ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

SYDNEY PINCOMBE PTY. LIMITED

V.

CAMPBELL & ORS.

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Thursday, 23rd April, 1953.

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

C.12280/45

SYDNEY PINCOMBE PTY. LIMITED

V.

CAMPBELL & ORS

ORDER

Appeal dismissed with costs.

SYDNEY PINCOMBE PTY. LIMITED

V.

CAMPBELL & ORS

JUDGMENT (ORAL)

DIXON C. J.
McTIERNAN J.
WEBB J.
FULLAGAR J.
TAYLOR J.

SYDNEY PINCOMBE PTY. LIMITED

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JUDGMENT (ORAL)

DIXON C.J. This is an appeal from a decree in a suit for specific performance by which the suit was dismissed.

The contract it was sought to enforce was one made, as it is alleged, by the plaintiff Company with three gentlemen Mr. A. E. Campbell, Mr. L. J. . Richardson and Mr. Edmond Read.

The property which is the subject of the alleged contract consists of a city building, Nos. 44-48 Hunter Street. For some years the plaintiff Company has been a tenant of portion of that building. They occupy the ground floor of No. 48 and they occupy the first floors of Nos. 44, 46 and 48. The gentleman with whom they have dealt in the matter of the collection of rent, in the matter of repairs and in other matters relating to the tenancy, is a Mr. Bruce Smith.

It appears that the building forms part of the estate of William Barnard Walford deceased; the estate includes a large number of other city properties.

It appears sufficiently clearly that in the administration of that estate a situation had arisen in which a number of beneficiaries were entitled as co-owners to an interest in possession in the various lands. They therefore fall within section 66G of the Conveyancing Act. An application was made under that provision and on 15th January, 1952 an order was made by which the then Trustees were to retire and the three gentlemen whom I have named were made trustees for

the purpose of the statutory trusts under the section. The order which was made included the following provision :

> "That in lieu of the obligations under Section 66H of the said Act in the event of disagreement of the trustees in carrying out the statutory trust they shall act in accordance with the directions of Dr. G. W. Waddell of Messrs. Minter Simpson & Co. or failing him of Mr. G. A. Yuill of Messrs. Norton Smith & Co. as representing the majority of the beneficiaries in number and interest, the costs of any such consultation and/or direction to be paid for on the basis of costs as between solicitor and own client out of the proceeds of sale".

The statutory trustees were contemplating the sale of the property in Hunter Street. The plaintiff Company made an offer of £35,000 for the purchase of the freehold of the property. That offer was made to Mr. Bruce Smith but the statutory trustees declined to accept it. On the 13th March, 1952 a letter was sent by the plaintiff company increasing the offer to £40,000 and Mr. Bruce Smith signed a letter, which I shall refer to more particularly, accepting that offer.

The circumstances in which he did so are stated in his evidence and to that I shall briefly refer. He said that the trustees met and rejected the offer of £35,000; the meeting was attended by Mr. Richardson and Mr. Campbell. He continued :

> "After that meeting I rang Mr. Urquhart (of the plaintiff Company) and told him that the offer had not been accepted and he asked me if I could still get in touch with the trustees, and I said that I could get in touch with them by telephone and he said 'We will raise our offer to £40,000' I rang Mr. Campbell and I told him, and he said that he thought it was a good offer. Q. Will you say what you said? A. I said: 'I have been in touch with Sydney Pincombe's and they have increased their offer to 40,000'. He said: 'I think it is a good offer, see what Mr. Richardson thinks'. I rang Mr. Richardson and I told him what Mr. Campbell had said. Mr. Richardson said : 'I think it is a good offer. I think we should accept it'". "The next step was to go down to Sydney Pincombe and get the offer in writing. I went down and saw Mr. Urquhart at Sydney Pincombe, and the substance was that the offer of £40,000 would be accepted. I typed this letter accepting it". "I took my letter down, he handed me his letter and I handed him my letter".

There was no communication with Mr. Read. Mr. Read had become ill on the 10th February 1952 and in fact did not return to his office until the first week in May, 1952 and he not only was not consulted on that point but he disagreed with the policy of the sale, believing that more could be obtained.

The suit was dismissed upon the ground that those documents to which I have briefly referred, if they form a contract, had not got the authority of Mr. Read and therefore could not form a contract binding the trustees as such and that there were no circumstances which precluded the defendants from setting up that absence of authority.

The letter of the 13th March, 1952, which constitutes the alleged acceptance, is signed - as I have already said - by Mr. Bruce Smith and its terms are as follows. It is dated from Parkes House, Hunter Street, the office of the trust, and it says :-

> "I have your letter of the 13th inst. submitting an offer of £40,000 (Forty thousand pounds) for the property situated and known as 44-46-48 Hunter Street. This offer has been referred to the Trustees, and I am instructed to accept the offer. I will ask the Estate solicitors Messrs. Sly & Russell, to prepare a contract, which will be submitted to you for signature when completed. I shall be pleased if you will advise me of the name of your solicitors in due course".

It will be observed that the letter contemplates the preparation of a full formal contract. The property, of course, was an important one. It is true that the title was under the Real Property Act, but such a sale could not be free of complications and could not be regarded as an entirely simple transaction. The letter does not expressly make the preparation of a formal contract a condition of so much of the letter as purported to accept the offer; nevertheless it is apparent that a very substantial question must exist as to whether it was not the real intention of the document merely to indicate a readiness to accept the price and to leave the terms and conditions of the sale to be expressed in a formal contract, which alone would bind the parties.

Passing that question by and coming to the question of the authority behind the document, it is necessary now briefly to state who Mr. Bruce Smith was and why it is supposed he had authority. Mr. Smith had been employed by the Trustees, who were superseded by the order of 15th January, 1952, for some

time as General Manager of the estate. He had collected rents, and inspected properties, he had recommended and superintended repairs, he had dealt with transfers of tenancies and he had done all the things which one would associate with the ordinary management of a somewhat large trust estate consisting of real property. He was accustomed to consult the trustees. Apparently when the new trustees were appointed he continued doing the same work under their authority as he had done before; but some new decisions were made by the trustees notably one to the effect that he might be paid commission on the sale of land.

In none of the circumstances can be found any sufficient reason for supposing that the trustees gave him general authority to sell. It may be remarked that it would have been contrary to the duty they owe as trustees to exercise for themselves a discretion with respect to any proposed transaction. There is nothing which affords any foundation for the supposition that Mr. Bruce Smith was allowed to bind them by a contract of sale. His work was of a different description. He was not held out to the plaintiff Company as having any authority to do any act of that description. The document, in the first instance, must depend on the actual authority he possessed. It is sufficient to say that, so far as Mr. Edmond Read was concerned, he possessed none and the letter which he wrote - assuming for the purposes of this decision it did amount to an acceptance of the contract so as to create a binding obligation - would not bind Mr. Read.

Within a few days the plaintiff Company acted upon the supposition that they obtained a contract, or it was presumed they so acted. They borrowed money on security from a Life Assurance Company whose head offices are in Melbourne. That circumstance is relied upon as something which would entitle them to treat the trustees as precluded from denying the authority of the letter. So it might, if they had acted on any representations for which the three trustees were responsible,

but there were no such representations. They were not led or misled into taking that step by any representations for which the three trustees were responsible. But within a very few days more, namely on the 18th March, they were apprised by letter signed by Mr. Campbell and Mr. Richardson that there had been a mistake.

The letter from these gentlemen stated :

> ".... We have before us your offer for 44/48 Hunter Street in the sum of £40,000 and we also have before us Mr. Smith's letter to you of the 13th March accepting the offer. This was written under a misunderstanding as the whole of the Trustees had not agreed to the acceptance of the offer but we are considering the matter and will write you at a later date.
> We understand that it is the desire of the whole of the Trustees to submit the property for sale by Public Auction and if that decision is arrived at you will be duly notified".

Upon that date, the 18th March, it appears to have been the desire, not unnaturally, on the part of the plaintiff Company to fix the transaction upon the trustees and to ensure that they carried it out. Negotiations proceeded. On the 9th April, 1952 Mr. Read agreed with his fellow trustees that he would be prepared that the question should be submitted to Dr. Waddell pursuant to the clause, which is in fact paragraph (c), of the Order made on the 15th January, 1952. He said: "I am quite prepared for the question to be submitted to Dr. G. Waddell and if you propose to approach him, as you have indicated, kindly let me know so that I can place my views before him".

Again, after returning to the office in the first week in May, he apparently concurred in the decision, which is minuted at a meeting of the trustees, who referred the matter to Dr. Waddell for decision.

The matter was submitted to Dr. Waddell as one for him to decide, whether the trustees ought or ought not to sell at £40,000 and accept the offer or proceed with the transaction. He considered the matter and heard what Mr. Edmond Read had to say. Mr. Edmond Read himself had communicated with Dr. Waddell and said he must leave the matter in his hands for

determination. Finally, on the 23rd June Dr. Waddell gave a decision in which he recited the facts, the desirability of selling, the offer of £40,000, as he described it, and Mr. Read's belief that he could get more and said as Mr. Read had failed to produce an offer for more he would decide that £40,000 should be accepted. He ended his recital of the facts with this statement:

> "For these reasons I direct the Trustees to accept the offer of £40,000 made by Sydney Pincombe Pty. Limited for the property known as 44-48 Hunter Street Sydney".

That direction Mr. Read declined to carry out. It seems that ultimately an agreement (whether of a binding character or not is not clear) for the sale to an unnamed party for £45,000 was decided upon or agreed to by the Trustees.

In my opinion the plaintiff can make nothing of the reference to Dr. Waddell and his decision. It appears to me that the whole of that matter was a question inside the trusts of the estate and not a matter upon which the plaintiff's rights could depend. There was a controversy between the trustees, it fell within the ambit of the clause which had been introduced into the order; it was remitted for decision to Dr. Waddell and he decided adversely to the contention of Mr. Read and did give a direction, presumably binding on the trustees as trustees, that it should be carried out.

Dr. Waddell was not constituted in any office, statutory or otherwise, which would enable him to supersede and, in the capacity of the trustees, to contract on their behalf. He was not vested with any power to confer rights on the plaintiff. He was not in a position to ratify an unauthorised dealing which had already been made, nor did the language in which he expressed himself purport to ratify any dealing on behalf of the Estate for which they or he could be responsible.

It is easy to understand that the plaintiff Company should feel the situation was one which had many elements favourable to its contention that the transaction should be carried

through. It had Mr. Bruce Smith's letter of acceptance, it had the referee's (if I may so call Dr. Waddell) decision that it should be carried out; but what was lacking was the essential element of the assent by one of the parties whom the plaintiff Company sought to bind by the contract and that assent was studiously withheld.

It was contended that Dr. Waddell derived some authority or some better position from Mr. Read's consent to his deciding the controversy among the trustees from Mr. Read's communications with Dr. Waddell and his submitting arguments and material to him. That is a matter concerning the two trustees, it was not a matter which concerned the rights of the plaintiff. It may be or it may not be that it was the duty of Mr. Read to act upon the direction contained in Dr. Waddell's decision; but the fact is he did not and until he did the plaintiff could not bind him as a party.

For those reasons I think the decision of the Chief Judge in Equity was right and that the appeal should be dismissed.

McTIERNAN J. : I agree.

WEBB J. : I agree.

FULLAGAR J. : I agree.

TAYLOR J. : I agree.