9 24 OF 1965 ORIGINAL 9

IN THE HIGH COURT OF AUSTRALIA

SIEVERS

V.

EDER AND ANOTHER

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on THURSDAY, 7th JANUARY, 1965

A. C. Brooks, Government Printer, Melbourne
C.7639/60

SIEVERS

v.

EDER AND ANOTHER

ORDER

Appeal dismissed with costs.

SIEVERS

v.

EDER AND ANOTHER

JUDGMENT

KITTO J.
TAYLOR J.
OWEN J.

SIEVERS

v.

EDER AND ANOTHER

The appellant was one of three defendants in an action brought by the respondents in the Supreme Court of South Australia. He was the manager of a firm of land agents, consisting of two partners named Lumsden and Kean, which carried on business in Adelaide and which was acting as agent for a Mr. and Mrs. Baluta who wished to sell a residential property of which they were the owners. The respondents, who are husband and wife, agreed to buy the property and on 25th February 1958 the parties signed a contract of sale. The purchase price was £5,750 which was to be paid, as to £350 as a deposit on the signing of the contract; of the balance £3,400 was to be paid "on date of settlement and vacant possession to be secured by way of first mortgage from a finance company at an interest rate of 10% per annum to be adjusted yearly and repayable by monthly instalments of £38.10.0 including interest", and the remaining £2,000 was "to be carried as a second mortgage by the vendors to be repaid by monthly instalments of not less than £14 including interest at a rate of 7% per annum to be adjusted quarterly and to be paid in full within a period of five years".

The respondents paid the deposit but later told the appellant that they did not wish to complete the purchase. The Balutas were about to go abroad and the appellant pressed the respondents to carry out the contract, saying that he would be able to re-sell the property on their behalf and without loss to them. As a result, a written agreement dated 7th May 1958 was drawn up by a solicitor acting for the respondents and signed by them and by the appellant who purported to sign for

himself and for Lumsden and Kean. The recitals in the agreement referred to the fact that the respondents ("the purchasers") had on 25th February 1958 contracted to buy the property from the Balutas; that the purchasers were unwilling to continue with the sale and desired to be relieved of their obligations; and that the "land agent", which in the context meant the appellant, had "undertaken that if the purchasers shall complete the purchase in accordance with the contract, the land agent will re-sell the property without any financial loss to the purchasers whatsoever". The operative clauses of the agreement were three in number. By Clause 1 the respondents gave the "land agent" the sole agency for the sale of the property for a period of three months from the date of the contract with the Balutas. Clause 2 provided that

> "The land agent for himself and his employers Lumsden & Kean shall within the said period of three months re-sell the said property at a price equal to:
>
> (a) The purchase price paid by the purchasers, plus
>
> (b) The commission payable on the re-sale of the said property, plus
>
> (c) The costs of and incidental to the drawing engrossing stamping and registering the Memoranda of Transfer and Mortgages mentioned in the said contract of 25th February 1958
>
> (d) All interest payable by the purchasers on the said mortgages
>
> (e) The costs of and incidental to the discharge or transfer of the said mortgages
>
> (f) All other costs charges and expenses whatsoever
>
> To the intent that the purchasers shall within the period of six months recover all monies paid out by them and within the said period of three months be discharged and released from all liability with respect to all obligations they entered into or debts they incurred in connection with the said sale and re-sale".

Clause 3 was as follows:

> "The land agent for himself his executors administrators and assigns covenants and agrees that he will indemnify and keep indemnified the purchasers and each of them from all damages costs and expenses which they may suffer or incur by reason of having completed the purchase and entered into this agreement."

Later in the month the respondents completed the purchase from the Balutas and became the registered proprietors of the property. In order to do this they borrowed £3,400 from a man named Heggaton secured by a first mortgage over the land and executed a second mortgage for £2,000 in favour of the Balutas. A few days later the appellant found a buyer for the property, a man named Ralph, and he and the respondents signed a contract of sale dated 2nd June. The price was £6,000 of which a deposit of £300 was to be paid forthwith and in fact was so paid. A further sum of £300 was to be paid on or before 31st May 1959 and the balance of the price, namely £5,400, was "to be paid by acceptances of a transfer of the existing first mortgage to Heggaton and the existing second mortgage to" the Balutas. The contract also provided for the payment by the purchaser of "all payments due by the vendors under and pursuant to the said mortgages from the date hereof until the transfer of the said mortgages and without affecting in any way the payment of the purchase price . . . shall pay in satisfaction thereof £42.6.8 per month", the first payment to be made on 30th June 1958. Settlement was to be made on 31st May 1959 or on such earlier date as the vendors might nominate.

Ralph went into possession of the property but, after paying a number of the monthly instalments for which the contract provided, he fell into arrears and apparently went out of possession of the property. No action was taken by the respondents to compel him to carry out the contract or to pay damages for its breach, presumably because his financial position would not have justified such a course. As a result, it may be inferred, of his failure to meet his obligations, the respondents

made default in the payment of interest under the first mortgage with the result that the property was sold by the mortgagee Heggaton for £3,850, the amount due being £3,821.3.11. The respondents also failed to meet their obligations under the second mortgage with the result that in 1960 the Balutas took proceedings against them in the Supreme Court to recover the amount owing under the mortgage and obtained judgment with costs for £2,355.0.7.

The respondents then instituted these proceedings against the appellant, Lumsden and Kean, claiming that they were liable, under the agreement of 7th May 1958, to make good to the respondents the amount of the judgment obtained by the Balutas and the costs of the proceedings to obtain that judgment. They sought also to recover a number of smaller sums. These consisted of £21.6.11 paid for municipal rates levied on the property after the sale to Ralph, 17/5 for land tax, £103.8.6 being the respondents' costs of and incidental to the purchase of the land from the Balutas, and £91.15.0 being the respondents' costs of the proceedings brought against them by the Balutas. The amount of £103.8.6 included the sum of £64.15.0 being stamp duty on the purchase from the Balutas.

The action was heard by Mayo J. who gave judgment for the respondents against the appellant in the sum of £3,044.1.2. His Honour dealt first with a claim by the respondents that the appellant, Lumsden and Kean were liable under Clause 2 of the agreement and, on this issue, the learned trial judge found against the respondents. He took the view that the obligations imposed by Clause 2 were satisfied when the contract of sale to Ralph was made. The respondents have not challenged this ruling nor have they attacked a further finding by his Honour that the authority of the appellant to bind Lumsden and Kean by the agreement set out in Clause 2 was not established. His Honour went on then to consider Clause 3 of the agreement

and held that, under that clause, the respondents were entitled to recover against the appellant. The amount of the judgment and costs recovered by the Balutas and the other items which went to make up the respondents' claim were, he thought, "damages costs and expenses" suffered or incurred by them "by reason of having completed the purchase" from the Balutas "and entered into" the agreement of 7th May. Accordingly he found for the respondents in the sum of £3,044. 1. 2.

It was submitted that the amounts which the respondents were seeking to recover were not damages, costs and expenses suffered or incurred by them by reason of having completed the purchase from the Balutas and entered into the agreement of 7th May.

The expression "damages ... suffered" is obviously intended to embrace much more than is comprehended in the measure of damages for breach of contract or in tort: in its natural meaning it extends to any pecuniary loss and was intended to furnish to the respondents an indemnity in the event of the property not producing sufficient to cover them for all the obligations which they undertook or might incur by completion of the purchase. To give it that meaning in the context of Clause 3 appears not only to be justified but actually to be required, when the agreement is read as a whole in the light of the circumstances which led to its being entered into. The respondents had made it clear to the appellant that they were intent upon getting out of their contract with the Balutas. The evidence does not explain why this was so, nor why the appellant was so anxious to see the contract with the Balutas completed before their departure for America that he was willing to undertake a personal obligation in order to ensure that result. But the fact is that he procured the completion of the purchase by the respondents by promising to resell the property within the specified

period of three months, upon such terms that they should be freed within that period from all liabilities they should undertake in connection with the purchase and resale and should recover within six months all moneys they had paid out. Clause 3, following immediately, makes plain what is the general intention of the agreement and binds the appellant accordingly: if any financial burden, not recouped by the proceeds of resale, remains upon the respondents by reason of their having completed the purchase the appellant will save them harmless from it.

In the argument submitted for the appellant, several narrower interpretations of the clause were suggested, but none of them can be accepted. The damages, costs or expenses referred to, it was said, are only such as are suffered or incurred by the respondents by reason of the double event, the completion of the purchase from the Balutas and the making of the agreement itself. Obviously a distributive reading is required: all the damages, costs and expenses are covered, any that may be suffered or incurred by reason of the completion of the purchase and any that may be suffered or incurred by reason of the making of the agreement. The inclusion of both events serves only to emphasise the comprehensiveness of the intended indemnity. Next it was said that Clause 3 is directed only to the event of failure by the appellant to effect a resale in accordance with Clause 2. Doubtless it covers that event, but there is no justification for saying that its wide language should be read down so as to cover no other event. A more important submission was that the resale which in fact took place, the resale to Ralph, was upon terms different from those contemplated by Clause 2, and that the respondents by agreeing to that resale accepted it as fully satisfying the appellant's obligations under the agreement. Clearly they did accept

it as satisfying the appellant's obligations under Clause 2, but there was no reason why they should intend to forego their rights under Clause 3, and there is not a word in the evidence to suggest that in fact they did so intend. It is impossible to conclude from the bare fact of their having agreed to the resale to Ralph that the appellant was absolved from his general obligation to see that they suffered no loss by reason of completing their purchase from the Balutas. Finally, it was contended that the items of loss which Mayo J. allowed in his judgment were not within the description in Clause 3 of damages, costs and expenses. Only by an unduly restricted interpretation of the expression could this contention be supported. What we have already said shows the wide sense which we understand the expression to have in the context of the agreement.

The chief item in the amount awarded to the respondents was the amount by which the proceeds of the first mortgagee's sale fell short of what was necessary to satisfy the respondents' obligations under the second mortgage. The respondents are liable to pay this amount by reason of having completed their purchase from the Balutas, and it falls within the description in Clause 3 notwithstanding the fact that if Ralph had duly performed his contract the respondents would have been saved from having to meet this liability. The failure of the purchaser to meet his obligations under the resale of the property, though not, of course, specifically adverted to in the agreement now sued upon, was an event of the kind against which the need existed for such a provision as that contained in Clause 3 if the respondents were to be placed thereby in a position of immunity from loss by reason of completing their purchase. In our opinion the clause was rightly applied by Mayo J. to the circumstances of the case.

The appeal must be dismissed.