

27/79

SUPREME COURT OF VICTORIA

MUNRO v MORRISON

Kaye J

27 February 1979 — [1980] VicRp 10; [1980] VR 83 (Noted 55 ALJ 292)

CIVIL PROCEEDINGS – CONTRACT – TENANCY AGREEMENT POSSESSION – AGREEMENT'S PURPOSE TO DEFEAT OR FRUSTRATE EXECUTION OF A JUDGMENT CREDITOR – WHETHER SUCH AGREEMENT IS A FRAUD UPON THE LAW AND ILLEGAL.

HELD:

1. It was not part of any agreement made between the parties that the defendant would cause the plaintiff's interest in the property to be transferred to A.B.C. Constructions. An agreement or transaction the purpose of which is to defeat or frustrate the execution of a judgment by a judgment creditor is a fraud upon the law and illegal.
2. The tenancy agreement formed part of the same transaction; being an integral part of a fraud upon the law, was also tainted and illegal. It followed that because of the fraudulent and illegal purpose for which it was made the tenancy agreement as pleaded in the defence and counterclaim was unenforceable.
3. Both the plaintiff's claims for a declaration that the defendant held the property in trust for them and the defendant's counterclaims for possession, unpaid rent and unpaid rates, being tainted by fraud and illegality, must therefore fail.

KAYE J: Plaintiffs claim a declaration that defendant holds land formerly owned by the first-named plaintiff in trust for him, alternatively in trust for the infant plaintiffs. They also claim an order requiring defendant to transfer the land in accordance with the declaration sought, and an injunction restraining defendant from interfering with plaintiff's possession of the land. Plaintiff is the father of the 2nd, 3rd and 4th named plaintiffs all of whom are infants.

On 26.2.74 and at all relevant times until then plaintiff was the registered proprietor of property known as 42 Wimble Street, Seymour, which comprises approx. 4 acres on which are a dwelling house, brick garage and workshop. Plaintiff, a road contractor, lived and is presently living there with the children – this has been so since before 1972. He has operated his business from the property. In February 1974 the property was encumbered to the CBC Bank as security for \$5000 overdraft accommodation which plaintiff used as working capital for his business.

Defendant is a retired grazier who returned to Seymour in January 1973 after which friendship and confidence developed between them. In the following 12 months plaintiff experienced difficulties in meeting his debts as they fell due. By February 1974 his situation was critical because of a County Court judgment for \$2405 plus costs. He was concerned lest execution on the order against his property would total approx. \$4000. At that time he owed defendant between \$800 and \$1200 for moneys advanced the previous year and \$2800 advanced in January 1974 to purchase a caterpillar tractor. He also owed CBC bank \$3412 on the overdraft. After judgment was entered against him in February 1974 he discussed with defendant ways and means of preventing execution against his property; and suggested that defendant might purchase his property thereby taking it out of reach of the judgment creditor. Later plaintiff with assistance from defendant wrote a letter to defendant's solicitor as follows:

"I wish to confirm the arrangement made by Bruce Morrison of recent date re the sale of my house & land at 42 Wimble St, Seymour at the under-mentioned conditions. He takes over the \$5000 debit at CBC Seymour and I allow him \$6000 which I owe him from previous loans and adjustments. The total price of house and land is \$14000 to be made up of –
\$5000 @ CBC bank \$6000 present debit; Balance of \$3000 to be made in equal yearly payments of \$500.00 per year for 3 years @ 9% int. 1st payment to be made in January 1st 1975, interest reducing as payments made. I consent to you acting for us in this matter."

Plaintiff swore in their conversation which preceded the composition of the letter defendant expressed concern that the house should be retained to provide a home for the plaintiff's children, and that defendant proposed that he would form and register a company to be known as A.B.C. Constructions, that the property would be transferred into the name of the Company, that plaintiff would operate his contracting business in the name of the Company for which he would receive wages, that he, the defendant would attend to the financial affairs of the Company and plaintiff would pay \$25pw rent for the use of the house. On 26.2.74 plaintiff sold the property to defendant for \$14000. Later he signed a deed of Mortgage to defendant for the sum of \$3000 which was the unpaid balance at 9% interest.

The primary issue was whether there was an agreement whereby defendant agreed to take all steps necessary to effect transfer of the property to A.B.C. Constructions Pty Ltd. Plaintiff's version was supported by evidence of the then manager of the Seymour branch of CBC bank (the bank of both Parties) who swore that on 13.2.74 defendant discussed borrowing \$5000 to commence a business A.B.C. Constructions of which he, the defendant, would be sole proprietor and plaintiff the manager. He also swore that defendant discussed borrowing \$5000 to facilitate transfer of the property to his (defendant's) name. Defendant told him that the purpose of transferring the property was to ensure it was out of plaintiff's name so plaintiff and the children would continue to have a roof over their heads.

Defendant swore he told plaintiff the bank manager had suggested that they should "get together and make a transfer of the house." On 28.2.74 defendant as sole proprietor applied for registration of the business name of A.B.C. Constructions; he did not incorporate the Company and swore such a proposal had not been discussed. In the Contract of Sale, the purchaser was stated to be the defendant; similarly he was stated to be the transferee on the transfer instrument. Plaintiff swore he didn't read the documents before signing and that defendant said he would fill in the name of the company as transferee when it was registered. I reject plaintiff's evidence on these matters ... it seems most unlikely that defendant's name was added subsequent to the document being typed. Moreover I accept defendant's evidence that he signed all three documents on the same day as the plaintiff signed and in his presence.

I therefore find that it was not part of any agreement made between the parties that defendant would cause plaintiff's interest in the property to be transferred to A.B.C. Constructions. An agreement of transaction the purpose of which is to defeat or frustrate the execution of a judgment by a judgment creditor is a fraud upon the law and illegal. Here the Court referred to *Gascoigne v Gascoigne* (1918) 1 KB 223; *Musman v Musman* (1933) SASR 327; *re Emery's Investments Trust* (1959) Ch 410; *Holman v Johnson* [1775] EngR 58; [1775-1802] All ER 98; 98 ER 1120; (1775) 1 Cowp 341. Reference was also made that "it matters not that the defendant did not plead by way of defence ... that the agreement was tainted by fraud or illegality": *Scott v Brown Doering McNab & Co* (1892) 2 QB 724 and *Palaniappa Chettiar v Arunslam Chettiar* [1962] UKPC 1; [1962] AC 294; [1962] 2 All ER 238; [1962] 1 WLR 279.

By counterclaim defendant pleaded that on or about 26.2.74 the date of the Contract of Sale he agreed to let the property to plaintiff at \$25pw, and rates, that by notice to quit dated 4.10.76 tenancy was terminated thereby entitling him to possession and that in breach plaintiff had failed to pay the rent and rates. He sought possession of the property, \$3975 as arrears of rent, \$1641 as unpaid rates and mesne profits from 4.10.76 to date of possession. Defendant's claims could not have been maintained other than by proving the date conversations as that upon which plaintiff agreed in his statement of claim. The tenancy agreement formed part of the same transaction; being an integral part of a fraud upon the law, was also tainted and illegal. It follows that because of the fraudulent and illegal purpose for which it was made the tenancy agreement as pleaded in the defence and counterclaim is unenforceable.

Both the plaintiff's claims for a declaration that defendant holds the property in trust for them and the defendant's counterclaims for possession, unpaid rent and unpaid rates, being tainted by fraud and illegality, must therefore fail.

The situation resulting from my findings is that plaintiff is in possession of the property which is owned by defendant. A further matter which emerges is whether defendant is entitled to possession notwithstanding that the tenancy agreement as pleaded is unenforceable. Defendant

commenced proceeding in the Magistrates' Court at Seymour to recover possession and on 7.2.77 this was adjourned *sine die* because of this action. Is the plaintiff having exclusive possession with the owner's consent a tenant at will – and is such a tenancy at will capable of proof without reliance upon the illegal transaction? There are to be found *dicta* in old authorities supporting the proposition that a tenancy at will is to be implied when a person is in possession with the consent of the owner. (*Halsbury* 3rd Edn. Vol. 23, pp506-7); *Wheeler v Mercer* [1956] UKHL 5; [1957] AC 416; [1956] 3 All ER 631; [1956] 3 WLR 842 considered.

I am presently of the opinion that plaintiff might be said to be in possession as the tenant at will of defendant and that the defendant would not be compelled to give evidence of the conversations on which the tainted claims and counterclaims are based. Authorities establish that a party to an illegal or fraudulent transaction will not be denied the Court's aid to relief if he is able to prove his cause without proving the illegality or fraud. *Bowmakers Ltd v Barnet Instruments Ltd* (1945) KB 65; [1944] 2 All ER 579; *Sajan Singh v Sardara Ali* (1960) AC 167; [1960] 1 All ER 269; [1960] 2 WLR 1186; 876 F 882; *Kiriri Cotton Ltd v Dewani* [1960] AC 192; [1960] 1 All ER 177; [1960] 2 WLR 127.

There will be judgment for defendant on the claim, There will be judgment for the defendant on the counterclaim as amended. It is adjudged plaintiff give to defendant possession of the land ... otherwise it is ordered that the defendant's claims for rent, rates and mesne profits be dismissed. (After discussion) No order as to costs.
