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SUPREME COURT OF VICTORIA

IVEY v GRAHAM & ANOR

Dunn J

2 December 1975

CIVIL PROCEEDINGS – SALE OF HOUSE – BEFORE SETTLEMENT PURCHASERS ENTERED INTO POSSESSION OF HOUSE PURSUANT TO AGREEMENT WITH SOLICITORS – LETTER TO PURCHASERS THAT THERE WOULD BE NO SETTLEMENT UNLESS RENT WAS ADDED TO THE PURCHASE MONEY – PURCHASERS GAVE A CHEQUE TO VENDORS – CHEQUE BOUNCED – NO LAWFUL CONSIDERATION – COMPULSION – FINDING BY MAGISTRATE THAT PURCHASERS NOT LIABLE TO PAY THE PROCEEDS OF THE CHEQUE TO THE VENDORS – WHETHER MAGISTRATE IN ERROR: *BILLS OF EXCHANGE ACT*.

A special summons to recover $150.00 on a dishonoured cheque given by the defendant was dismissed. The complainant, a solicitor, was acting for the vendors of a house being sold to the defendants. Before settlement took place and before the defendants were entitled under the contract to enter into possession, the defendants entered into possession pursuant to an agreement between solicitors. This agreement was evidenced by a letter sent by the defendants' solicitor to the complainant on 16th December 1974 stating "our clients shall lease the property contracted to be sold at a weekly rental of $30 to be deducted from the settlement monies ..." (the letter preserved title rights etc. of the parties in the meantime. In addition the Magistrate accepted as a fact this agreement was confirmed between employees of each solicitor. On 21st January 1975 the complainant by letter to the defendants' solicitor stated that the possession (tenancy) was at a weekly rental to be added to the balance of the purchase price money payable at settlement. The complainant on behalf of the vendors maintained the attitude that there would be no settlement unless rent was added to the purchase money payable at settlement. Accordingly the subject cheque was given to the complainant. The Magistrate found there was no such agreement that the rent would be in addition to the purchase money and dismissed the complaint. Upon Order nisi to review—

HELD: Order discharged.

1. It was open to the Magistrate to hold as he did that the cheque was given without lawful consideration which would support a simple contract, because it was in fact made for a purpose for which there was no legal obligation. It was clear from the Magistrate's findings that this payment was only made under compulsion because the complainant was insisting that there would be no settlement unless the money was paid.

2. In those circumstances it fell clearly within the principle of a case in which a promissory note was given to the plaintiff by the defendant to obtain certain of his goods that were illegally detained by the plaintiff, the only means by which he could obtain their release or one means by which he could obtain their release was by giving this promissory note, to which the plaintiff was not entitled. It was held that the plaintiff could not recover on the note as the giving of the note was not given voluntarily but was given under compulsion and the same principle is clearly applicable to the present case.

***Brunker v Breckinridge* (1867) 6 SCR (NSW) p163, applied.**

DUNN J: ... Mr Walker for the complainant has made a valiant effort which I respect in an endeavour to convince me that the decision of the learned Stipendiary Magistrate is wrong and that although he found that the agreement was that there was to be no extra money paid I should notwithstanding, having regard to the provisions of the *Bills of Exchange Act*, still order these defendants to pay this money.

It has to be borne in mind that the complainant is the solicitor for the vendors and he is the person to whom the letter of 16 December was written and it must be inferred that he had full knowledge of what the agreement in fact was between the two solicitors as to the purchasers entering into possession.

Having regard to the findings of the learned Stipendiary Magistrate which are in these terms:—

> 'I accept the evidence of Mr Hammet, together with the Letter dated 16 December 1974 and the telephone conversation between Mrs Walker and Mrs Carter establishing that there was an agreement

> made between the solicitor for the vendors and the solicitors for the purchasers, which agreement is set out in the Letter dated 16 December 1974. I do not accept Mrs Carter's evidence (the employee of the complainant) which I found to be unsatisfactory as to the terms upon which the purchasers entered into occupation of the land owned by the vendors. I find that if the defendants had paid any money in respect of rent they would have been entitled to have it reimbursed by the vendors. As no money was paid by the defendants for rent then there was to be no reimbursement of the money paid to the defendant.'

I omit some words and the learned Stipendiary Magistrate went on:—

> 'The agreement which allowed the defendants to enter into occupation of the premises was for the convenience of both parties, particularly as this was the time of the year when settlement fell within the legal vacation.'

Accordingly, I think it was open to the learned Stipendiary Magistrate to hold as he did that this cheque was given without lawful consideration which would support a simple contract, because it was in fact made for a purpose for which there was no legal obligation. In any event, in addition on the return of an order nisi to review it is open to support the judgment or the order in the court below upon any ground that was open on the material before that court and the findings of the learned Stipendiary Magistrate. And it is clear, I think, from his findings that this payment was only made under compulsion because the complainant was insisting that there would be no settlement unless the money was paid.

In these circumstances it seems to me to fall clearly within the principle of *Brunker v Breckinridge* (1867) 6 SCR (NSW) p163, a case in which a promissory note was given to the plaintiff by the defendant to obtain certain of his goods that were illegally detained by the plaintiff, the only means by which he could obtain their release or one means by which he could obtain their release was by giving this promissory note, to which the plaintiff was not entitled. It was held that the plaintiff could not recover on the note as the giving of the note was not given voluntarily but was given under compulsion and the same principle is clearly applicable to the present case.

Accordingly, in my view the order made by the learned Stipendiary Magistrate was quite correct and the order nisi should be discharged with costs to be taxed.
