GOODWIN

V.

BAKER

REASONS FOR JUDGMENT

Oral

Judgment delivered at Sydney

on Monday 2nd November 1970

GOODWIN

v.

BAKER

ORDER

Appeal dismissed with costs.

GOODWIN

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JUDGMENT

(ORAL)

BARWICK C.J.

GOODWIN

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The appellant, against whom a verdict was found in a District Court for $10,000 for the malicious prosecution of the respondent, failed in his appeal to the Supreme Court because the points of law which he there sought to raise as a ground for setting aside the judgment of the District Court had not, in the opinion of the Supreme Court, been raised before the judge of the District Court for his decision.

The Supreme Court held that the requirement of s. 144 of the District Courts Act 1912 had not been satisfied and that, following a consistent line of decision both in England and in Australia, the appellant's appeal was not competent; see Smith v. Charles Baker & Sons (1891) A.C. 325 at p. 333.

In this court counsel for the appellant has not challenged the proposition that unless the points of law have been raised before the District Court, no appeal based on them can be entertained: but he has argued that the form of certain questions addressed by the trial judge to the jury sufficiently satisfied the requirements of s. 144 in that they represent the trial judge's decision on matters of law to which those questions are relevant, because he did, in fact, put the questions and act upon the answers which the jury gave to them.

The main point which counsel for the appellant has sought to raise as a ground of this appeal is that the trial judge did not properly instruct himself as to the elements necessary to be present if the finding of absence of reasonable and probable cause for the prosecution of the respondent was to be made.

I gather that what is said is that the trial judge ought to have considered the appellant's state of mind in relation to a person named Barker and not to have acted upon the answer to the first question which the jury made, which was as to the appellant's state of mind in relation to the respondent. The point sought to be made is that the jury ought to have been asked, not did the defendant honestly believe that the plaintiff was probably guilty of the offence in connection with which the warrant was issued, but did the prosecutor honestly believe that the accused was probably guilty of the offence in connection with which the warrant was issued.

The change in verbiage is suggested in order to call attention to the fact that the warrant was issued against Noel Barker, not against Noel Baker. However, so far from any point being taken as to the form of this question or as to the use made of the answer to it, that form was expressly agreed to by counsel for the appellant, who asked the trial judge to submit it to the jury and to ask them to answer it, along with other questions, in order to assist the judge in deciding himself whether or not there was an absence of reasonable and probable cause for the launching of the prosecution of the respondent.

It is quite clear that the questions which were asked of the jury were not intended to be exhaustive of the matters which the judge would have in mind in deciding the absence of reasonable and probable cause.

The trial judge who had heard the whole of the evidence, after the jury had answered the questions and returned the amount of their verdict, said this:

> "The jury, having answered these questions in the manner in which they have, and on the undisputed admissions by the defendant in the action, I find that there was an absence of reasonable and probable cause for the issue of the warrant."

Although counsel for the appellant did raise another matter with the trial judge after he had made this finding, no question of any kind as to the finding which he had made then or at any earlier time, as to any reason why he ought not to make such a finding, was raised.

I should add that the argument in support of the criticism of the trial judge and of the form of the questions asked of the jury, is that the state of the appellant's mind as to a person named Barker and not his state of mind as to the respondent whose name is Baker, was the matter to be considered in relation to the issue to be found by the judge. However, the appellant, in evidence, quite clearly stated that he had taken the view that Barker was a false name assumed by the respondent and it is quite clear that it was the respondent whom the appellant intended to prosecute, although because of the use of the name Barker in the hire purchase document the respondent's name in the warrant was given as Barker.

The point now sought to be raised as to the finding of the absence of reasonable and probable cause was not only not raised at the hearing of the case in the District Court, but it was not raised at the hearing of the appeal to the Supreme Court. I would add that in my opinion there is no substance whatever in the point.

The appellant also sought to raise some question as to the trial judge's direction to the jury as to whether or not exemplary damages could be awarded, and as to the matters which they ought to have in mind in considering that question. However, again no point was taken at the trial on this aspect of the summing up.

Some reference was made to the decision of this court in George Wills and Company Ltd. v. Davids Pty. Ltd. (1957) 98 C.L.R. 77 at p. 92 in order to overcome the effect of the failure to raise the points of law for the decision of the District Court judge in this case. However, nothing in that case, in my opinion, is intended to qualify the requirements of s. 144 of the District Courts Act 1912, as amended. In that case it was clear to the court from the record of the proceedings and from the reasons for judgment given by the District Court judge that the points of law there in question had in fact been raised before the District Court judge and had been decided by the judge; the record and the reasons afforded the requisite note of the points, although the judge had not been specifically requested by counsel to make a note of them. It is as well to observe the words of the court's decision, which are to be found at p. 92 of the report.

Some reference was made to rule 10, sub-rule 2, of the Court of Appeal rules dealing with the grant or refusal of a new trial in certain circumstances. However, that rule, in my opinion, can have no relevance when the appeal is not competent, because the points of law on which it is based have not been taken before the District Court. In my opinion, the Supreme Court was right in holding that the appeal to it should fail because the points raised had not been taken before the District Court judge.

I have already indicated that the additional points here sought to be raised were not taken either before the District Court or the Supreme Court. In my opinion, the appeal should be dismissed.

GOODWIN v. BAKER

JUDGMENT
(ORAL)

McTIERNAN J.

I agree.

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JUDGMENT
(ORAL)

MENZIES J.

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BAKER

I agree.

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JUDGMENT
(ORAL)

WINDEYER J.

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I agree.

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JUDGMENT
(ORAL)

OWEN J.

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I agree.