IN THE HIGH COURT OF AUSTRALIA

WEDD

V.

PARKER AND OTHERS

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on THURSDAY, 16TH OCTOBER, 1958.

W. M. Houston, Govt. Print., Melb.

WEDD

v.

PARKER AND OTHERS

ORDER

Appeal allowed with costs.

Judgment of the Supreme Court of Western Australia varied as follows:

(1) by substituting for the second of the orders therein contained a declaration that the option to purchase the defendant's share in the capital and assets of the partnership business, which became exercisable under clause 20 of the partnership agreement of 21st October 1953 at the time of the giving of the notice dissolving the partnership, has not been validly exercised;

(2) by adding after the fourth order therein contained an order that liberty be reserved to all parties to apply in the Supreme Court from time to time for such orders as may be proper for the due winding-up of the partnership;

(3) by substituting for the fifth of the orders therein contained an order that the costs of the plaintiffs of the action up to and including the said judgment, taxed on the Higher Scale in Appendix N to the Rules of the Supreme Court of Western Australia, with certificate for counsel and certificates for the second and third days, be paid by the defendant to the plaintiffs, and that all further costs in the action be reserved to be dealt with in the Supreme Court.

Order that the costs of the action to be paid by the defendant to the plaintiffs under the judgment of the Supreme Court as so varied and the costs of the appeal to be paid by the respondents to the appellant under this Order be set off.

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JUDGMENT

DIXON C.J.
KITTO J.
MENZIES J.

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This appeal is from a judgment of the Supreme Court of Western Australia (Wolff J.) in an action between the members of a partnership. The partnership carried on a business of dry cleaners in and around Perth. It was governed by an agreement dated the 21st October 1953 which provided that the partnership should continue for a period of three years certain from that date and thereafter until determined by six months' notice. There were six partners. During the three-year period, namely on 28th June 1956, five of the partners gave the sixth a notice purporting to determine the partnership forthwith under a provision in that behalf contained in the partnership agreement, and one of the five simultaneously gave the sixth a notice purporting to exercise an option under the partnership agreement to purchase the share of the sixth in the capital and assets of the partnership. The five then sued the sixth, seeking a judgment of dissolution of the partnership and ancillary relief. An injunction was claimed on the footing that a round worked by the defendant for picking up clothes for dry cleaning in certain areas south of the Swan River was part of the partnership business. On the other hand the defendant counterclaimed for declarations that the notices abovementioned were ineffectual. He also counterclaimed for dissolution of the partnership as for a wrongful repudiation of the partnership agreement by the plaintiffs, and for other relief.

At the hearing Wolff J. gave judgment for the plaintiffs on their claim and dismissed the counterclaim. Judgment was entered declaring that the partnership was

validly dissolved by the first of the abovementioned notices, that the option of purchase which the second notice purported to exercise was validly exercised thereby, and that the pick-up round in areas south of the Swan River was part of the business and goodwill of the partnership and was operated by the defendant for and on behalf of the partnership. From that judgment the defendant brings this appeal.

The question concerning the ownership of the round south of the Swan River was contested at length before Wolff J. and his Honour's finding on it was challenged in the notice of appeal to this Court. Upon that question however the appeal is not now pressed. The appellant's counsel submitted an argument against the declaration that the partnership was dissolved by the notice of dissolution given to the appellant on 28th June 1956, but in the end he took up the position that, since both parties desired a winding-up on the footing that the partnership was dissolved on that date, the validity of the purported dissolution was immaterial except as to costs. The fate of the appeal was thus made to depend upon the question whether the purported exercise of the option of purchase was effectual.

Several grounds were suggested upon which it might be held ineffectual, but in the view we take there is no need to discuss more than one. It is a ground depending upon the true construction of the provision, in clause 20 of the partnership agreement, by which the option is created. The provision is expressed to apply if any one of the partners commits any breach of certain provisions of the agreement, or becomes physically or mentally unfit to attend to the business, or commits any act of bankruptcy or any criminal offence, or does or suffers to be done any act which would be a ground for

the dissolution of the partnership by the Court. It provides that "then and in any (such) case the other partners may, within three calendar months after becoming aware thereof, by notice in writing determine the partnership, and that in that case the other partners shall have the option (to be exercised at the time of giving such notice) of purchasing the share of the defaulting partner in the capital and assets of the business upon the terms as are set forthwith in the next succeeding clause hereof in relation to the purchase by the surviving partners of the share of a deceased partner". The next succeeding clause, dealing as it does with the event of the death of a partner during the continuance of the partnership, gives, not a single option of purchase to the surviving partners jointly, but successive options, first to one partner the plaintiff Norman Alfred Parker, and in the event of his not purchasing then to the other surviving partners. Norman Alfred Parker's option is conferred for a period of one month from the death of the deceased partner, and in the event of its being exercised the purchase price is fixed as the amount at which the share stands in a balance sheet of the partnership to be prepared as at the date of death of the deceased partner and is to be paid by the purchaser to the representatives of the deceased partner within twelve months of the exercise of the option. If Norman Alfred Parker does not exercise the option within the specified period, any one or more of the other partners is to have a similar option of purchasing the share of the deceased partner for a period of one calendar month from the time that Norman Alfred Parker gives notice of his intention not to exercise his option or the expiration of the period within which he had to exercise the option whichever shall be the sooner.

The notice given to the defendant on the

28th June 1956 purporting to exercise the option under clause 20 was a notice by Norman Alfred Parker alone. It read -

"Mr. Peter. G. Wedd,

I NORMAN ALFRED PARKER herewith give you notice of my intention to exercise my option as appearing in the said Partnership Agreement dated 5th (sic) October, 1953, to purchase your share as a defaulting Partner in the capital and assets of the said Partnership business.

(sgd.) N.A.PARKER".

If clause 20 is to be read as giving the option to "the other partners" collectively, this notice must necessarily be invalid. If, on the other hand, the reference in that clause to the terms of clause 21 which relate to the purchase of a deceased partner's share imports mutatis mutandis so much of the provisions of clause 21 as creates options of purchase exercisable by "the other partners" successively, the notice must be held an effectual exercise of the option given to Norman Alfred Parker. There is strong prima facie reason for understanding the expression "the other partners", in the portion of clause 20 which creates the option of purchase, as meaning all the other partners acting together, for that is plainly the meaning of the same expression where it first appears in the clause, namely in the portion of the clause providing for a notice to determine the partnership. Why should not that be the meaning of the expression where it is used for the second time? The plaintiffs reply that a sufficient reason for reading it differently is to be found in the words of the clause itself: the option is an option to purchase "upon the terms" set forth in

clause 21. This, they submit, is a reference, not only to the provisions of clause 21 as to the ascertainment of the purchase price and the time for payment, but also to the provisions which confine the option to Norman Alfred Parker in the first instance and make it exercisable by the others in the event only of his not exercising it within the specified period.

Were it not for one feature of the clause this would be a possible view to take, though it could hardly be considered to give the material words their most natural meaning. It treats the concluding portion of clause 20, beginning "upon the terms", as so controlling both the expression "the other partners" (where it secondly appears) and the expression "shall have the option" that what is imported from clause 21 not only supplies the terms of the potential purchase but converts what would otherwise be a single option in favour of a single group of partners into successive options in favour respectively of Norman Alfred Parker and any one or more of the other continuing partners.

But the words enclosed in brackets in clause 20 show conclusively that this is not what the clause intends. They are unequivocal: the option is to be exercised at the time of giving the notice to determine the partnership. To be exercised by whom? Surely, by the persons giving the notice to determine the partnership. The plaintiffs seek to meet the difficulty with which the words in brackets confront them by pointing out that for the giving of the notice to determine the partnership clause 20 requires joint action, and that it therefore contemplates consultation among "the other partners". They suggest that it also contemplates that the consultation will extend to the question of exercising the option of

purchase, so that before the notice of determination is given Norman Alfred Parker will have decided whether he will exercise the option of purchase and will have communicated his decision to the others, and the others (if he has decided not to purchase) will have agreed amongst themselves whether they or any of them will do so. The answer, however, is clear. Clause 20 prescribes one period of time and one only within which the right to determine the partnership and the right to purchase the defaulting partner's share may be exercised, and the words in brackets preclude a construction which would require Norman Alfred Parker to decide whether to exercise the option in any less period of time than the three months which is allowed for all "the other partners" to decide whether to determine the partnership. Those words are inconsistent with any construction putting Norman Alfred Parker in a different position from the other plaintiffs in relation to the option of purchase. There is one option; it is made exercisable by one group of partners, within one period, and at one moment of time; and the moment is fixed by reference to another act which must be done, if it is to be done at all, by the same group acting as a body.

So reading the clause, we are of opinion that the option of purchase of the defendant's share in the partnership was not exercisable by Norman Alfred Parker alone,and that accordingly the purported exercise of it by him on 28th June 1956 was ineffectual. The judgment of the Supreme Court should be varied to express this conclusion. All parties should be given liberty to apply in the Supreme Court so that such orders may be made as are proper for the due winding-up of the partnership.

The judgment of the Supreme Court provides that the plaintiffs' costs shall be on the

basis of a claim for £1217 3s. 7d.. The intention no doubt was to make an order entitling the plaintiffs to be indemnified against their liability for the costs of the action as taxed on what is called the Higher Scale in O.65 r.17 of the Rules of the Supreme Court. However, presumably by a slip, no order was made for the payment of the plaintiff's costs either by the defendant or out of the partnership assets. The trial of the action was devoted mainly to the questions whether the pick-up round south of the Swan River belonged to the defendant and whether the defendant so conducted himself that the plaintiffs were entitled to determine the partnership under clause 20. These questions were decided against the defendant, and it seems likely that what was intended was an order that he pay the plaintiffs' costs of the action up to and including the judgment. He has not displaced on this appeal any of the findings of fact which were made against him. His counsel did indeed direct some argument to the question whether the event relied upon by the plaintiffs as entitling them under clause 20 to determine the partnership had in fact occurred, the event being breach of a provision in clause 17 (b) requiring the defendant to pay all moneys received by him on account of the firm into the firm's bank account. There was, however, ample ground in the evidence for the finding which Wolff J. made against the defendant on this question, and we see no ground for disturbing that finding. If the judgment under appeal had contained an express order that the defendant pay the plaintiffs' costs it would have been correct. To make the order effective a provision of this kind should be added to the judgment. And we think that this should be done notwithstanding that under our decision the plaintiffs have failed in one object of the suit. In the same way we think that the appellant should have the costs

of the appeal notwithstanding that this judgment decides one of his points only and leaves aside the others. The situation that arises between the parties seems best met by a full order for costs of the suit on the one hand and a full order for the costs of the appeal on the other and an order that the costs of the two proceedings be set off.