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SUPREME COURT OF VICTORIA — FULL COURT

COMMERCE CONSOLIDATED PTY LTD v JOHNSTONE

Gowans, Lush and Harris JJ

29-30 March, 17 May 1976 — [1976] VicRp 78; [1976] VR 724

CONTRACT – SALE OF PROPERTY – RECTIFICATION – MUTUAL MISTAKE – UNILATERAL MISTAKE.

This Report is the result of the appeal from the decision of Crockett J in *Johnstone v Commerce Consolidated* [1976] VicRp 46; (1976) VR 463. The facts and matters in dispute are set out in that report. On the dismissal of the appeal the Court said:—

HELD: The appeal against the order for rectification failed.
1. The critical question was whether there was a consensus between the parties, which they had communicated to each other, with respect to the date from which interest was to run. There had been no explicit communication between the parties on this point, but the trial Judge nevertheless found as a fact that there was a common communicated intention between the parties, by 19 November 1973 or thereabouts, that the interest should run from the date possession was given to the appellant, which was to be 1 May 1974.

2. The matter was an evidentiary one, and as there was no evidence to support an inference that the further difference, dealing with the way interest was to be calculated, had any effect upon the appellant, it did not lead to the conclusion that the parties ceased to continue to have a common intention about the other point.

3. The trial Judge took the view that, as he had rejected the evidence of the appellant's director, the appellant was on the horns of a dilemma, either one of which led to the conclusion that the respondents had established a sufficient mistake to entitle them to rectification. This was a legitimate process of reasoning and it was not fatal to the respondents' case that no express finding was made to show whether it was "common mistake" or "unilateral mistake" which formed the basis for the grant of relief.

The judgment of the Full Court (Gowans, Lush and Harris JJ) was delivered by Gowans J:
This is an appeal from a judgment of Crockett J in a vendors' action for rectification of a contract for the sale of land. The rectification claimed and ordered was the alteration of the date for commencement of interest on unpaid purchase money from 1 May 1975 to 1 May 1974. The vendors (the respondents to this appeal and the plaintiffs in the action) alleged that the earlier date had been the subject of a prior agreement or of a pre-existing common intention between the parties, and that the later date had been inserted in the contract by mistake.

The contract was dated 9 April 1974 and was a contract for the sale of six parcels of land at Montrose, which included three leased shops and a residence occupied by the vendors, for the price of $200,000. The contract provided that the purchaser was to be entitled to vacant possession of the residence upon payment of a deposit of $20,000 and an instalment of $30,000 payable on 1 May 1974. The purchaser was also to be entitled to receive the rents and profits of the shops upon the same events.

Under the heading "Terms and Conditions of Sale" the following appeared: —

> "1. The Purchaser shall pay a deposit of twenty thousand dollars ($20,000) on the signing hereof, and shall pay the residue of the purchase money as follows:— The sum of thirty thousand dollars on the First day of May 1974 and thereafter the sum of twenty five thousand dollars ($25,000) on the First day of May in every year until five years from the date hereof when the balance then owing shall be paid in full. Until payment of the whole of the purchase money the purchaser shall pay interest on so much thereof as shall from time to time be owing at the rate of eight per centum per annum calculated from the First day of May 1975 and payable with quarterly rests calculated on the amount owing at the commencement of each quarter."

It was the last date in this condition which the plaintiffs desired to have rectified, they alleging that interest should run from the date of possession, i.e. 1 May 1974.

The prior agreement or common intention which the plaintiffs said was intended to be embodied in the contract was, they said, to be found in conversations in which the negotiations for sale were conducted and in documents which came into existence contemporaneously with those conversations and which recorded them or indicated their contents.

The participants in the negotiations were an estate agent named Van Ekeris, and a director of the defendant company named Gayst. Much of their evidence concerning the negotiations was vague, and as a result it is convenient to centre a consideration of the evidence upon the documents.

The first of these was a letter dated 1 November 1973 from Van Ekeris to Goldhill Pty. Ltd., another company of which Gayst was director. It read:—

> "Dear Sirs,
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> "Enclosed please find a Schedule setting out the Price and Terms that would be acceptable to the vendors. "If satisfactory and to enable us to have Formal Contracts prepared please let us have the name of the purchasers and their solicitors together with the preliminary deposit of $2,500.00."

The enclosed schedule (which was also dated 1 November 1973) contained the following statements:—

> "Purchase Price: $200,000.00
> "Deposit: $20,000.00 on signing of the contract. A further $30,000.00 on possession in May 1974.
> "Terms: $25,000.00 in December 1974. From then on by $25,000.00 per year plus interest at 8% until the whole of the balance of purchase money together with all outstanding interest shall have been fully paid.
> "Preliminary Deposit Payable: $2,500.00."

Of these documents, notwithstanding the wording of the first paragraph of the letter, Van Ekeris said that in negotiation the terms set out in the schedule had been agreed to by Gayst at the time when the document was drawn up.

On 8 November 1973, Van Ekeris wrote again to Goldhill Pty Ltd, supplying details of the leases to which the shop properties were subject, and stating that vacant possession of the house property was to be given in May 1974, the precise date not being specified. The letter ended with the sentence "Please note payment of $25,000.00 payable May 1974 instead of December 1973." This last sentence was not elucidated in spite of attempts at the trial, but an obvious explanation is that it was intended to postpone the making of the payment which, according to the schedule dated 1 November 1973 was payable in December 1974, until May 1975, twelve months after the payment of the first instalment of $30,000.00.

On 14 November 1973, Gayst, on the letterhead of the ultimate purchaser and present appellant, wrote to Van Ekeris enclosing a cheque for $2000 as preliminary deposit, which was expressed to be paid "subject to satisfactory searches of Title, Leases and Contract of Sale." The letter nominated the present appellant as purchaser, and also nominated the solicitors who would be acting for it.

On 19 November 1973 Van Ekeris wrote to both the vendors' solicitors and the purchaser's solicitors. In each case the letter asserted in appropriate terms that the relevant property had been sold, and enclosed a document described as a "Summary of the Transaction". There was an irrelevant discrepancy between the two summaries. The parts relevant to the present case were as follows:—

> "Purchase Price: $200,000.00 "Deposit: $20,000.00 on signing of the Contract. $30,000.00 on possession in May 1974. "Interest: 8% with yearly rests. "Instalments: $25,000.00 per year, the first of which shall be paid in May 1975 and to continue for five years from the date of Contract when the whole of the balance of purchase money together with all outstanding interest shall become fully payable."

Neither of the solicitors to whom these summaries were sent raised any criticism of their contents.

Van Ekeris said of them that they represented what he believed to be the agreement reached between Gayst and himself. The effect of Gayst's evidence of the situation at this stage was that he regarded himself as not bound to any terms at all but he said "I was prepared to go along those lines if everything was alright". He also said that he would expect the contract to "cover" the terms set out in the summary.

With the summary forwarded to the purchaser's solicitors, there was also enclosed a document on a standard form headed "Statement pursuant to s34 of the *Estate Agents Act*". Paragraph 4 of this document purports to set out the "particulars of any promise with respect to the obtaining of a loan", and states that the amount of the loan is $150,000, and that the rate of interest is 8 per cent with annual rests.

On 14 December 1973 the vendors' solicitors forwarded to the purchaser's solicitors a contract of sale for execution, containing the condition set out earlier. Later in the month they wrote correcting the omission of a word in the contract, but the only relevance of this at the trial was that the omission had been discovered by one of the plaintiffs himself, who had nevertheless failed to notice any defect in the date for the commencement of interest. On 3 April 1974, the purchaser's solicitors forwarded the contract to the purchaser for execution, drawing attention to the terms of payment and to the date from which interest was to be calculated. It would appear that between December and April Gayst had been investigating the developmental potentiality of the land. The purchaser's solicitors' letter does not invite the purchaser's attention to the possibility that a mistake may have been made though it does expressly refer to the fact that under the contract interest was payable at the rate of 8 per centum per annum calculated from the 1 May 1975, adjustable and payable quarterly. The contract was executed by the purchaser and exchanged by an exchange of letters on 9 and 10 April 1974, when the balance of the deposit was also paid.

Gayst's evidence of his appreciation of the condition in the contract of sale was not clear, but the general result of the evidence is that he noticed the date and appreciated that the inclusion of the date 1 May 1975 in the contract would produce a result different from that which would have been produced under the provisions set out in the summary of 19 November 1973.

It should be added that, in his evidence, Gayst stated that it had been agreed that the date for possession should be 1 May 1974 and that the first-named respondent's evidence was to the same effect. (The second-named respondent had left the negotiations to the first-named respondent.)

The learned Judge found that the inclusion of the date 1975 was, so far as the respondents were concerned, an inclusion by mistake. This finding was not challenged on the appeal, and accordingly the evidence on which it was based has not been referred to.

This review of the facts shows that at least by or about 19 November 1973, there was a consensus between the parties, which they had communicated to each other, upon a number of matters with respect to the proposed sale of the respondents' property to the appellant. These matters included the following:--

> (a) That the property to be sold was situate at the corner of Leith Road and Trevallyn Road Montrose and that on it there were three shops under lease and a house;
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> (b) that the price was $200,000, to be paid by a deposit of $50,000, payable as to $20,000 on the signing of the contract and as to $30,000 on 1 May 1974, when possession was to be given, and by payment of the residue of $150,000 by instalments of $25,000 per year (the first to be paid on 1 May 1975) for five years from the date of the contract when the whole of the balance was to become payable;
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> (c) that the appellant was to pay interest at 8 per cent, with yearly rests on the sum of $150,000 (being the residue of the purchase money) and that any interest which was unpaid five years after the date of the contract became payable on that date.

The critical question is whether there was also a consensus between the parties, which they had communicated to each other, with respect to the date from which interest was to run. It will be appreciated from the statement of the facts set out earlier that there had been no explicit communication between the parties on this point, but the learned trial Judge nevertheless found as a fact that there was a common communicated intention between the parties, by 19 November

1973 or thereabouts, that the interest should run from the date possession was given to the appellant, which was to be 1 May 1974.

He arrived at this conclusion, in essence, as we understand his reasons for judgment, upon the basis that both parties did in fact take it for granted that the purchaser was to pay interest from the time he obtained possession of the property sold, on so much of the purchase money as was then unpaid. His Honour's view was that, as it was agreed that the purchaser was to be entitled to possession of the land sold before it had paid the whole of the purchase money, the parties could only have understood the agreement to pay interest at 8 per cent on the purchase money then outstanding as an agreement to pay such interest from that time, as, from then on, the purchaser and not the vendors had the benefits of possession. His Honour clearly thought that the parties, as persons bargaining for the sale and purchase of land, proceeded upon the assumption that, whereas a purchaser is normally required to pay the whole of the purchase price to be entitled to possession, when he is to be allowed an extended time for the payment of the purchase price and is to be allowed into possession upon payment of part of the price, then he has to pay interest on the balance during the period for which it is outstanding as a quid pro quo to the vendor, who otherwise has ceased to be entitled to the rents and profits and yet has not got all his purchase money.

His Honour said that he had no doubt that the parties understood the bargain they had made to mean that the interest was payable from the time when, as he expressed it, the vendors made a loan to the purchaser of the amount of the balance of the purchase money. He added that "it was unnecessary to spell out in actual words the obvious, namely, that when you borrow money on interest, that interest accrues over the whole currency of the loan".

It is true that his Honour said that no other meaning was possible for a term of this nature, but, in our opinion, in saying that, he was not regarding himself as merely attributing an intention to the parties, by a process of construction or otherwise, whether it accorded with the parties' actual intention or not, but correctly addressed himself to a consideration of what was the parties' actual intention with respect to the date from which interest should be paid. And, in our opinion, he was amply justified in coming to the conclusion he did.

Therefore, the respondents established the starting point for their case, i.e. that they formed a consensus, a common intention, communicated to each other, that interest at the rate of 8 per cent, with yearly rests, was to be payable on the balance of the purchase money, from 1 May 1974, that being the date upon which the purchaser was to be entitled to possession of the property sold.

The evidence shows that this continued to be the intention of the respondents up to and including the time when the executed parts of the contract of sale were exchanged on 9 April 1974. The evidence is that the respondents were unaware until after that date that condition 1 of the contract of sale provided for payment of interest from 1 May 1975, although possession was to be given on 1 May 1974. The learned Judge accepted the respondents evidence on these matters, and as we have said, this finding was not challenged on appeal. Thus, the finding was that the respondents executed the contract in the mistaken belief that it provided for interest to be paid from 1 May 1974. There was nothing to suggest that, up to the time when its director received the contract on or about 4 April 1974, the appellant departed from the intention that interest should run from 1 May 1974.

The learned Judge did not accept the explanation proffered by the appellant's director that then, upon receipt of the contract, he had observed that interest was expressed to be payable from 1 May 1975 but did not think that this had been inserted by mistake. But his Honour did not make a finding that the director had noticed the discrepancy at the date. Having rejected the explanation, he regarded the appellant, through its director, as then being in a dilemma. Either the position was that the appellant, not having departed from the intention formed in or about November 1973 that interest should be paid from 1 May 1974, had not noticed that the contract provided for interest to be paid from 1 May 1975 and that therefore the appellant had executed the contract in the mistaken belief that it expressed the common intention of the parties on that point; or the appellant did notice that the date in the contract was 1 May 1975 and realized it was a mistake but stood by and executed the contract without informing the respondents of the mistake.

Before this Court, counsel for the appellant submitted that there was a fundamental barrier to the respondents' claim for rectification. He submitted that, because, by its letter of 14 November 1973, the appellant had indicated its concurrence with the terms proposed by the respondents "subject to satisfactory searches of Title, Leases and Contract of Sale", the appellant was indicating that he was not agreeing to anything unless and until, *inter alia*, a contract of sale had been entered into between the parties. In our opinion, it is certainly correct to say that the appellant was making it clear in that letter that it was not binding itself to any contract to purchase at that stage; but, in our opinion, it does not follow from that, that it was indicating that there was no consensus at all between the parties about any of the matters that had been the subject of the negotiations between them. Parties can reach a consensus about major points of their negotiations without binding themselves to a contract and the fact that they express their common intention upon these points to be "subject to contract" does not deny the existence of that common intention. We therefore do not accept this submission put on behalf of the appellant.

Counsel for the appellant accepted that rectification of a written document could be granted by the Court where there was either a concluded binding antecedent agreement between the parties or where the parties had reached a common intention before the execution of the written contract and that common intention continued up to the time of the execution of the written document, and he was clearly correct in so doing. (See: *Shipley UDC v Bradford Corporation* [1936] Ch 375; *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662; *Slee v Warke* [1949] HCA 57; (1952) 86 CLR 271; *A. Roberts and Co Ltd v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 545; *Re Streamline Fashions Pty Ltd* [1965] VicRp 57; [1965] VR 418; *Joscelyne v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213; *Australasian Performing Right Association Ltd. v Austarama Television Pty Ltd* [1972] 2 NSWLR 467; *Hooker Town Developments Pty Ltd v The Director of War Service Homes* (1973) 47 ALJR 320; *Maralinga Pty Ltd v Major Enterprises Pty Ltd* [1973] HCA 23; (1973) 128 CLR 336, [1973] 1 ALR 169; *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656.)

What was put however was that the evidence in the case did not support a finding that there was a common intention between the parties as to the date from which interest was to run. Counsel pointed to the high degree of proof required before rectification on the ground of mistake would be ordered and he said that it was essential that there should be an outward expression of accord between the parties. In substance the submission relied upon the absence of any express reference during the negotiations to the date from which interest should run and upon an argument that what the learned trial Judge had done was to impose an obligation on the appellant as a matter of law. We have already dealt with these matters in what we have said about the way in which the learned trial Judge reached his conclusion that the parties had agreed that interest was to run from 1 May 1974, the date of possession. In our opinion, the learned Judge was not precluded by the absence of express reference to the date or time from which interest was to run from finding that the parties had agreed upon that point. He was entitled to draw the inference from the facts and circumstances, which was what he did. Furthermore, as we have said, in our opinion the learned trial Judge made this finding as a finding of fact with respect to these particular parties and did not reach his conclusion by attributing to the parties an intention they might not have actually possessed, through a rule for the construction of written documents or otherwise. Unless we could be persuaded that the learned trial Judge could not on the evidence have reached the appropriate degree of satisfaction on this matter, his finding should stand. As stated earlier, in our opinion, there was ample justification for his finding, which was firmly grounded upon human experience.

Then counsel for the appellant attacked the finding that the parties continued to have a common intention about the matter of interest up to the time of the execution of the contract. The basis relied on for this attack was the fact that the date "1975" appeared in the condition for the payment of interest and not "1974", taken with the evidence of the director that he observed that the date was different and thought that it had been altered intentionally. But the learned trial Judge rejected this evidence and so this basis for the attack must fail.

Another possible basis could have been the fact that, not only was the date from which interest was payable different, but the method of calculating interest was also different. In the negotiations what had been agreed was that it should be calculated with yearly rests, whereas the contract provided for it to be calculated with quarterly rests. But no reliance was placed on this difference by the director in his evidence and, in our opinion, it follows that, on the facts of this case, the presence of this further difference between what had been agreed in the negotiations and what

appeared in the contract does not tell against a conclusion that the parties retained their common intention on the other matter where there was a difference between what had been agreed upon earlier and what appeared in the contract. What the respondents had to establish was that the parties continued to have a common intention with respect to the matter upon which rectification was sought. In our opinion, this is all that the respondents had to establish. Where a plaintiff relies on the existence of an antecedent contract as the basis for his claim for rectification, the situation may be different. We make this suggestion to leave open the argument that the wording of the Maralinga judgments may have been determined by the facts of that case. (See *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973), 128 CLR at pp350-1, per Mason J) But when Simonds J (as he then was) stated his view that such an antecedent contract was not an essential element if rectification were to be granted, he said that it was sufficient "to find a common continuing intention in respect to a particular provision or aspect of the agreement" (see *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662, at p664); and it is this view which has been approved in later cases. Hence the matter is, in our opinion, an evidentiary one, and as there is no evidence to support an inference that the further difference, dealing with the way interest was to be calculated, had any effect upon the appellant, in our opinion, it does not lead to the conclusion that the parties ceased to continue to have a common intention about the other point.

We now come to consider whether the respondents established that the contract had been executed under a mistake that it provided for interest to run from 1 May 1974. Here it was said that, because the learned trial Judge failed to make a definite finding as to the state of mind of the appellant's director when the appellant executed the contract, the respondents' action must fail.

It was pointed out that, although there was a finding that the respondents executed the contract under a mistaken belief that the date in the contract from which interest was to run was 1 May 1974 and not 1 May 1975, there was no such finding with respect to the appellant. And it was further pointed out that there was no finding that the appellant, through its director, realized that the date was different (although this seems to be the effect of the director's evidence), appreciated that this was a mistake on the part of the respondents, and yet stood by and executed the contract. It was correctly conceded, on the basis of the authorities cited earlier, that a finding on the first mentioned footing would have been sufficient for the respondents' case, and it was further conceded (again correctly) on the basis of *A. Roberts and Co. Ltd. v Leicestershire County Council* [1961] Ch 555; [1961] 2 All ER 545, and *Riverlate Properties Ltd v Paul* [1975] Ch 133; [1974] 2 All ER 656, that a finding on the second mentioned footing would also have been sufficient for the respondents' case.

As we said earlier, the learned Judge took the view that, as he had rejected the evidence of the appellant's director, the appellant was on the horns of a dilemma, either one of which led to the conclusion that the respondents had established a sufficient mistake to entitle them to rectification. In our opinion, this was a legitimate process of reasoning and it was not fatal to the respondents' case that no express finding was made to show whether it was "common mistake" or "unilateral mistake" which formed the basis for the grant of relief.

The result is that the appeal against the order for rectification fails. The appellant also appealed against the order for costs made by the learned trial Judge. The order was that the appellant should pay two-thirds of the respondents' taxed costs. The appellant contended that, even if the order for rectification stood, the parties should have been left to abide their own costs because the respondents were responsible for the initial mistake. But the costs were in the discretion of the learned trial Judge and he was entitled to have regard to the conduct of both parties. We see no reason to interfere with his exercise of discretion.

Appeal dismissed with costs.

Solicitors for the appellant: Ford, Aspinwall and De Gruchy.
Solicitors for the respondents: Remington and Co.