IN THE SUPREME COURT OF QUEENSLAND Appeal No. 181 of 1987

FULL COURT

BEFORE:

Mr. Justice Connolly

Mr. Justice McPherson

Mr. Justice Williams

BRISBANE, 21 APRIL 1988

BETWEEN:

BERNARD THOMAS KNAPP (Plaintiff) Appellant

-and-

ALAN MAXWELL DOBLE (First Defendant) Respondent

-and-

LEMONTREE PRODUCTIONS PTY. LTD. (Second Respondent Defendant)

JUDGMENT

MR. JUSTICE CONNOLLY: This is an appeal from a judgment of His Honour Judge Wylie Q.C., constituting the District Court at Brisbane, dismissing a plaintiff's action in which $10,000 was claimed as being moneys due and owing by the first defendant or, alternatively, the second

defendant to the plaintiff pursuant to an oral agreement made on or about 25 June 1986.

The circumstances may be shortly stated. People by the name of Pichelin had work done by a firm of solicitors the partner in question being Mr. Knapp, and the work having been attended to by a law clerk, Mr. Moore. Some $6,000 was owing for work already done and it was expected that another $4,000-odd would be incurred and the solicitors, very understandably in all the circumstances; desired to be secured for these costs.

A conference was accordingly held at the solicitors' office on 25 June 1986 attended by Mr. Knapp himself, Mr. Moore, the clerk, Mrs. Pichelin and her son and Mr. Doble, the first defendant, together with Mr. Reid who advised Mr. Doble but was not a lawyer. Mr. Moore explained the nature of the existing indebtedness of the Pichelins to the solicitors and the likely additional costs which would be incurred and said that the solicitors required to be secured for their costs.

Mr. Doble had an interest in the transaction, which the solicitors were handling, being carried to fruition.

Mrs. Pichelin and her son made it clear that they could not find the $10,000. Mr. Moore then said to Mr. Doble that it was a commercial matter for him, and it was a commercial matter for him because he, as I have said, had an interest in the transaction being completed. It was explained to him that the solicitors were not prepared to act any further for the Pichelins' company as vendor unless they were paid $10,000, that, as he had heard, they did not have the ability to pay, and that if he wanted the solicitors to act in the transaction, he must decide whether he was prepared - and I am now reading from the transcript - “to lend the money to Mr. and Mrs. Pichelin to pay the solicitors.” According to the evidence of Mr. Moore, although he did not recall the exact words, the response was in the affirmative; that is, “I am prepared to do that.”

The arrangement which had been made was that it was the Pichelins, having incurred the debt originally to the solicitors, would ultimately repay it to Mr. Doble. It is said that the natural way to understand what was done on 25 June was that it was an agreement that Mr. Doble would pay $10,000 direct to the solicitors. Obviously that is a way in which the object of this arrangement could have been achieved, but that is not the same thing as saying that was what was agreed between the solicitors and Mr. Doble; and the action is brought on a promise made by Mr. Doble to pay the solicitors $10,000.

It is pleaded in this way: that in consideration of the plaintiff Mr. Knapp continuing to act as solicitor for the company - that is the Pichelins' company - in respect the transfer of the business then conducted by the company, Mr. Doble or, alternatively, a company in which he was interested, would advance $10,000 by way of loan on commercial terms to be repaid by the Pichelins. As that is pleaded it seems to me plainly to contemplate a loan made direct to the Pichelins; although it is true that the object of that loan was that the Pichelins should pay their existing debt and secure the further costs. The pleading goes on to say that it was also the contract that the sum of $10,000 would be paid by Mr. Doble or his company direct to the solicitors.

The learned District Court Judge made an extensive and careful judgment and declined to find any such contract. There is really no more evidence than this. Our attention was directed to a couple of passages which it was thought would help. At p. 100 of the transcript, counsel cross-examining Mr. Doble, the first defendant/respondent, said, “You understood that the money that was to be lent was to go to Forde, Knapp & Marshall, didn't you?” He said, “Yes, I did.” He was asked, “And that it was to be repaid by the Pichelins?” He said, “Yes.” That is consistent, of course, with one of two things. It was consistent with his understanding being that the money was to go to the Pichelins and to be paid by them to the solicitors and that

the debt was, as between Mr. Doble and the Pichelins, to be that of the Pichelins. It was also, I suppose, consistent with the notion that Mr. Doble would pay the money direct to the solicitors; but the matter is left wholly equivocal and it is not taken any further by the final passage to which our attention is directed.

On p. 103 he was asked, “What-did you think this transaction was designed to achieve?” His reply is, “As an interim measure to give funds to Forde, Knapp & Marshall for past, present and future litigation costs.” Again that is wholly equivocal. Had he given the money to the Pichelins and had they paid their debt and given the necessary security to Forde, Knapp & Marshall, that is precisely what would have occurred; but it does not establish that there was a contract, the obligation of which was that Mr. Doble should pay money direct to the solicitors.

It seems to me, therefore, that the action was rightly dismissed and that the appeal also should be dismissed.

MR. JUSTICE McPHERSON: Paragraph 2 of the amended plaint alleged an agreement which was, in effect, as follows: if you, the plaintiff's solicitor, continue to act for the company in this transaction, I, the defendant Doble, will pay you $10,000 on account of costs incurred and to be incurred, the sum to be repaid to me by the Pichelins. That seems to me to be an allegation of an agreement that would conform to the agreement held in Carlisle v. Carbolic Smokebale being enforced; in other words, it was a promise by Doble for an act, namely, to continue to act as a solicitor which, when performed, would give rise to a debt on the part of Doble to the plaintiffs solicitor.

I am not entirely persuaded that His Honour approached the matter in that fashion or appreciated that that is a possible view of the transaction, even though it had been so alleged in the plaint. At all events, he did not find that the defendant Doble promised to make the payment

direct to the plaintiff but did find that there was an agreement, although apparently not one that he regarded as amounting to an enforceable contract that Doble would lend to the Pichelins.

The evidence to which the learned presiding judge has referred supports the view that, taken literally, what the parties intended was that the moneys should be paid by Doble to the Pichelins and the Pichelins should then pay it on to the plaintiff Knapp. On that footing I do not think that the appellant in this matter has the necessary findings in its favour but instead has a finding which, if anything, is inconsistent with the finding which it requires in order to make good its appeal.

In those circumstances, not without some regret, I think that the appeal should be dismissed.

MR. JUSTICE WILLIAMS: The learned trial judge made a finding that the appellant was not a party to any agreement for a loan. In his view any such agreement was between Doble and the Pichelins. Consideration of the evidence as to the conversations held on 25 June 1986 demonstrates that that finding was correct.

I am further satisfied that the appellant cannot improve his position by relying on s. 55 of the Property Law Act. The evidence just does not establish any promise given by Doble to the Pichelins that he, Doble, would pay the appellant.

I agree with all that has been said by the learned presiding judge and my brother McPherson.

MR. JUSTICE CONNOLLY: The order of the Court will be: appeal dismissed.

MR. McMURDO: I ask for costs.

MR. JUSTICE CONNOLLY: Can you resist that, Mr. Harrison?

MR. HARRISON: No, Your Honour.

MR. JUSTICE CONNOLLY: With costs.
