13 ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

DE VRIES AND OTHERS

V.

WIGHTMAN AND OTHERS

ORIGINAL

REASONS FOR JUDGMENT

L. 3 0

Judgment delivered at Sydney

on Tuesday, 8th September 1959

W. M. HOUSTON, Govt. Print., Melb.

8/55

DE VRIES AND OTHERS

v.

WIGHTMAN AND OTHERS

ORDER

Appeal allowed with costs. Order of the Full Court of the Supreme Court discharged. In lieu thereof order that judgment be entered for the plaintiffs upon the claim in the action for £1750 with costs of the action and judgment be entered for the defendants upon the counterclaim for £560 with costs of the counterclaim. Order that the judgments upon the claim and the counterclaim be set off and that the plaintiffs recover the balance only, viz. £1190, and be at liberty to issue execution therefor. The costs of the claim and counterclaim when taxed are to be set off and execution may be issued for the balance.

DE VRIES AND ORS

v.

WIGHTMAN AND ORS

JUDGMENT

DIXON C.J.
McTIERNAN J.
KITTO J.
TAYLOR J.
WINDEYER J.

DE VRIES AND ORS.

v.

WIGHTMAN AND ORS.

On 26th November, 1954, the appellant entered into an agreement in writing to purchase from the respondents the right title and interest of the latter in and to "a general mixed and cafe business" at Clontarf near Brisbane "together with the goodwill of the said business and the stock-in-trade, fixtures, fittings, plant, trade utensils, implements, licences and quotas used by the vendor in connection therewith" as set out in a schedule to the agreement. The purchase price was £3,000 and this sum was payable as to £2,000, upon the execution of the agreement and as to the balance, by instalments of not less than £10 per week the first of which was to become payable on 27th November, 1955. The sale was expressly subject to the purchasers obtaining a satisfactory lease of the business premises for a period of three years with an option of a further term of three years at a weekly rental of £10. The respondents were, however, the registered proprietors of the premises and on 30th November, 1954, they executed a memorandum of lease whereby they leased the premises to the appellants for a term of three years at the specified weekly rental. The premises consisted of a shop and flat dwelling and on the day after the agreement was executed the appellants took over the business. When the lease was executed on 30th November they took possession of the flat.

By March 1955, it was apparent that the appellants were dissatisfied with their bargain and in the following month their complaints crystallised into definite allegations that the purchase had been induced by fraudulent representations on the part of the respondents. They claimed that the business was worth much less than the amount of the purchase price, and accordingly, they demanded to be compensated. Their allegations were met by an emphatic denial and no compensation was forthcoming. Subsequently, on 25th May, 1955, the appellants

commenced proceedings in which they sought damages for the loss they claimed to have suffered. The action, which was to recover damages for deceit, came to trial in 1958 and on 26th September in that year the appellants obtained judgment for £1,456. The respondents, however, moved to set this judgment aside on the ground that the appellants had failed to establish that the business was worth less than they had paid for it. That application succeeded and this appeal is now brought from the order of the Full Court of Queensland.

It should be mentioned at this stage that on 8th December, 1954, the appellants had executed a bill of sale over the lease and the tangible assets comprised in the business to secure repayment to the respondents of the balance of the purchase price and that, in view of what the appellants claimed to be the facts, they did not at any time pay any part of this balance. Indeed in June, 1955, they ceased carrying on the business and, thereafter, they refused to pay the rent reserved by the lease though they continued to occupy the flat as their residence. The consequence was that on 15th September, 1955, the respondents gave them notice to quit the premises and on the same day indicated their intention to take such steps under the bill of sale as might be necessary to protect their interests. Nothing further was done under the bill of sale until July, 1956, when a formal demand for repayment was made and thereafter the respondents took possession of the chattels previously used in the business. Finally, the respondents vacated the subject premises in August, 1956.

Some recital of these facts has been necessary in order to understand the differing approaches to the question of damages made by the judge of first instance and the Full Court. The trial judge formed the opinion that "the business and the lease purchased by the plaintiffs from the defendants had no value". He was satisfied that if the plaintiffs had

continued to carry on the business they "would have continued to lose money". This was a view which, not unnaturally, he thought was supported by the evidence that from the time the appellants left the premises in August, 1956, the respondents did not use the premises for business purposes nor let them to anyone else until a considerable later time when the Brisbane Cash and Carry organisation commenced business in the premises. But the business which that organization conducted was "an entirely different proposition to the business sold to the plaintiffs". On this view, it is said, it became necessary for the learned judge to attribute a value to the plant and fittings but he did not do this, because they had, as he said been repossessed. Then he held that the appellants were entitled to the sum of £2,000 which they had paid less the sum of £250 for stock which they had taken over pursuant to the agreement. Thereafter he allowed, pursuant to the respondents' counter-claim, an amount of £294 representing rent at the rate of five guineas per week for fifty-six weeks from 25th June, 1955, and in the final result, directed judgment for the appellants in the sum of £1,456.

As already appears the respondents' appeal to the Full Court was concerned only with the assessment of damages and that Court differed from the learned trial judge because it thought the conclusion was not open upon the evidence that the business had no goodwill. Townley J., with whom the other members of the Court agreed, pointed out that in the months from December, 1954 to April, 1955, inclusive, the appellants had made monthly profits totalling £384. As against this a loss of £133 was made in May, 1955, and in the following month the appellants lost a further £36 before closing the business. He also referred to the fact that prior to the advent of

of the respondents, the business had been allowed to run down and that it was actually closed for some eight to ten weeks before the purchase whilst the premises were being renovated so that the appellants were, therefore, "virtually starting from scratch". In these circumstances, the members of the Full Court Court thought that it was impossible to say that at the date of sale the business had no value at all and, since the evidence failed to reveal the value of the business, they were of the opinion that the appellants had failed on the issue of damages.

Some of the steps taken by the learned trial judge in assessing damages may appear to be open to criticism. For instance it may be said that if, as his Honour held, the business had no goodwill at all it was necessary for him to ascertain the value of the tangible assets which passed pursuant to the agreement. If that was all the appellants obtained for their purchase money then the difference between the value of what they received and the purchase price which they had agreed to pay was, in the main, the measure of their damages in relation to the agreement. And this was so whether or not they had paid the whole of the purchase money or whether some unspecified part of it had been satisfied by seizure and sale under the bill of sale. We should, perhaps, add that the evidence does not disclose whether or not there was an actual sale or, if there was, what amount was realised. During the hearing of the appeal, however, we were informed that, at the trial the respondents had, in effect, treated the appellants' liability for the unpaid purchase money as satisfied by the seizure and that they had abandoned their claim to that sum or any part of it. That being so it was not out of place when the time came to assess damages to disregard the balance of purchase money originally left outstanding and, likewise, to disregard the value of the plant and equipment which the appellants had originally obtained and which had been taken

in satisfaction prior to judgment. On this view the only item to be set off against the amount of £2,000 which had been paid by the appellants was the value of the stock which originally passed to the appellants. In the course of closing down the business the appellants had refrained from replacing stock and comparatively little, if any, remained when the respondents made their seizure. Some little difficulty arises, however, from the fact that in dealing with the respondents' counter-claim the learned trial judge awarded them £294 for rent under the lease. This was at the rate of £5.5.0 per week for fifty-six weeks from the 25th June, 1955. But the lease continued until it was surrendered in August, 1956, and the rent reserved by it was at the rate of £10 per week. Whether or not this rent was excessive and whether or not some additional amount by way of damages should be allowed to the appellant in respect of such an item is a matter of some difficulty. In fact they paid rent at this rate for some thirty weeks but this expenditure was reflected in the trading results which, in turn, induced the learned trial judge to reach the conclusion that the business had no goodwill. Nor, in the events which happened, can the appellants contend that they had no escape from their liability to pay an excessive rent until August, 1956, for in the previous December they had received notice to quit and they might then have left the premises and avoided any further liability. It should perhaps be observed that the appellants didnot in their action seek to have the lease set aside. Nor, apparently, did they seek any such relief at the trial. On the contrary they remained in possession and continued to do so even after they had been asked to leave. In these circumstances the learned trial judge was in error in assessing the amount recoverable under the respondents' counter-claim at the rate of £5.5.0 per week and thereby, in effect, making an allowance to the appellants in respect of rent which he considered to

be excessive, or treating the case as one in which the respondents were entitled to succeed in a claim for rent only for the occupation of the flat after June, 1955.

It may be said at once that the present difficulty would not have arisen in the case if there had been some clear evidence establishing the value of the business when the appellants purchased it, or on the other hand, denying that it had any goodwill at all. But one thing that does appear with reasonable certainty from the evidence is that it was not worth anything like the sum for which it was purchased. Indeed there are cogent reasons for supposing, in accordance with the conclusion of the learned trial judge, that it had no value beyond that to be found in the stock-in-trade and plant and fittings. Nor is the reflection that the appellants did in fact make profits in the first five months of their operations sufficient to exclude this conclusion for the accounts, which disclosed these profits, make no provision for the services of the appellants. In effect, the conclusion to which, in the circumstances of the case, a study of the accounts leads is that the appellants worked long hours for considerably less than wages in an attempt to make a success of the business. This is so even when the accounts are recast to exclude expenditure on legal expenses and other items which were not properly chargeable in ascertaining the profits earned. And in May and June, 1955, there were losses and the trial judge was satisfied that if they had persisted in carrying on they would have continued to lose. Apparently the business, such as it was, was seasonal, and it may be that trade would have picked-up in the warmer months of 1955 but the conclusion is inescapable that the price obtained from the appellants for the business was out of proportion to its worth.

In those circumstances, what is this Court to do? It is, of course, true that the onus of establishing their damages rested upon the appellants and if, upon the evidence,

it is impossible to say whether or not they suffered a loss their claim must fail. But if it is apparent, as we think it is, that the business was worth far less than the price which was obtained for it, then in the absence of precise evidence of the character which is usually produced in cases of this character we must be content to be guided by such less substantial indications of value as may be found in the evidence.

As already appears the conflict between the learned trial judge and the Full Court resulted, in substance, from the view that the former thought the so-called business had no goodwill whilst the latter thought that it was impossible to reach this conclusion upon the evidence. Primarily this latter view seems to have proceeded from the fact that for some months the appellants did in fact make profits in the business. But it is beyond question that the appellants worked diligently and for long hours in the business, and, as already pointed out the accounts which show these profits make no provision whatever for their own services. Nor, since the appellants refrained from replacing stock in the later stages of their operations, did the accounts indicate what the position would have been if greater expenditure had been incurred on this account. Indeed, so far as the accounts throw any light on the problem they suggest that the so-called business was worthless. For what they reveal is that for some seven months the appellants worked for a fraction of the wages they might have earned doing the same work and it is idle to suppose that any purchaser with a knowledge of the facts would pay any substantial sum of money for such a privilege. But we are told that there is evidence that the business had a "great potential" and that a competent and diligent purchaser could, in time, have built up a profitable business on the site. It should be added that it was not suggested in argument upon the appeal that any or any substantial goodwill existed in the sense that there was an established and profitable business

in existence on the site. Nor could any such suggestion have been made in view of the evidence that for a number of years ending a few months before the advent of the appellants a previous owner, one Burnett, had experienced great difficulties in endeavouring to carry on and that for some seven or eight weeks immediately before the purchase by the appellants no business had been carried on at all. As the Full Court said, the appellants were "virtually starting from scratch".

Perhaps it is not too much to say that there was no existing business at that time. But, however that may be, the contention of the respondents was not, as already pointed out, that there was in existence, a business with a valuable goodwill in the ordinary sense but that the site had a "great potential" and that upon the evidence this could not be disputed. To this contention, however, two answers may be made. The first is that there was abundant evidence that the site had no special value and the learned trial judge appears to have been impressed by it. The witness, Mosman, whose evidence his Honour accepted, said that he was asked to consider taking over the business shortly before the appellants purchased it. His view was that the price then asked for it, namely £2,000, was out of the question. "The place" he said "has been a white elephant for so long and is dead. Anyone with business ability would know that end of the Peninsula was in the doldrums". This evidence, if believed, can mean only that the site had no "great potential" and no special value.

The second answer which may be made is that the agreement for the sale of the business gave no right to the appellants to occupy the site. It was simply an agreement for the purchase of a business with specific plant and fittings and no part of the specified consideration was paid for the right to occupy the site. The agreement was merely subject to the appellants obtaining a lease of the premises for a

specified period at a rental of £10 a week and such a lease was subsequently executed. Insofar, therefore, as the respondents now seek to support their case by contending that the premises had a great potential value the answer may be made that the appellants sued to recover the damages sustained by them when they entered into the agreement for the purchase of the business and this agreement gave them no right whatever to occupy the premises in question.

There is evidence that some six years before the purchase, Burnett paid the sum of £1,450 for the business and that a like sum was paid by the respondents to induce Burnett to abandon the business and vacate the premises. But in the circumstances these dealings afford no indication that the business had any valuable goodwill when the appellants made their purchase. Nor does the letter which was written by the appellants' solicitors to the respondents' solicitors on 30th September, 1955, carry the matter any further. In this letter the appellants complained that they had lost an opportunity of selling the business to a third party by reason of the respondents' delay in consenting to a transfer of the lease. But we have no knowledge of the conditions upon which the appellants then proposed to sell, nor was the proposed dealing investigated at the trial. In the circumstances, it seems to us that at the trial the conclusion was open upon the evidence that the business itself had no goodwill and that, in so finding, the learned trial judge was right. For the reasons given, therefore, the plaintiffs are entitled to recover upon their claim the sum of £1,750, being the sum of £2,000 less £250 for stock, and the respondents, on their counter-claim, are entitled to recover the sum of £560, being rent at the rate of £10 a week for fifty-six weeks. When this amount is set off against the amount to which the appellants are entitled judgment should be entered for them for £1,190.