ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

BAYLDON AND ANOTHER

V.

STAFFORD

REASONS FOR JUDGMENT

Oral Judgment delivered at Sydney

on Wednesday, 11th November 1959

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

C.1978/55

BAYLDON AND ANOTHER

v.

STAFFORD

ORDER

Appeal dismissed with costs.

BAYLDON AND ANOTHER

v.

STAFFORD

JUDGMENT
(ORAL)

JUDGMENT OF THE COURT
DELIVERED BY DIXON C.J.

CORAM: DIXON C.J.
McTIERNAN J.
FULLAGAR J.
TAYLOR J.
MENZIES J.

BAYLDON AND ANOTHER

v.

STAFFORD

This is an appeal by the defendants in the suit from a decree for specific performance of an agreement of an unusual description, relating to the departure, if I may use that loose expression, of one of three men who conducted a joint enterprise from the association which they had maintained and which had taken the form of the incorporation of two companies. The agreement was in substance for the sale of the plaintiff's share in the business, but was expressed as a sale of his share or interest in the companies.

The decree under appeal declared that the agreement referred to in the statement of claim ought to be specifically performed and carried into execution. That is the main portion of the decree, which then proceeds to give only one or two special directions.

The agreement alleged in the statement of claim was that the plaintiff should sell his share in each of the two companies to which I have referred to the defendants for the sum of £7500, payable as to £1000 forthwith and as to the balance by fifty-two weekly payments of £125. It was a further term that the plaintiff should be paid by the defendants, until the sum of £7500 was paid in full, an additional weekly sum of £25, treated as salary and therefore subject to a deduction for tax which reduced it by £3. The result, as will be seen, is that the plaintiff was to be paid £147 a week for twelve months with £1000 down.

The defence denied the agreement and so far as the denial of the existence of the agreement was concerned, it turned to a very great extent on the view that while the parties were more or less ad idem as to the main features of the agreement, nevertheless they had not reached a concluded

agreement. To that defence there was an additional plea which relied upon misrepresentation. That was found against the defendants. The defendants, in support of the plea of misrepresentation, put forward a case that they had agreed on £7500 and the consequential other terms by reason of a representation by the plaintiff of the amount which he had put into the venture. The evidence upon which they relied to show misrepresentation presupposed most of the terms of the agreement. However, Myers J. who heard the suit, declined to accept the evidence called for the defendants in the main and I think that reliance upon any expressions used by the defendants in the course of that evidence might perhaps be misplaced. His Honour said: "I may say at this stage that the plaintiff made a much better impression upon me than the defendants' witnesses and I prefer to accept him." He then goes on to exclude from that general statement two gentlemen who are accountants and who had been called on behalf of the defendants.

The appeal has been placed on one general ground which is expressed in the notice of appeal in these terms: that his Honour should have held that there was no concluded agreement between the parties in respect of the sale of the shares.

It is desirable before proceeding to read two short passages from his Honour's judgment, one dealing with the parties and the other with his view of that ground. The learned judge says: "The parties appeared to me to be men who though they no doubt firmly understood the business of dealing with secondhand cars were quite ignorant of the ordinary principles relating to companies and partnerships. I do not think that any of them at any time appreciated the difference between the two forms of association, and I do not think that they realised that the issued capital in a company gave, in effect, the entire assets of the company to the holders of the

shares. They appeared to be extremely vague on the subject and to have some vague notion that the business of a company was something distinct from the company itself and something that would not necessarily pass to the defendants by the transfer to them of the only outstanding share - that is, the share of the plaintiff in these companies."

Then, as to the specific ground taken in the notice of appeal, his Honour's finding was expressed in these terms: "The defendants claim that there was no contract because, they say, the terms of the contract had not been fully agreed upon and because they say the parties were not to be bound until the agreement had been reduced to writing. As to this, I think it is sufficient to say that I do not accept the evidence given on behalf of the defendants and in my opinion the contract was entirely unconditional."

At the opening of the appeal two matters were relied upon for the purpose of showing that that conclusion was wrong. First, it was suggested that there was a term of the contract enforced by the decree left undetermined. It was in this form, and I quote from the pleading: "It was a further term of the agreement that if the defendants should make default in payment of four of the said fifty-two weekly payments that the sums already paid by the defendants pursuant to the said agreement should be forfeited to the plaintiff at his option."

The evidence accepted by his Honour did support the view that a forfeiture was contemplated if default was made; but there was nothing in terms in the evidence stating expressly, that is in terms, that the forfeiture was to be at the option of the plaintiff. On that ground it was suggested not only that the terms as pleaded were not made out but that there was fatal incompleteness or uncertainty as to the character of the forfeiture.

There is no reason, in my opinion, for saying that the agreement was incomplete, for, whether the words "at his option" were proved or not, the result would be the same. If the term was not expressed by the parties the general tenor of the agreement, which was an oral agreement, would mean that it rested with the plaintiff to say whether he would have a forfeiture and a rescission of contract or would proceed with the contract and enforce it. That ground as a separate reason for supporting the conclusion that there was no concluded agreement appears to me to fail.

But a wider ground was stated. It is that if you examine the general character of the alleged contract as appearing from the plaintiff's evidence it is not sufficiently clear in its terms and that it is certain that the parties intended that it should be drawn up by a solicitor, who was named, so that on ordinary principles it remained an unenforceable agreement to agree until a document had been drawn up by the solicitor and executed by the parties.

One is always reluctant to come to a conclusion that parties have definitively contracted so as to bind themselves when they do contemplate a formal document being drawn up. That reluctance may be seen in the decisions of the Court, particularly in Sinclair Scott & Co. v. Naughton (1929) 43 C.L.R. 310 where however it may be said that Sir Isaac Isaacs vigorously dissented on the ground that right and morality ran in the other direction.

On the other hand, in Niesman v. Collingridge, 29 C.L.R. 177 there is a well known instance of an agreement which remained to be drawn up but which was enforced. According to the language given in the reasons although perhaps not in the decree, it was to be enforced by two steps: the first being a direction that the documents should be drawn up and settled.

These decisions were reviewed in the case of Masters v. Cameron, a much more recent decision, reported in 91 C.L.R. 353 where three possible categories of agreement are given which have just been read by counsel. It is in the third category that it is contended that this particular case falls.

Now it is an oral contract and after all it is a question of fact on what terms it was made. There is evidence which has been read to us, particularly in the course of the plaintiff's cross-examination when he was recalled, which might support the view that the contract was incomplete and was not enforceable until it was drawn up in writing by a solicitor. But on the other hand the plaintiff gave evidence which, if accepted, is decisively against that view. He was asked in cross-examination, whether wisely or not, this question: "You wanted a written agreement setting out your rights and they wanted a written agreement?" His answer is: "It was agreed to be fair." Then it goes on: "The arrangement was subject to Mr. Lincoln Smith drawing up the agreement? A. Not subject. He was told, he was instructed, by Mr. Bayldon and Mr. Bullock, the two defendants, and myself, to draw up what I have said." It had been previously said by the witness that all had agreed unanimously on the terms. The cross-examination persisted and after some questions about the £1000, counsel cross-examining said: "I suggest to you the whole arrangement was subject, that is conditional, on a document being drawn up by Mr. Lincoln Smith, the solicitor, and signed by all the parties. A. No, the agreement was definite. It was agreed between the three of us."

It appears to me to be completely within the province of the learned judge to prefer that view of the case and to treat it as a definitive contract to be carried out independently of the common intention that it should be expressed in writing. His view is much supported by the fact that the parties acted on the agreement and indeed large sums of money

were regularly paid on the footing of the agreement. It is true that cheques by which they were paid were drawn on the company; but what I have read from the learned judge's judgment would explain that the parties were inclined to treat the share in the business as the thing and not the plaintiff's shares in the incorporated companies. It is true also that curious receipts were given which suggest that money was paid for the purchase of a business, but all that illustrates the non-legal way the parties were looking upon the transaction and the fact that they were dealing in substance with the payment out of one of three people and no doubt that one who himself found the major part of the money. The agreement was between him and the two defendants. They were liable to him but it was for them to find the money from any source available to them. It appears to me that the learned judge was quite justified in his conclusion that it was to be a concluded contract before it was actually put into writing.

As the argument advanced, wider ground was taken as to the indefinite nature of the agreement and suggestions were made that other terms were not completely agreed. I do not myself think that there is any substance in any of the suggestions that were made. I think that counsel was well advised in his first choice of the two subsidiary grounds upon which he opened the appeal.

For those reasons I think the appeal should be dismissed.