nature of the so-called fresh evidence. It is not material upon which the Court could possibly exercise its discretion if it has any, - I do not admit it has any discretion - of the kind Mr. Stuckey asks us to exercise by making an order which would disturb the finality of the judgment.

For these reasons I would dismiss the appeal.

WEBB J. I Agree

KITTO J. I Agree.