MAGNER v. McELLIGOTT

JUDGMENT WALSH J.

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The plaintiff who resides in Queensland has brought this action against the defendant who resides in New South Wales. By her statement of claim she seeks a declaration that she was joint owner with the defendant of two one-fifth share tickets in Mammoth Casket No. 2747 and entitled to half the proceeds thereof. She claims alternatively a declaration that the defendant was a trustee of the said tickets for the plaintiff and himself jointly.

The details of the statement of claim are inaccurate. It was in Mammoth Casket Art Union No. 4797 that a ticket (No. 52728) in which two shares had been purchased in the defendant's name won the first prize of $30,000, with the result that the defendant became entitled to one-half (not two-fifths) of that prize. At the time when the shares in that ticket were bought three shares in ticket No. 52729 in the same Art Union were also bought in the defendant's name. The fact that five shares were purchased appears to have led to the description of the shares as being one-fifth shares. But in fact they were one-quarter shares.

Apart from those inaccuracies there were some differences between the allegations in the statement of claim and the evidence given by the plaintiff at the trial. But, in my opinion, these differences are not of such a character that they require that amendments of the statement of claim must necessarily be made if the plaintiff is to succeed or that they render it impossible for the Court to accept the

plaintiff's account of what happened as being, in substance, a true account.

It is common ground that the plaintiff and defendant arranged that she would travel with him on a journey to Sydney upon which he was about to set out in a truck. He was the owner of the truck and carried goods on it for reward and the journey was for him an ordinary journey in the course of his business. He had become friendly with the plaintiff and her husband and on occasions he had stayed with them overnight. At the time when the arrangement was made that the plaintiff would go with him, her husband was away from home and a friend named Mrs. Gail Chirgwin who was then at the house agreed to take care of the plaintiff's young children during her absence.

Before setting out on the journey the parties went to a hotel and had some drinks and then went together to a small shop close to the hotel which was conducted by a person who had an agency for the sale of Golden Casket tickets. The plaintiff had been in the habit of buying tickets at that agency. According to her evidence she said to the defendant before they went to the hotel that she wanted to go to that hotel for a drink because the agency was nearby and she said "I always get a ticket there". He said "We will go halves in the ticket". When they went to the shop she selected some sunglasses that she wished to buy and then said to the woman who was serving in the shop "We want to buy a ticket". The woman said that there were two shares left in one ticket and asked whether they would take those two and two shares in another ticket or would prefer a full ticket. The defendant decided to take the two shares in one ticket and two shares in another ticket. In fact, as it turned

out, three shares were bought in the second ticket. The plaintiff gave their names and her own address and as the ticket vendor began to write, the plaintiff added that the ticket was to be called "Sydney Bound". The vendor said that there would not be enough room for all those details and she was told to put down the defendant's name only, together with the plaintiff's address and the syndicate name. The plaintiff offered then to pay for the sunglasses and for her share of the ticket. The defendant said that he would pay. Both had money out in their hands. The vendor took the defendant's money. The plaintiff took the tickets into her possession.

The tickets with which this action is concerned are in evidence. Upon them the vendor of the tickets wrote "Ted McElliott Sydney Bound Syn." On the corresponding butt she wrote "Ted McElligott 25 Postle Street Cooper's Plains Sydney Bound Syn". On the butt corresponding to the shares in ticket No. 52729 the surname had the spelling "McElliott" and "Qld" was added but otherwise the same details were written as on the butt of the winning ticket.

If the foregoing account of the purchase of the tickets is accepted I am of opinion that the plaintiff is entitled to succeed in the action. It is usual when there is an arrangement that a lottery ticket will be bought for two or more persons that each contributes or promises to contribute an appropriate amount towards the price of the ticket. In this case, according to the plaintiff's evidence, she offered to contribute but because the defendant insisted that he would pay the whole price she did not actually make any contribution. But, according to her account, it had been arranged previously

that a ticket would be bought in which they would "go halves". His insistence that he would pay and her acquiescence in it could not affect the rights of the plaintiff arising from the circumstance that it had been arranged that the ticket would be bought for the two of them jointly.

There is reason to suppose that at a later time each party believed that in order that another person might maintain a claim to an interest in a ticket, the actual payment of a share of its price might be essential, if the ticket had been purchased in the name of one person only. But if the defendant acquired the tickets in the circumstances stated by the plaintiff, I am of opinion that he became a fiduciary agent or trustee and was bound to hold his legal title to the rights conferred by the ticket for the benefit of himself and the plaintiff: see Van Rassel v. Kroon (1952-53) 87 C.L.R. 298 at p. 302 and Nassar v. Barnes (1954) 54 S.R. (N.S.W.) 113 at pp. 117-118.

But the defendant disputes that there was any arrangement that the tickets would be bought upon joint account. He asserts that they were bought by him for his own benefit. According to his evidence it was his idea that they should go to the hotel at Rocklea. They went then to the agency. She wanted to buy sunglasses and he wanted to buy a ticket. He told the vendor his name and spelt it for her. She asked for his address. The plaintiff intervened and said "No, put my address on it". He thought that this did not matter and he agreed to it. The vendor asked what syndicate name was wanted. He said he did not care and the plaintiff said to call it "Sydney Bound". He paid for the tickets. She paid for the

sunglasses. She took the tickets. He said that "she grabbed them straight off the counter and put them in her purse".

According to that account it is clear that no interest was acquired by the plaintiff. The result of the action depends upon a decision as to which of the conflicting versions of what happened is to be accepted. More precisely it depends upon whether the Court is satisfied that the version given by the plaintiff is more probably than not a substantially true account.

My conclusion is that I should accept the plaintiff's account as being probably correct in its essential elements. I am not prepared to accept everything that she said in evidence as being true. One example of evidence given by her which I do not accept is her statement that it was she and not the defendant who gave the spelling of his surname to the ticket vendor. There are other pieces of her evidence which I suspect are not true. But in relation to the matters which are of primary importance in the case, that is to say, the events leading up to and accompanying the purchase of the tickets and the subsequent statements and conduct of the defendant after it was known that a prize was won, I think that her account gains significant support from other witnesses and is more probable than the account given by the defendant. He was an unsatisfactory witness. I do not feel that I can rely upon his evidence.

The ticket vendor was not called as a witness and neither party gave any evidence that she was not available. The failure to call her could perhaps be regarded as telling against the plaintiff's case, as the plaintiff has the burden

of proof. But in the circumstances I do not find it very significant. It may be that she did not take much notice of what occurred in the course of what was for her a routine transaction.

Without examining all the details of the evidence I propose to refer to some features of it which appear to me to indicate that I should accept the case for the plaintiff.

I think that the witness Mrs. Chirgwin told the truth about what occurred when the plaintiff and the defendant returned after the trip to Sydney to the plaintiff's home. By this time Mrs. Chirgwin had seen a notice that someone called "McElligott" and two other persons had held the winning ticket (the remaining quarter shares of ticket No. 52728 had been bought separately by two persons). The defendant had already ascertained that a ticket in which shares had been bought when the plaintiff and he went together to the agency had won a major prize. According to Mrs. Chirgwin the defendant said, after she had referred to him and two other fellows as having won the prize, "No, Daphne and I shared the ticket". The plaintiff herself gave a somewhat different account of what was said, but upon her version of it, as well as upon that of Mrs. Chirgwin, there was an admission by the defendant that both the plaintiff and himself had won the prize. The defendant agreed that on this occasion the plaintiff said "Half of that is mine" and said "It was Teddy and I that won it". But he stated that he said she would get part of the money but not half of it. I prefer the evidence of Mrs. Chirgwin concerning this conversation.

What followed the conversation was that the plaintiff and defendant both went off together to collect the

prize. What had preceded it was that at a hotel at Jimboomba, some twenty-five miles out of Brisbane, the defendant made some telephone calls to check the information which he had just received that he had won a prize. Then there was some talk in the hotel in which, according to the plaintiff, the defendant agreed that she had a half share. But according to him, she made a claim to be entitled to a half share which he rejected. She stated in evidence that she said "You probably won't give me my half now seeing my name wasn't on the ticket". He said "No, I wouldn't do that to a blackfellow". It appeared to me to be odd that at that time the plaintiff should express such a doubt about what would happen. She said in evidence that she had done this jokingly but this is not convincing. The explanation is, I think, that the parties were under the impression that a person who held a ticket might be able to resist any claim to a share made by a person whose name did not appear on the ticket. It appears also that the plaintiff was apprehensive that her claim would be prejudiced because she had not paid part of the price of the ticket. I think it was through simplicity rather than through guile that she offered then to pay the defendant twenty-five cents, which he declined to take. All this doubt and worry on her part may seem odd having regard to the friendship between the parties. But I have not heard a full account of all that occurred during the week that they were away on their journey and I do not know all that may have happened to affect their relationship. In any event his version of what happened on this occasion at the hotel, and afterwards, is as much at variance as hers with the notion that perfect friendship and trust existed between them. I think

that it is more likely than not that in the discussion at the hotel he did not reject her claim to have a half share. But that discussion may have put the idea into his head that he might be able afterwards to get her to accept a much smaller slice of the cake. The defendant called as a witness a man named Ryan who was present with the parties at the hotel. But his account of what happened varied significantly from that of the defendant, as well as differing from that of the plaintiff. According to his account, the defendant's response to the plaintiff's claim to a half share was to say "You should have produced your money for the share of the ticket if you wanted to be in it beforehand when the ticket was bought". No suggestion was made by the defendant, according to Ryan, that she would be given anything from the prize. Mrs. Grant who was serving in the bar on that occasion gave evidence which I am satisfied was truthful. But she did not hear all that was said and could not recall all that she heard. From her evidence it seems clear that she received the impression that the two parties had shares in the winning tickets, but it would not be safe to place much reliance on that impression of hers.

I think it is probable that when the parties left the hotel at Jimboomba the defendant had not rejected the claim of the plaintiff to a half share and that she believed that he would give her that share, although she may have had some doubt as to what he would do. It is consistent with this that when they arrived at her home they were apparently upon good terms and that there he acknowledged (as I think he did) that they both shared in the win. On his own story he had given no indication of the amount which he intended to give her and, indeed,

he had not then made any decision on that point. It might have been some trifling amount or a large sum. Yet according to him she was content with that and did not make any greater claim until a considerable time had elapsed. This does not seem likely.

The defendant admits that later, after a claim had been made upon him by solicitors acting for the plaintiff, he told Mrs. Chirgwin that they (meaning the plaintiff and her husband) would not get any money because he had put everything away in his children's names. He told her that he had put $8,000 in their names. These statements were admittedly false. They could have been made by a man anxious to discourage the plaintiff from proceeding with a claim believed by him to be baseless. But the defendant can scarcely be surprised if the making of these statements (for no reason which he can suggest now) is taken as some indication that he thought that she had a good claim.

There are some facts which are not in dispute and which I regard as pointing to the probability that there was an arrangement that the tickets were to belong equally to the plaintiff and the defendant. None of these facts which I am about to mention is conclusive against the defendant's case. Explanations are offered for each of them. But in combination they provide a great deal of support for the plaintiff's case.

It was her address that was written on the butts of the tickets. This could have happened if she had no share in the tickets but is more likely to have happened if she had an interest in them.

It is common ground that the syndicate name was chosen by the plaintiff.

She took and kept the tickets. Even after she had produced them at Jimboomba to enable the win to be verified by the telephone calls, she took them back into her possession and did this apparently without protest, although by this time (according to the defendant) she was making, and he was rejecting, a claim by her to have an interest in the prize.

Finally, there is the fact that he paid her $1,000. He has advanced two different reasons for this. One was that because she was with him when he bought the tickets he considered it right that she should receive some of the money. According to him, it was in relation to this notion of fair dealing and to his statement that he would give her something and would not "wipe her clean" that he said, at Jimboomba, "I wouldn't do that to a blackfellow". It is thus that he explains that statement which was heard by Mrs. Grant. She did not hear what went before it. The plaintiff says that it was made as a response to her remark that probably he would not give her a share as her name was not on the ticket. This explanation by the defendant of the payment to the plaintiff of such a sum as $1,000 is not convincing. Considered as a friendly gratuity which would have been given to anyone who had happened to be with the defendant when he bought the ticket, it may be thought to be excessive.

The other reason advanced by the defendant in his evidence-in-chief and there stated to be the only reason for the payment was "so she wouldn't get sore and ring up my wife". It was put to the plaintiff in cross-examination, but

denied by her, that she had said to the defendant that she wanted a half share or he would be in trouble at home, because she would disclose to his wife that he had been unfaithful to her with the plaintiff on the journey to Sydney. Obviously, it is possible that this could have been seen as a promising opportunity for blackmail, which might procure for the plaintiff some of the gold which was coming to the defendant. This could be so whether or not there had been intercourse between the parties on the journey, which is a matter which has not been fully investigated in the evidence and upon which I make no finding. But there is no evidence that the plaintiff made any attempt to carry out that form of gold digging. I have no doubt that when counsel for the defendant asked the plaintiff the questions suggesting that she had thus threatened the defendant he was acting upon instructions. But the fact is that when the defendant gave evidence he did not say that any such threat had been made. He did say, as I have already stated, that his reason for paying $1,000 was so that the plaintiff would not talk to his wife. But immediately after saying that, the defendant said in evidence that nothing had happened to give him the idea that she might tell his wife something. He just thought that she might do so. He had no discussion with her as to how much she would need to be paid to keep her quiet. He fixed the amount of $1,000 himself without reference to her. In the result there is really no satisfactory explanation of the important fact that the defendant paid the plaintiff $1,000 about a week after he had collected the prize money. According to her, he said that he had paid that amount because most of the money had been placed in a savings bank account and some of it would have to be transferred to a cheque

account before he could make a further payment. According to him, the cheque for $1,000 was left with Mrs. Chirgwin for the plaintiff and no explanation at all was given to her at that time or afterwards for the choice of that amount as the sum which she should receive.

I find that the plaintiff has established that she was entitled to a half share in the prize money which the defendant collected.

I make a declaration that the plaintiff was entitled to receive from the defendant the sum of $7,500 being one-half the sum of $15,000 received by him on 23rd November 1970 in respect of a prize won by ticket No. 52728 in the Golden Casket Art Union No. 4797. I direct that judgment be entered for the plaintiff for $6,500, together with interest thereon at the rate of seven per centum per annum from 8th February 1971, and for the costs of the action. I make the usual order as to the exhibits.

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ORDER OF MR. JUSTICE WALSH

I make an order in terms of the draft order submitted by counsel, as amended, and as initialled by me for identification.

ORDERED that the defendant attend and be orally examined before the District Registrar of this Honourable Court at Brisbane on Friday the 25th day of June 1971 at 2.30 o'clock in the afternoon as to -

(a) Whether any and what debts are owing to the defendant; and

(b) Whether the defendant has any and what other property or means of satisfying the judgment obtained against him in this Court on the 28th day of May 1971.

AND IT IS FURTHER ORDERED that the defendant produce on such examination all books and documents in his possession or power relating to such debts and to any property which he has now either solely or jointly or which he has had either solely or jointly since the 23rd day of November 1970.

AND IT IS FURTHER ORDERED that costs of this application and of the said examination and of any proceedings arising from or incidental to the said examination be paid by the defendant. Liberty is granted to the defendant to apply if he is so advised after the said examination has been concluded and upon fourteen days' notice to the solicitors for the plaintiff for variation or rescission of the said order for costs.