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SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

TRANS REALTIES PTY LTD v GRBAC

Hutley, Glass and Mahoney JJA

24 March 1975 — [1975] 1 NSWLR 170

CIVIL PROCEEDINGS – CONTRACT FOR SALE OF LAND – SELLER TOLD THAT THE SALE WAS 'CLEAR MONEY' – WHETHER SELLER REQUIRED TO PAY LAND TAX – UNILATERAL OR MUTUAL MISTAKE – RESCISSION ON GROUNDS OF FRAUD AND/OR MISTAKE.

Grbac and Schebeck, as agent for the plaintiffs, negotiated the sale of Grbac's land for $50,000. An impasse was reached as to responsibility for payment of land development tax. An Agreement was drawn whereby the purchaser was not liable for payment of the tax. Grbac was induced to sign after it had been translated to her. She was asked if the $50,000 was "clear money" and was told that it was. It was found as a fact that her reference to "clear money" meant that the tax was not to be paid by her as seller. Rescission was sought on grounds that the contract was induced by this fraudulent misrepresentation and/or mistake.

HELD: Appeal dismissed. Contract rescinded.
1. Per Hutley JA: It was immaterial whether what Mr Schebeck said was taken to be a positive statement of the legal effect of the instrument or a positive statement as to his privately held belief as to the legal effect of the instrument. In either case, he was making a statement false to his knowledge for the purpose of inducing the defendant to execute the instrument. As he succeeded and the contract resulted, the defendant was entitled to rescind. The appeal was dismissed.

2. Per Mahoney JA: The mistake under which Grbac signed the contract was such as to entitle her to have it rescinded.

HUTLEY JA: The only legal basis suggested for saying that the misrepresentation made Mr Schebeck was not one upon which the defendant could rely is that it was a misrepresentation of law. The statement could be understood in two ways, either as a statement of the effect of the agreement or as a statement as to what Mr Schebeck believed to be the effect of the agreement. A distinction between the two statements has been recognised (cf: *National Westminster Bank v Barclays* (1974) 3 All ER 834 at 850; [1975] QB 654). If it is understood as a statement as to his objective belief as to what the agreement meant it is a statement of fact and of course false to his knowledge. The existence of an opinion is a matter of fact (Cheshire & Fifoot, *Law of Contracts* 3rd Aust ed. p287). A statement of the legal effect of a particular instrument or set of facts is a question of fact (*Cooper v Phibbs* [1867] UKHL 1 (31 May 1867); (1867) LR 2 HL 149, 170) and the misrepresentation of a privately held opinion as to their legal effect is a misrepresentation of fact (*Oudaille v Lawson* (1922) NZLR 259). In my opinion it is immaterial whether what Mr Schebeck said is taken to be a positive statement of the legal effect of the instrument or a positive statement as to his privately held belief as to the legal effect of the instrument. In either case, he was making a statement false to his knowledge for the purpose of inducing the defendant to execute the instrument. As he succeeded and the contract resulted, the defendant was entitled to rescind. The appeal must be dismissed.

[His Honour decided that the case of the plaintiff failed because there was no consensus *ad idem*. Counsel for the plaintiff endeavoured to overcome this objection by submitting that as His Honour found that the contract was a document which was executed, as a matter of law there could not be a failure of consensus. There could be failure of consensus only when a contract came into existence by offer and acceptance and this was not such a contract.]

I do not find it necessary to deal with the somewhat esoteric question whether:
(a) every contract is a result of offer and acceptance; or
(b) the doctrine of absence of consensus is inapplicable to a contract which did not come about as a result of offer and acceptance.

In my opinion such questions can only be of importance where the alleged contract is not the result of any vitiating acts by either of the parties. Where you have a consensus brought about by misconduct (i.e. by innocent or fraudulent misrepresentation) you have a true consensus even though it may be possible for the induced party to set the transaction aside. It is no answer to say that the contract is not the result of offer and acceptance. The contract can still be induced by a vitiating act and in the proper case set aside. In my opinion this agreement was not the result of mistake which led no consensus. The written agreement was not void. At the moment when she signed the defendant was not mistaken as to what she wanted to do. She was mistaken as to the legal consequence of what she was about to do. It was because her assent was brought about by the plaintiff that this was significant. If it had happened otherwise it would be legally irrelevant in this context...

MAHONEY J: Two matters were urged by way of defence in the proceedings before the learned trial judge.
(1) Mistake; and
(2) Fraud.

(1) In my opinion, the respondent defendant was entitled to succeed upon the issue of mistake. It is not contested upon this appeal that His Honour found, and was entitled to find, that Mrs Grbac mistakenly believed that if she signed the relevant agreement to sell the land, she would not be required to bear the development tax to which reference had been made. The precise nature of the mistake which in this regard she made, is to be inferred from the cryptic exchange between her and Mr Schebeck '$50,000 it is clear money?' 'Yes'. This in my opinion is to be understood as meaning 'Does the contract I am about to sign contain, a term whereby I will not bear development tax?' It is clear that the parties both understood, and the matter had been discussed between them, that Mrs Grbac would bear the development tax unless there was a contrary agreement between her and the purchaser. There was nothing in the context of the exchange between them to support any suggestion that any such contrary agreement would be made otherwise than in the document which she was then proposing to sign. In the light of what had taken place between them, it is, in my opinion, proper to infer that she was asking whether the document was such as to merely to oblige her to sell the land, but also to have the result that she would not bear such tax.

In my opinion, the proper finding upon the evidence was that when Mr Schebeck answered 'yes' to her question, he was leading her to believe that the contract contained a term such that he would not bear the development tax and that he knew that this was wrong.

This mistake by Mrs Grbac as to the relevant matter, albeit a unilateral mistake, was in my opinion, sufficient to entitle her to have the contract put aside in equity. The law as to mistake has been the subject of considerable discussion and, at least in Australia, the principles may not yet be finally settled: see *Porter v Latec Finance (Queensland) Pty Ltd* ([1964] HCA 49; (1964) 111 CLR 177 at p200-1); 40 ALJ 315-6.

It is clearly established in the English courts that where there is a unilateral mistake of the kind here relevant, brought about by the conscious misstatement of the other party, that will be sufficient to warrant the setting aside by a Court of Equity, the contract which has been made: *Stewart v Kennedy (No. 2)* [1890] UKHL 1; (1890) LR 15 AC 108; (1890) 17 R (HL) 25; *Wilding v Sanderson* (1897) 2 Ch 534; 76 LT 346; *Jennings v Jennings* (1898) 1 Ch 378: cf. also *Riverlate Properties v Paul* (1974) WLR 564; [1975] Ch 133; [1974] 2 All ER 656. In *Wilding v Sanderson* Lindley LJ (at p550) said:

> "But it was strongly contended mistake in the meaning of the words used in drawing up the agreement is not enough, and in support of this contingent reliance was placed on *Powell v Smith* LR 14 Eq 85 and *Stewart v Kennedy* [1890] UKHL 1; (1890) LR 15 AC 108; (1890) 17 R (HL) 25. These cases decide that a written contract cannot be impeached simply because one of the parties to it put an erroneous construction on the words in which the contract is expressed. This is a sound principle, and, as pointed out in *Stewart v Kennedy* [1890] UKHL 1; (1890) LR 15 AC 108; (1890) 17 R (HL) 25, if it were not adhered to the security of written engagements would be destroyed. But a mistake by one of the parties as to the meaning of words used may be induced may the other party, and, if so induced, the above principle ceases to be applicable. *Stewart v Kennedy* [1890] UKHL 1; (1890) LR 15 AC 108; (1890) 17 R (HL) 25 is an authority for this qualification."

In *Wilding v Sanderson*, the mistake made was that the account in question was not intended to be taken on the footing of its being a current account with interest charged and allowed at £5 per cent on both sides, (at p543), this mistaken belief having been induced by what had taken place between the parties in previous correspondence and what had been said by the other party's counsel during the proceedings. In *Stewart v Kennedy*, the appellant argued that he understood the contract to impose on him an obligation to sell only in case the Court approved of its terms and, upon application to it, ordered a sale at the price and the conditions specified in a particular matter (at pp116-7). In my opinion, the kind of mistake here made by Mrs Grbac is of a similar nature.

Counsel were not able to refer the Court to any case in which this principle had been authoritatively adopted or considered in Australia but in my opinion, the Australian authorities are not consistent with such a principle. In *Svanosio v McNamara* ([1956] HCA 55; (1956) 96 CLR 186; [1956] ALR 961), Dixon CJ and Fullagar J (at CLR p196) said:

> "'Mistake' might, of course, afford a ground on which equity would refuse specific performance of a contract, and there may be cases of 'mistakes' in which it would be so inequitable that a party should be held to his contract that equity would set it aside. No rule can be laid down *a priori* as to such cases (see an article by Professor RA Blackburn in *Res Judicatae* (1955) Vol 7 p43), but we would agree with Professor Shatwell (1955) 33 Can BR at 186, 187, that it is difficult to conceive any circumstances in which it could properly give relief by setting aside the contract unless there has been fraud or misrepresentation or a condition can be found expressed or implied in the contract."

Their Honours (at p195-6) adopted generally the statement of Denning LJ in *Solle v Butcher* (1950) 1 KB 671; [1949] 2 All ER 1107, but where parties, whatever their innermost states of mind, have to all outward appearances agreed upon their terms, then the contract is good unless and until it is set aside for some sufficient reason. McTiernan, Williams and Webb JJ (at pp203-4) held that where there is a common mistake of a fundamental nature as to the substance of the property contracted to be sold, the effect of that common mistake 'is to make the contract and the subsequent conveyance both void or at least voidable so that the purchaser may sue the vendor for rescission of the contract and conveyance even after completion'. Their Honours did not, at least in terms, indicate that such a kind of common mistake was the only kind of mistake which would warrant the rescission of the contract, whether void or voidable, and did not consider the particular matter here in question.

In other cases, the possibility of rescission for unilateral mistake if induced by the misrepresentation of the other party, appears to have been assumed see e.g. *Cousins v Freeman* (1957) 58 WALR 79. In my opinion, therefore, the mistake under which Mrs Grbac signed the contract was such as to entitle her to have it rescinded.

In view of the conclusions which I have formed as to the effect of the mistake made by Mrs Grbac, it is not necessary for me to form any final conclusion upon this aspect. However, I think it is proper that I refer to one matter. The learned judge took some care to indicate why it was that he found against Mrs Grbac on this issue. He appears to have been of the opinion that Mr Schebeck did not 'set out' to procure Mrs Grbac to sign a document upon a representation that it contained a term which it did not contain or to defraud her in this regard. His Honour appears to have been of the view that the events which took place may properly be described as Mrs Grbac being under a mistake as to the effect of the arrangements *qua* development tax and Mr Schebeck merely refraining from disabusing her of this belief.

Were the case in which the issue in this regard depended upon the assessment of witnesses, I would not, of course, differ from the learned judge. However, the facts in the present case are clear; the real question is as to the proper inference to be drawn from them and in those circumstances, I feel able to and indeed I have the duty to, draw such inferences as appear to me appropriate. I do not think that what Mr Schebeck did is to be categorised as merely refraining from disabusing Mrs Grbac of an erroneous belief. She asked him a specific question: '$50,000 it is clear money?' This was, in my opinion, a statement made interrogatively and he so understood it. In the light of what had passed between the parties, his answer 'yes' should be understood as conveying to her Mr Schebeck's assurance upon the matter. However, in the circumstances, it is not necessary for me to consider the effect of this assurance to Mrs Grbac and I prefer to base my decision upon the ground of mistake and to express no final view upon the alternative ground of fraud.