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SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

PLYTARIAS v ANDREWS

Reynolds, Hutley and Glass JJA

19 December 1974 — [1974] 2 NSWLR 382

CIVIL PROCEEDINGS – CONTRACT – DEFENDANT AGREED TO MARRY PLAINTIFF – PLAINTIFF PAID DEFENDANT THE SUM OF $6000 – MONEY HAD AND RECEIVED – PARTIES LIVED TOGETHER FOR A BRIEF PERIOD – MARRIAGE DID NOT TAKE PLACE – FAILURE OF CONSIDERATION – PLAINTIFF SUED FOR THE MONEY PAID – WHETHER PLAINTIFF ENTITLED TO BE PAID.

Defendant had agreed to marry plaintiff who paid her $6000 to convince her so to do. On failure to carry out her promise, the plaintiff sued for money had and received (as under the NSW *Evidence Act* corroboration is required in a breach of promise suit, and no such evidence was apparently available). It was argued that the true cause of action was for breach of promise and not an *indebitatus* count.

HELD: Claim by plaintiff upheld.
1. By express finding of the trial judge, the plaintiff promised to pay $6,000 and to marry the defendant and these promises were in exchange for the defendant's promise to marry him. Whatever else might have passed between them, until such time as she presented herself before a duly authorised marriage celebrant, she had not begun to perform her promise and the consideration upon her part of the contract had wholly failed.

2. So long as the agreement remained on foot, no action lay to recover as a debt the money paid. Until the contract was dissolved, the possibility of future performance inhibited a contention of total failure of consideration. But the defendant's refusal to marry the plaintiff was a renunciation of the contract which *prima facie* entitled him to rescind. The commencement of the proceedings took effect as an election by him to cancel the agreement provided he was otherwise able so to act.

3. The fleeting pre-nuptial interlude by preventing a restoration of the status quo did not raise an effective bar to such action. Because the liberties the defendant had permitted the plaintiff were judged to be something done not under the contract but outside it, the plaintiff could not only rescind but also claim that the consideration due to him had entirely failed.

GLASS JA: ... The plaintiff in the present proceeding had sued for and recovered a verdict upon a common money count for money received to his use. Such an action is generically different from an action for damages based upon a contract (*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited* [1942] UKHL 4; [1943] AC 32 at 65; [1942] 2 All ER 122; (1942) 73 Lloyds Rep 45. It is a claim for debt based not upon the contract but upon an obligation imposed by law. The writ of *indebitatus assumpsit* alleged a debt and a promise. The latter was fictitious and the former was the real cause of action (Maitland, *The Forms of Action at Common Law* p70). The law gives a remedy in quasi-contract to the party who has not received that for which he has bargained. It is a proceeding which rests upon a wholly different juridical foundation from an action for damages for breach of promise and stands outside the scope of the section. It does so, in my opinion, because no reason has been adduced for investing technical language in a technical context with the wider meaning it might bear in popular parlance.

The parties had lived together for a brief period in anticipation of marriage. Although found as a fact that this was not part of the arrangement for which he had paid, it was argued that:–

(a) it made the failure of consideration partial only ; and
(b) as there could be no *restitutio in integrum* the plaintiff was disabled from rescinding the agreement.

The first argument disregarded the identity between the consideration which supports the formation of the contract and the consideration, viewed not as promise but performance, the failure of which given a remedy in quasi-contract (*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited* (*supra*) at AC 48. By express finding of the trial judge, the plaintiff promised to

pay $6,000 and to marry the defendant and these promises were in exchange for the defendant's promise to marry him. Whatever else might pass between them, until such time as she presented herself before a duly authorised marriage celebrant, she had not begun to perform her promise and the consideration upon her part of the contract had wholly failed.

As to the second argument, I accept that so long as the agreement remained on foot, no action lay to recover as a debt the money paid. Until the contract was dissolved, the possibility of future performance inhibited a contention of total failure of consideration. But the defendant's refusal to marry the plaintiff was a renunciation of the contract which *prima facie* entitled him to rescind. The commencement of the proceedings took effect as an election by him to cancel the agreement provided he was otherwise able so to act. Did the fleeting pre-nuptial interlude by preventing a restoration of the status quo raise an effective bar to such action?

It might be said that, assuming the principle of restitution applied, evidence to actuate it was wanting because what the defendant had surrendered was so minimal as not to engage the concern of the law. But the answer is more fundamental. The notion of restitution is only appropriate when examining rescission by reason of misrepresentation which has vitiated the compact. In such a context the rehabilitation of the parties to their former position is apt for consideration. But it has no place when essential breach or renunciation endow the innocent party with a power of dissolution (*McDonald v Dennys Lascelles Ltd* [1933] HCA 25; (1933) 48 CLR 457 at 477; 39 ALR 381). Upon exercise of the power, the contract is dissolved prospectively leaving what has thus far been done unaffected (*ibid*). If the defendant had done something under the contract, the plaintiff could still have validly rescinded although restitution was no longer possible (*Associated Newspapers Ltd v Bancks* [1951] HCA 24; (1951) 83 CLR 322; *Carr v JA Berriman Pty Ltd* [1953] HCA 31; (1953) 89 CLR 327). Because the liberties she had permitted the plaintiff were judged to be something done not under the contract but outside it, the plaintiff could not only rescind but also claim that the consideration due to him had entirely failed.
