IN THE HIGH COURT OF AUSTRALIA

ARMSTRONG

V.

CAPPER

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Tuesday, 9th November, 1954.

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

C.7103/51

ARMSTRONG v. CAPPER

JUDGMENT (ORAL)

DIXON C.J.
McTIERNAN J.
FULLAGAR J.
KITTO J.
TAYLOR J.

ARMSTRONG v. CAPPER

This is an appeal from a decree of McLelland J. granting specific performance of an agreement for the sale and purchase of land. The suit was a vendor's suit. The plaintiff, the vendor, is the owner of a residence upon an area of one acre, one rood, eighteen and a half perches, in Bowral. It consists of three allotments and/was apparently known as "Tait's" block. It appears that the plaintiff was desirous of selling his residence and he placed it in the hands of an agent named Walker. This he did somewhere at the beginning of 1951. At the end of March 1951 the defendant met Walker and spent a little time in his company. The defendant apparently had been addicted to alcohol and had undergone some treatment which had terminated some little time before. While his alcoholism was a little better he was not entirely free from it. Walker had him to stay with him at his house for some few days at the end of March and the beginning of April. At that time it does not appear that he was drinking very heavily. He took him to see the plaintiff's house and apparently the defendant expressed his desire to buy such a residence. There was a very cursory inspection of the place but the three men, the plaintiff, the defendant and Walker, afterwards met. They were at Picton Showground on what appears to be Saturday, 7th April. On that day a document was drawn up and was signed by both Armstrong the defendant, and Capper, the plaintiff. In the first place the document was given the date Saturday, 6th April 1951, but in somewhat irregular figures the correct date of the seventh of the fourth month 1951 was added. It was a Saturday. The document expresses in a very rough and crude way an agreement for the sale of the property for the sum of £13,500. On the same day a cheque was given by the defendant for a deposit of £1,350. It is that transaction which the decree of McLelland J. specifically enforces.

The defence of the defendant to the action of specific performance was in the first place that the document itself was not an absolute contract of sale, but was conditional upon the approval of Mr. Smith who was the Managing Clerk of his solicitors, Messrs. Biddulph and Salenger. In the second place, the defendant contended that the document, considered as a whole, was not a complete but only an incohate agreement of sale; it was too vague and inconclusive to amount to a contract. In the third place he relied upon a defence that he was in such an inebriated condition that the contract was void or alternatively that the remedy of specific performance should not be granted by a Court of Equity. The last defence was disposed of on the facts and is not made the subject of this appeal by the defendant. The appeal depends entirely on the contents of the document. Photostats were made of the document and the original, of course, was put in evidence before his Honour. Both parties appear to have been of opinion that it did contain a phrase to the effect that it, or some part of it, was to be confirmed by Mr. Smith. The contest was whether he was to confirm the description of the area and the boundaries of land or whether he was to confirm,in the sense of approve, the whole transaction before it took effect. It does not seem that very great attention was paid to the reading of the somewhat bad writing in which the contract is expressed. It begins by saying: "Ken Armstrong and Richard Capper agrees to buy and purchase" and then is inserted the word "respectively", and it continues "the Property known as 'Monabillie', Mount Rd. Bowralfor £13,500". It will be noted that the word "purchase" follows the word "buy" as if it was the opposite side of the transaction. In fact, the word "purchase" should have been "sell" because it was Armstrong who in fact intended to buy and Richard Capper who agreed to sell. No point, however, appears to have been made of this error at the trial,where the document might have been rectified. After the figures £13,500 there is no full stop but there follows the sentence: "Vacant possession with 8 weeks as from 6/4/51". The

letter "v" at the beginning of the word "vacant" is a capital and it would appear on a scrutiny of the document that it is intended to be the commencement of an independent sentence ending with the date 6/4/51, although there is no full stop after the "51" of the figures "6/4/51". Beginning with a capital "L" there is this statement: "Land approx 100" and "180" with a "?" is written over it "x 300 i.e." and then there is a capital "X" meaning from "Mount Rd to back to Oxlys boundary", next in brackets "(the 3 Tait Blocks)" and in another set of brackets "(1 2 & 3,)"and there is a comma after the "3", and then with a small "t" there is the phrase on which so much turns "to be confirmed" as both parties seem to have read it "by Mr. Smith of Biddulph & Sallenger of Phillip St Sydney." When the document is scrutinised there seems to be very little real ground for reading it as "confirmed". The word seems to be very much more like "compared". Quite distinctly are the three letters "com" and then there is a letter which conceivably might be "f" but which is very like a "p" as the writer forms other p's in the document and certainly at the end concludes with "ed". The letter "r" is not clearly or certainly formed but after the "p" comes an "a". The word looks to me very like the word "compared" and not "confirmed". Then follows a sentence of lesser importance "Richard E Capper has the privilege of removing 20 trees or shrubs & replacing same with like variety" and then over on the back of the document "This deal is on a friendly give & take basis as Mr. Armstrong & Mr. Capper will continue to be neighbours after the sale". Then appear the signatures and the date "Saturday (6/4/51)" and after that the figures "7.4.51" and underneath - "Deposit £1350 herewith".

If the words which are critical are read "to be compared by Mr. Smith", as seems the more probable reading, it is clear enough that they do not express anything more than a necessity by Mr. Smith to compare with authentic documents the description of the land and particularly its dimensions. If, however, it is read, as

the parties appear to have read it, as "confirmed" the question raised by the appellant is one which is more debatable, but, even so reading it, it appears to us that analysing the document as I have attempted to do, it forms part of the sentence beginning with the word "Land" describing the land and then going on as part of the same sentence to require Mr.Smith to confirm what it says. That is the manner in which McLelland J. read it. So reading it he came to the conclusion that it was a mere requirement as to the dimensions and boundaries of the land that Mr. Smith should confirm the description. It does not go to the essence of the contract or impose upon the transaction entered into by the parties thereto any external condition depending upon the act or opinion of a third party. Therefore, on either reading of the document, it appears to us that we must come to the conclusion that the contention based on that sentence fails. The sentence must be read, however, with the whole document and the second matter relied upon by the defendant appellant must be considered in the light of what it contains. That point is that there was no effective agreement but only what may be described as a provisional or tentative agreement expressing a desire to carry through a transaction to be subsequently expressed in binding form. When the whole document is considered, including the statement concerning the deal being "on a friendly give & take basis", it is said to have that effect. But so reading the document it does not seem possible to treat it in that manner. It begins with a most definite expression of agreement and it goes on with a sufficient description of price and parcels, subject, of course, to what has already been said as to the critical phrase. It goes on also to the detail of the removal of the trees. What may be described as the final declaration of the friendly character of the deal relates only to the way it shall be carried through. It cannot be treated as an indication that the parties did not regard themselves as then and there bound to carry out the transaction, that is to say on the basis of an open contract.

For these reasons we are of opinion that the appeal should be dismissed with costs.