ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

HAMMOND

V.

THE BANK OF ADELAIDE

REASONS FOR JUDGMENT

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Judgment delivered at PERTH

on 20th June, 1963.

(10)

W. M. HOUSTON, Govt. Print., Melb.
C.1978/55

HAMMOND

v.

THE BANK OF ADELAIDE

ORDER

Appeal dismissed with costs.

HAMMOND

v.

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JUDGMENT

KITTO J.
TAYLOR J.
MENZIES J.
WINDEYER J.
OWEN J.

HAMMOND

v.

THE BANK OF ADELAIDE

In the action out of which this appeal arises the respondent bank sued the appellant to recover the sum of £5,497.17.10. which was alleged to be due and owing under a guarantee given by the appellant to the respondent on 15th July 1959 in consideration of advances made by it to a company known as J. H. Masters Pty. Ltd. on its No. 2 account with the bank. The guarantee was limited to the company's liability on that account. The business of the company included trading in wool and at the time when the guarantee was given it was experiencing difficulty in obtaining adequate funds for this aspect of its business. However, one Pearce, a public accountant, introduced Masters, the Managing Director of the company, to the appellant and an arrangement was made, pursuant to which the guarantee was given, which had the effect of enabling the company to obtain accommodation from the respondent on an account known as the company's No. 2 account. Further reference will presently be made to the terms of this arrangement but for the moment it is enough to say that within a short time after it was made the company's difficulties were accentuated and on 10th September 1959 it, at the request of the respondent, appointed one Evans to supervise its operations and it agreed, inter alia, with Evans that it would not, during the continuance of his appointment, transact any business contrary to his advice and that it would not draw, accept or endorse any bills, notes or cheques unless countersigned by him. On the following day the company gave to the respondent a debenture over the whole of its assets which as to its trading stock constituted a floating charge. It is not

without some importance to notice that by the terms of the debenture it was provided that the company should not be at liberty without the consent in writing of the respondent to create or give any debenture, mortgage, bill of sale, charge, lien or other security upon or over the property or assets comprised in the debenture. Shortly after the execution of the debenture it was registered under the Bills of Sale Act and, ultimately, on 14th December 1959 Evans was appointed receiver thereunder.

At this time the company had in its possession some 137 bales of "Ripley" brand wool and these the receiver seized and subsequently sold in England for a net amount in sterling. By the defence raised to the respondent's claim in the action this wool was said to be the property of the appellant and he claimed to set off so much of the amount which the wool realized against the respondent's claim under the guarantee and to recover the excess, approximately £984. But this figure was an error for the excess calculated in Australian currency was £2,934.

Unfortunately for the appellant, the proofs at the trial did not support the case so simply stated and, for reasons which will appear, the claim to recover any excess was abandoned on the hearing of the appeal. Instead the defence assumed a more complicated form and for a proper understanding of the case it is necessary to state how the proceeds of the sale of the wool in question were applied by the bank. The appellant's guarantee, it should be remembered, was limited to the company's liability on its No. 2 account and if the proceeds had been credited to this account it would, with another substantial credit subsequently made, have sufficed to extinguish the appellant's liability. But the proceeds were credited to the company's general account and it is this of which, basically, the appellant complains. He no longer asserts that he was beneficially entitled to the wool in the sense that he was

entitled to retain it, and the proceeds of sale, for his own use but rather that he was to hold it for resale upon condition that the proceeds of sale should be paid to the credit of the No. 2 account.

The basis of this claim is the arrangement between the respondent and the company, to which reference has already been made. Initially it was said that this arrangement was contained in a deed of 21st July 1959 in which the respondent was referred to as the "promoter", J. H. Masters Pty. Ltd. as the "company" and J. H. Masters as the "surety". It recited that the promoter was desirous of participating in a business venture with the company and that in order to do so he would guarantee the required finance in the manner and for the purpose thereinafter provided. Further it was recited that the company was desirous and willing to participate in the said business venture "by arranging the required finance and conducting the business in the manner thereinafter provided" and that the surety had requested the promoter to guarantee the required finance. By clause 1 of the deed it was provided that the company should establish and maintain a current account styled "J. H. Masters Pty. Ltd. Number 2 Account" at the Bank of Adelaide, Fremantle and that all cheques and other negotiable instruments drawn on the said account should be drawn by the public accountant previously referred to, Pearce. Clause 2 stipulated that the promoter should become surety for the company in respect of advances made or to be made by the bank not exceeding in the aggregate the sum of £10,000 and by clause 3 it was provided that the company, as agent for the promoter, should purchase and resell wool in such quantity, of such quality and at such price or prices as it should in its absolute discretion think fit, provided that the total purchase price of wool so purchased and remaining unsold should not exceed at any one time the sum of £10,000 and that the company should resell the wool so purchased within sixty days of and inclusive of the date of purchase thereof.

The wool so purchased was to be invoiced to the promoter and the purchase price was to be paid to the vendor thereof against delivery into the company's store at Fremantle. Such wool was to be stored by the company free of charge to the promoter and the promoter was to be entitled to a share in the net profits in the manner specified in the deed. In effect the deed provided that the promoter should be entitled to receive the sum of £1,000 a year by quarterly payments whether profits were made or not.

The action was commenced on 24th July 1961 and the defence and counter claim were filed and delivered in the same year. By this defence the only basis for the appellant's claim was the deed referred to but by an amended defence, filed and delivered on 29th November 1961, the appellant claimed that on or about 9th November 1959 the company had sold to him the 137 bales of wool in question for the sum of £9,966.11.6. and that the wool was at all material times held by the company for the purposes of resale and on the condition that the proceeds of such resale should be paid into the No. 2 account of the company with the respondent. Subsequently on 13th April 1962 a document, which was in effect a further pleading but which was said to constitute particulars of paragraph 5 of the amended defence, was delivered. The date of the delivery of this document was about three weeks before the trial commenced and by it it was alleged that on or shortly prior to 22nd July 1959 the company and Pearce, as agent for the appellant, verbally agreed

"(a) . . . the defendant company would submit to Pearce invoices for wool (showing the number of bales, the registered wool brand, the description, the poundage and the price) which it was prepared to sell to the defendant Hammond

(b) That if Pearce were prepared to purchase such wool at the prices stated, he would draw a cheque on the No. 2 account of the defendant company with the plaintiff bank for the amount of such invoice

(c) That the property in such wool would thereupon pass to the defendant Hammond

(d) That such wool would be held by the defendant company for the purpose of resale for not longer than 60 days and that the proceeds of such resale should be paid

into the said account

(e) That during such period of 60 days the defendant company would have the right to repurchase the wool from the defendant Hammond at the price at which it had been sold by the defendant company to the defendant Hammond and that the purchase price would be paid into the said account.

The learned trial judge found as a fact that an agreement was made more or less in the terms of paragraphs (a), (b) and (c) above and, further, that it was a term of the agreement that wool purchased by the company should be held by it for the purposes of resale for not longer than sixty days and that otherwise the provisions of the deed of 27th July 1959 were to apply. We were invited to review this finding of fact and there would appear to be sound reasons why we should do so. It was first of all pointed out that it was apparent, and indeed conceded, that the 137 bales of Ripley brand wool - which was constituted by wool blended by the company - had not been purchased by the company on behalf of the appellant and that therefore it was not within the purview of the deed. Then it was said that if such an oral agreement was made at the time alleged it was made prior to the execution by the appellant of the deed which bears date the 21st July 1959. The reason advanced for the making of the oral agreement was said to be that the parties had already then realized that the deed would not effectively carry out the intentions of the parties in many cases but if this was so it is surprising, to say the least, that the terms of the contemporary oral agreement were not incorporated in the deed. However, this consideration may be set aside, for what is even more surprising is that an agreement which the parties to it are said to have regarded as of first-rate importance was entirely overlooked when competition between the receiver and the appellant arose concerning the 137 bales of wool for the claim made by the appellant and his advisers at all times rested expressly and exclusively upon the deed. Further, as already appears, the deed was also the basis of the claim asserted by the original

defence and the existence of the oral agreement was asserted only three weeks before the trial commenced and when it must have been about as clear as it could be that the wool in question had not been purchased by the company on behalf of the appellant and that, therefore, the deed could not constitute any foundation for the appellant's claim. Upon a review of the whole evidence we think there is grave doubt whether any oral agreement such as was then alleged was ever made but we find it unnecessary to review the learned trial judge's findings for the purpose of disposing of the case. We therefore proceed to consider the matter on the basis that an oral agreement of the character specified by the learned trial judge was in fact made.

Before dealing with the contentions of the appellant concerning any transaction which fell within and which was, therefore, governed by the terms of the oral agreement it is of some importance to refer not only to the dealings which took place in relation to the 137 bales of Ripley brand wool but also to earlier transactions. In all there were seven transactions in which the appellant was concerned. Altogether seven invoices were produced by the company to Pearce or one of his subordinates and the particulars of these are as follows:

Invoice No.	Date	Amount
1	22. 7.59	£1,656.15. 6.
2	27. 7.59	£1,324. 4.10.
3	27. 7.59	£4,221. 3. 4.
4	5. 8.59	£5,899. 3.10.
5	7. 8.59	£2,118. 7. 1.
6	27. 8.59	£9,942. 3. 4.
7	9.11.59	£9,966.11. 6.

Upon the presentation of invoices 1 to 5 inclusive, cheques were drawn by Pearce or under his authority for the amount specified in each invoice and the appropriate debits appear in the statement of the company's No. 2 account. On 4th August 1959 the sum of £6,449.16.1. was paid to the credit of the No. 2 account but by 29th August when the cheque for the amount appearing on invoice No. 5 was presented and paid the account

was overdrawn to the extent of £8,770.13.6. It should be added that at no time were the proceeds of sale of any wool paid to the credit of this account; it appears that the vendors of wool to the company were paid by cheques drawn on the company's general account, that in respect of the first five transactions the general account was reimbursed by cheques drawn on the No. 2 account and that this had the effect of transferring the company's liability to the bank for the amount of the purchase price in each of the latter transactions from its general account to its No. 2 account. But in respect of the last two transactions where the purchase price in each case - £9,942.3.4. and £9,966.11.6. respectively - had been paid for by cheques drawn on the company's general account, that account was reimbursed by cheques drawn on the No. 2 account only to the extent of £1,172.5.6. and £24.8.2. respectively. The reason for this was that in respect of invoice No. 6 the company purported to give a credit of £8,769.17.10. in respect of wool which was said to have been sold by the company and this amount was said to be owing to the appellant as upon a repurchase of it by the company from the appellant. In respect of invoice No. 7 a credit of a like nature was given in respect of the wool comprised in invoice No. 6 and the amount of £9,942.3.4. was set off - "Reimbursement of 136 bales wool our invoice of 27th August 1959" - against the amount of invoice No. 7, namely £9,966.11.6. Accordingly the cheque drawn on the No. 2 account was for the amount of £24.8.2. only. It will be seen, therefore, that the terms of the oral agreement were materially departed from in the case of the last two transactions and the reason for this is not difficult to see. If, and as long as, the No. 2 account was reimbursed by cheques drawn on the general account after a sale had been made and if the appellant was the owner of any unsold wool, his position would have been secure. But the company was in difficulties and it was on 10th September 1959 that Evans was appointed to supervise the

company's operation. There can be little question that at the time when the wool comprised in invoices Nos. 6 and 7 was sold, the company was not in a position to draw cheques on its general account which would have the effect merely of transferring liability from its No. 2 account to its general account and this presumably was the reason why, instead of attempting to transfer funds to the No. 2 account from the account which had borne the liability for the purchase of the wool in question in those instances, an attempt was made by the giving of credits in the manner mentioned to produce, in effect, the same result. And when it is seen that the credit given in respect of the transaction relating to the so-called purchase by the appellant of the 137 bales of Ripley brand wool comprised in invoice No. 7 was constituted by the price payable on the so-called repurchase by the company from the appellant of the 136 bales comprised in invoice No. 6 and that the latter wool had, in fact, been finally disposed of by the company some two months earlier the unreality of the transaction is exposed.

It was the primary contention of the appellant that the effect of the agreement as alleged was to constitute each transaction which was governed by its term, a contract of sale. But when it was pointed out that this could be so only if the appellant had undertaken to pay for the wool - as distinct from the mere transfer of funds from one of the company's accounts to another - the proposition was but faintly pressed. Of course if this were the right conclusion the appellant would be left with the right to the net proceeds of the wool comprised in invoice No. 7, namely £8,431.18.2., subject to a liability to pay to the company the purchase price of £9,966.11.6. out of his own funds. Nevertheless the appellant maintained that the effect of the agreement was that, upon the drawing of a cheque on the No. 2 account for the amount of any invoice, the wool comprised in it became the property of the appellant subject to the condition that the proceeds of sale should be paid into the No. 2 account. How far this contention would assist the appellant in view of the fact that the debenture of 11th September 1959 had been duly

registered some two months before it is unnecessary to enquire for it appears beyond question that the transaction with respect to the 137 bales of Ripley brand wool could not have been governed by the agreement alleged and there was no independent agreement which had the effect of vesting the property of the wool in the appellant.

In terms the oral agreement accepted by the learned trial judge provided that the property in the wool would pass to the appellant after Pearce had drawn a cheque on the No. 2 account for the amount of the invoice presented. Whatever the effect of the agreement might have been in relation to transactions to which it applied it was quite clearly a condition precedent to the vesting of the property that such a cheque should be drawn. The agreement made no provision for the giving of credits in the manner specified and, certainly, made no provision for the repurchase by the company from the appellant of wool which the former had already sold. In effect, as already appears, what happened was that a cheque on the No. 2 account was drawn for the sum only of £24.8.2. and the balance of the so-called purchase price was said to have been satisfied by a credit which arose because the company had failed to pay an amount equal to the sum credited into its No. 2 account some two months earlier. In our view such a transaction was not within the purview of the agreement which the learned trial judge found to have been made. No doubt the form in which the transaction was effected was adopted as a device to make it appear that it was a transaction of the character contemplated by the agreement. But in reality it was not. There was no so-called repurchase by the company of the wool comprised in invoice No. 6 as the appellant in his cross-examination conceded and, therefore, no basis for any set off on this account against the amount for which a cheque should have been drawn to meet invoice No. 7. Nor was there any evidence of any agreement that there should be set off against the amount of any such cheque the amount which the

company should have paid to the credit of the No. 2 account on the earlier sale of the wool comprised in invoice No. 6. In our view the transaction was completely outside the agreement which the learned trial judge found to have been made and which, for the purpose of disposing of the appeal, we have assumed was, in fact, made. The appeal should, therefore, be dismissed.