IN THE HIGH COURT OF AUSTRALIA

LONG

V.

COLE AND ANOTHER

REASONS FOR JUDGMENT

Judgment delivered at Melbourne,

on Monday, 12th October, 1953.

J. J. Gourley, Govt. Print., Melb.

C.7163/51

LONG

V.

COLE

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Appeal dismissed with oosts.

LONG

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COLE

JUDGMENT

WEBB J.
KITTO J.
TAYLOR J.

LONG

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JUDGMENT

WEBB J.
KITTO J.
TAYLOR J.

This is an appeal from a judgment entered for the defendant in an action in the Supreme Court of Victoria in which the appellant was the plaintiff. In that action the appellant sued the respondents to recover the sum of £1,000 as and for the purchase price of certain shares alleged to have been sold by the former to the latter and for interest on the said sum and, alternatively, for damages for a breach on the part of the respondents of an agreement to purchase the said shares constituted by their refusal to accept the said shares from the appellant.

The respondents are husband and wife and the evidence shows that the negotiations out of which the appellant's claims arose were, so far as the respondents were concerned, conducted by the male respondent alone. Counsel for the parties, however, agreed on the hearing of this appeal that the male respondent at all material times had authority to act for and on behalf of his wife and that no independent question arises concerning the liability of the latter. Accordingly it was agreed that if a judgment should be entered for the appellant it should be entered against both respondents.

The appellant is and was at all material times a stock and share broker and he and the male respondent were

jointly interested in underwriting a new issue of shares in a company known as Commando Engines Limited and, later, as Commando Industries Limited. In 1947 this company, which it is convenient to refer to as the old company, had an issued capital of some 30,000 shares of £1 each and in that year a proposal was made that further capital, to the extent of 60,000 £1 shares, should be issued. Discussions and negotiations for the issue of this further capital took place and on 2nd June, 1948, the appellant entered into an agreement with the old company to underwrite the whole of the new issue of 60,000 shares which were to be offered for public subscription. Within a day or two of the execution of this agreement the male respondent entered into an agreement with the appellant which subjected the former to a contingent liability to take some part of the new issue from the appellant. By this agreement the male respondent covenanted that in the event of the appellant requiring him so to do by written notice he would lodge with the appellant an application for any number of shares of the new issue up to a total of 8,000 shares as required. The male respondent also undertook by this agreement that, when lodging any such application with the appellant, he would pay or cause to be paid to the latter application moneys to the extent of ten shillings per share on the shares covered by the application. Collaterally to this agreement, however, the appellant undertook, by a letter dated 5th June, 1948, to provide the finance necessary to enable the male defendant to perform his obligations under the agreement in respect of any shares which he might be required, in pursuance thereof, to take up. In the terms of this letter any accommodation provided by the appellant was to be secured on "the said shares" or any other shares which the male respondent might have in the old company and the amount advanced, with interest at the current bank rate, was to be repayable to the appellant on demand.

On the occasion when the parties reached agreement on the subject of finance the male respondent said that he was prepared to lodge 4,000 shares in the old company as security for any shares that he might be required to take up and, according to the evidence the appellant then undertook that if that security was lodged he would provide the necessary finance to the male respondent at bank rate of interest.

During the month of July 1948 the shares of the new issue were offered for public subscription and by the 29th July, 1948, the issue was over-subscribed. But shortly before this date the male respondent went to the appellant's office and told him that he would like to take up 2,000 shares of the new issue and for that purpose he signed the necessary application form. On the 30th July he saw the appellant again when the latter informed him that the issue was over-subscribed. Thereupon the male respondent inquired about his application for 2,000 shares and the appellant informed him that as the issue had been over-subscribed it would be better to let the public have their subscriptions as far as possible and he, the appellant, would let the male respondent have 1,000 shares out of 5,000 of the new issue which the appellant had agreed to purchase from D. & W. Chandler Limited. According to the evidence, which was not denied and which was accepted by the trial judge, the male respondent said he would take these shares and asked the appellant to book them to his wife and "carry them for me as previously arranged". The appellant said that he was agreeable to this arrangement and added that he would carry them at call plus bank rate of interest provided additional security was lodged. It was on this occasion that the male respondent deposited with the appellant 4,000 shares in the old company as security.

At this stage the appellant's managing clerk was called in to receive the share certificates and the appellant informed him in the presence of the male respondent

of what had taken place and further said that he would not charge brokerage, that he would book the shares to the male respondent or Mrs. Cole when he received the scrip from D. & W. Chandler Limited and that the shares would carry dividends from that date. The appellant did not complete his transaction with D. & W. Chandler Limited until 13th October, 1948, when share certificates for 5,000 shares in the old company, accompanied by signed transfers, were delivered to him by that company. No steps were taken to have these transfers registered or to transfer any of these shares into the name of the male respondent or his wife, though at some subsequent stage the appellant sold and transferred 1,000 of them to another person.

The share certificates for the remaining 4,000 shares in the old company remained in the possession of the appellant for some time and they were still in the same form when, in 1950 arrangements were made for the amalgamation of the old company with a company known as John Buncle & Son Limited. This amalgamation was to be effected by means of the formation of a new company to be called John Buncle Commando Limited and by the exchange of shares in that company for shares in the amalgamating companies. The new company was incorporated late in October 1950 and on the 1st November, 1950, that company invited shareholders in the old company to exchange their shares for shares in the new company.

But before these events occurred differences arose between the appellant and the male respondent. Early in 1950 the latter had requested the appellant to return to him the 4,000 shares in the old company which he had deposited with the appellant. This request was made to the appellant's managing clerk who informed the male respondent that they were being held as security against his and Mrs. Cole's account and that before he could release any of them he would have

to refer to the appellant. Subsequently he arranged to release 3,200 of the shares but as at that time the share certificates for the 4,000 shares consisted of one certificate for 100 shares and one for 3,900 shares he handed the latter certificate to the male respondent upon his undertaking that he would have new certificates issued for these shares and return a certificate or certificates for 700 shares to the appellant. The share certificate for 3,900 shares was handed to the male respondent on 16th February, 1950, and within a day or two a share certificate for 700 shares in the old company was returned to the appellant. After this had been done the appellant held as security share certificates for 800 shares in the old company and he also still held the share certificates in the name of D. & W. Chandler Limited for 4,000 shares with transfers in respect thereof executed in blank.

The male respondent was at all material times a director of the old company and both he and the appellant took an active part in the negotiations and arrangements for the amalgamation of that company with John Buncle & Son Limited. It was the proposed amalgamation which led the male respondent, in November 1950, to have a further discussion with the appellant's managing clerk. On this occasion he asked for the return of the certificates for the 800 shares which were held by the appellant. The managing clerk, Mott, informed him that these were being held as security against his and his wife's account and that in the circumstances he could not release them without instructions from the appellant. A day or two later, when the male respondent again called to see Mott, the latter told him that the appellant had been unable to come to town. On this occasion the male respondent claimed to have no recollection of any indebtedness to the appellant and again asked for the return of his 800 shares. During the discussion which,

thereafter, took place Mott, for the purpose of refreshing the male respondent's recollection about the arrangement concerning the 1,000 shares in the old company which the appellant had promised to make available to him out of his purchase from D. & W. Chandler Limited, produced several of the letters which had passed between the parties. The male respondent appears to have been satisfied that his recollection had been at fault but said that he was "anxious to get all the shares into the company for the purpose of putting them into John Buncle Commando Limited and wanted the 800 shares for that purpose". Mott replied that if his account was settled he would let him have the shares whereupon the male respondent said that he would have to see the appellant about the matter. On the same day, 5th December, 1950, Mott, acting for the appellant, forwarded to the old company the share certificates for the 4,000 shares remaining from the purchase from D. & W. Chandler Limited and requested that new share certificates should be issued for ten of one-hundred and sixty of fifty and also asked that the necessary transfer forms should be supplied for the purpose of "transferring the shares into the new company". At some later stage this request was complied with and early in February 1951 the 4,000 shares were exchanged for shares in the new company. The shares in the new company were obtained in Mott's name and of such shares the appellant still retains certificates for shares in the new company equivalent to those to which the holder of 1,000 shares in the old company would have been entitled upon an exchange. These he claims to hold for and on behalf of the respondents.

It is in the circumstances related above that the appellant made his claims in the action brought by him in the Supreme Court. The statement of claim alleges that the respondents agreed to purchase 1,000 shares in the old

company and that it was a term of this agreement that the shares would "be taken" on account of the female respondent and held by the appellant until such time as the respondents paid to the appellant the price thereof, namely £1,000. Further, it is alleged, it was a term of the agreement that the respondents should pay to the appellant interest on the said sum at the current bank rate of interest whilst the said sum of £1,000 remained unpaid. Thereupon it was alleged that the respondents authorised the appellant to convert the said 1,000 shares in the old company into shares in the new company, that the shares were converted pursuant to this authority and that the appellant was ready and willing to transfer to the female appellant 600 ordinary shares and 400 deferred ordinary shares in the said new company in return for payment by the respondents of the amount claimed. On these allegations the appellant claimed to recover the price fixed by the agreement between the parties. Alternatively, the appellant alleged that the respondents had repudiated their agreement to purchase and he claimed damages for the breach involved in such repudiation.

At the outset it should be observed that the engagement of the appellant by the male respondent to endeavour to secure for him 2,000 shares of the new issue in the old company was, notwithstanding their friendly association at that time, an arrangement between broker and client and that if any shares of the new issue had been issued on that application and, pursuant to the arrangements made between the parties as to finance, held by the appellant on the respondents' account, the liability of the latter to the former would have been for money lent which could have been called up at any time. But notwithstanding the fact that the appellant agreed to sell to the respondents shares which he "had purchased from D. & W. Chandler Limited", or, perhaps more correctly, which he had agreed to purchase from

that company, the parties agreed that the necessary finance should be provided for the respondents "as previously arranged". Under this arrangement the respondents were to become entitled to future dividends on the shares and were to be liable for interest on the amount involved in the purchase of the shares. In these circumstances the appellant forwarded a contract note to the respondents on the 29th October, 1948, after he had settled with D. & W. Chandler Limited and from that date on interest was charged on the amount involved, namely £1,002.10. 0, in the same way as if the note had evidenced an ordinary brokerage transaction. It was suggested during the argument that possibly the true legal result of the arrangements between the appellant and the respondents was to leave the latter indebted to the former for money lent and not for the purchase price of the shares but it is unnecessary for us to consider what legal consequences would follow if this were the case for the claims of the appellant were limited to a claim for the price of the shares and damages for breach of an agreement to purchase them. Probably the final result in the circumstances of the case would not be affected but since the claims of the appellant were so framed and any desire to place the appellant's case on any other basis was expressly disclaimed during the course of argument we do not propose to follow this line of inquiry.

The obligation of the respondents which it is sought to enforce is the obligation to pay for shares which it is alleged were sold to him on terms which required him to pay for them "at call" or on demand. No demand could have been effective unless at the time of the making thereof the appellant, at the very least, was reading willing and able to tender to the respondents registrable share certificates for the shares to which the respondents were entitled. It is common ground that no demand at all was

made prior to the exchange by the appellant of the 4,000 shares in the old company for shares in the new company. Accordingly there is no basis for any suggestion, and no suggestion is made, that the price of the shares became payable or that there was any actionable breach on the part of the respondents prior to February 1951. But the appellant maintains that thereafter a demand was made, that he was ready and willing to deliver to the respondents registrable certificates for the appropriate number of shares in the new company and that there was a repudiation by the respondents of their obligations under the agreement which dispensed with the necessity for a formal tender of share certificates in such a form. There is, we should think, no doubt on the evidence that demands were made after this time and that the appellant was ready and willing to deliver registrable certificates for shares in the new company. The respondents, however, contend that a finding in favour of the appellant on these matters does not advance his case for, they say, if they did agree to purchase shares from the appellant - and this they were not prepared on oath to deny - they agreed to purchase shares in the old company and the appellant could not be said to fulfil his obligations under that agreement by tendering delivery of shares in the new company. On this aspect of the matter the appellant, as indicated previously, alleges that the male respondent authorised the appellant to convert "the said 1,000 shares" in the old company into shares in the new company. If this was so the appellant would be entitled to succeed on one branch of his claim but if it was not so then, obviously, the appellant's claim under both heads must fail. For the purpose of dealing with

this aspect, which to us seems to be the vital point in the case, it is convenient to refer to the particulars of the allegation that the male respondent authorised the appellant so to convert the shares referred to. In part, it was said, the authority ought to be implied from the facts that the male respondent was at all material times a director of both the old and the new companies, that the shareholders of the old company resolved upon the amalgamation at a meeting in June 1950, that the male respondent was present at that meeting and supported the proposal for amalgamation and communicated his desire to the appellant to do everything possible to carry through the amalgamation and that the old company by letter dated 1st November, 1950, requested shareholders in the old company to transfer their shares into shares in the new company which letter was said to have been written with the knowledge and approval of the male respondent. While these circumstances may indicate beyond doubt that the male respondent was anxious to see that the proposal for amalgamation was carried into effect and, indeed, that he took an active part in bringing it about they cannot form the basis for an assumption of authority on the part of the appellant to act on behalf of the respondents in exchanging the shares of the latter in the old company for shares in the new company notwithstanding that the appellant may have had good reason to think that the respondents would, if consulted, have desired this to be done. There is, however, no evidence to suggest that the appellant acted on any such belief. Nor can these circumstances be weighed without regard to the oral evidence referred to in the particulars as evidencing an express authority so to convert the old shares. The first move on the part of the appellant towards the exchange of the 4,000 shares in the old company took place on the 5th December, 1950, and on that day and before this move was made the male respondent had the discussion with

Mott to which reference has previously been made. The particulars given by the appellant alleged that during this discussion the male respondent expressly authorised the exchange of the shares in question but on that occasion the matter of primary concern to the male respondent was his desire to exchange the 800 shares in the old company which were then held by the appellant as security. These the former wished to lift for the purpose of exchanging them and it was Mott's refusal to deliver them to him which was the immediate topic of conversation. Not being able to obtain them Mott was informed by the male respondent that he "would have to see Mr. Long about the matter". No doubt "the matter" not only constituted a reference to the 800 shares but also to the male respondent's obligations with respect to the additional 1,000 shares concerning which, at the outset of the conversation, he professed to have no recollection but which, at a later stage, he appears somewhat grudgingly to have recalled. But he did not in the course of this conversation authorise Mott to exchange an additional 1,000 shares in the old company on his behalf. Indeed, the concluding terms of the conversation indicate that he did not intend to authorise Mott to do anything at all and make it clear that it was his intention to endeavour to make his arrangements with the appellant himself. The terms of the conversation were not, in our opinion, susceptible of conveying to Mott that any authority such as that alleged was intended to be given. Nor do we think the circumstance that the first move towards the exchange of the 4,000 shares in the old company was made that day indicates that Mott assumed that such an authority was intended. The appellant himself was actively interested in the amalgamation and the exchange of 4,000 shares no doubt would have been effected in his own interest even if the conversation between Mott and the male respondent had not taken place. At this time the male respondent and the appellant were still on reasonably friendly

terms and the exchange of these shares was not only a course which served the appellant's own interests but one of which he had reason to assume the male respondent would be prepared to approve. But we can see no evidence capable of supporting a finding that the male respondent authorised the conversion of the shares held on his behalf and that of his wife, nor any evidence capable of supporting a finding that he tacitly or expressly indicated that he would be prepared to accept the delivery of certificates for shares in some other company as performance of the agreement to purchase 1,000 shares in the old company.

Accordingly we are of the opinion that the only course open to us is to dismiss the appeal with costs.

IN THE HIGH COURT OF AUSTRALIA.

Arthur Leonard Long appellant

V.

Cole & Cole Respondent

Please supply one set of the Reasons for Judgment herein at a cost of Sixpence per folio.

Dated the 13th day of ~~October~~ October, 1953

J. A. Williams & Son

Solicitor for the appellant

Folios at 6d. per folio = £1-8-0