IN THE SUPREME COURT OF QUEENSLAND No. 1358 of 1985

FULL COURT

BEFORE:

Mr. Justice Connolly

Mr. Justice Carter

Mr. Justice Moynihan

BRISBANE, 13 OCTOBER 1989

KENNETH LYNIS STANIER and BRENDA STANIER (Plaintiffs) Appellants

- and -

BRUCE DOUGLAS HARRIMAN and SANDRA PATRICIA HARRIMAN (Defendants) Respondents

JUDGMENT

MR. JUSTICE CONNOLLY: I ask my brother Carter to deliver the first judgment.

MR. JUSTICE CARTER: In this matter I publish my reasons and I order that the appeal be dismissed with costs.

MR. JUSTICE CONNOLLY: I agree with the reasons proposed by my brother Carter and with the order he has proposed.

MR. JUSTICE MOYNIHAN: So do I.

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

IN THE SUPREME COURT OF QUEENSLAND W. No. 1358 of 1985

FULL COURT

BETWEEN:

KENNETH LYNIS STANIER and BRENDA STANIER (Plaintiffs) Appellants

AND:

BRUCE DOUGLAS HARRIMAN and SANDRA PATRICIA HARRIMAN (Defendants) Respondents

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CONNOLLY J.

CARTER J.

MOYNIHAN J.

Reasons for Judgment delivered on the 13th day of October, 1989 by Carter J.

Connolly J. and Moynihan J. agreeing with the reasons and order made.

"APPEAL DISMISSED WITH COSTS."

IN THE SUPREME COURT OF QUEENSLAND No. 1358 of 1985

Before the Full Court

Mr. Justice Connolly

Mr. Justice Carter

Mr. Justice Moynihan

BETWEEN:

KENNETH LYNIS STANIER and BRENDA STANIER (Plaintiffs) Appellants

AND:

BRUCE DOUGLAS HARRIMAN and SANDRA PATRICIA HARRIMAN (Defendants) Respondents

REASONS FOR JUDGMENT - CARTER J.

Delivered the 13th day of October, 1989.

CATCHWORDS:

Counsel: A. Heyworth-Smith for Appellants
Mr. Fraser for Respondents
Solicitors: Clarke and Kann T/a for Petersen Cutler & Co for Appellants
Stephens and Tozer T/a for Bernard Ponting for Respondents
Hearing date: 3rd October, 1989.

IN THE SUPREME COURT OF QUEENSLAND No. 1358 of 1985

BETWEEN:

KENNETH LYNIS STANIER and BRENDA STANIER (Plaintiffs) Appellants

AND:

BRUCE DOUGLAS HARRIMAN and SANDRA (Defendants)

PATRICIA HARRIMAN Respondents

REASONS FOR JUDGMENT - CARTER J.

Delivered the 13th day of October, 1989.

The appellants, the plaintiffs in the action, had carried on business at Paradise Waters in premises located in a shopping arcade which were adjacent to premises occupied by the respondents at the same location. The latter occupied premises considerably larger than those of the appellants and they conducted on their premises the business of a supermarket. The appellants on the other hand conducted a milk bar and sub-newsagency. Because the appellants had engaged in the sale of some grocery lines and, to that extent, were in competition with the defendants in the adjacent premises, friction developed between them. It seems common ground that out of that friction there developed the idea in about June 1984 that the parties should agree to merge the two businesses and henceforth carry on business as partners or in some other form of joint venture.

At the trial the defendants maintained the position that the merger discussions never proceeded beyond that stage and that no agreement of any kind between the parties ever eventuated. The learned trial judge was unimpressed by the male respondent's evidence and expressed the view that his evidence required a cautious approach where it differed from that of other witnesses. The other relevant witnesses were the male appellant, Morton a real estate agent and one Richardson who at the material time held a Bill of Sale over the stock in trade and chattels in the premises where the appellants carried on business as security for a guarantee of a personal loan obtained by the male appellant from a bank.

In substance the case for the appellants at the trial was that while there had been preliminary discussions related to a possible merger, those discussions matured into an agreement for sale whereby the appellants agreed to

sell to the respondents their business for $40,000.00 plus stock at valuation. The learned trial judge regarded the male appellant as an honest witness but did not accept his evidence as to the formation of an enforceable agreement in the terms alleged by him nor was the learned trial judge persuaded at the trial on the whole of the evidence that it was more probable than not that the appellants and the respondents bound themselves to an agreement for the sale by the appellants of their business to the respondents. Judgment was therefore entered for the respondents against the appellants.

The appellants by their statement of claim claimed a variety relief including declarations and a judgment for the sum of $40,000.00. I do not find it necessary to detail the somewhat complex terms of the declarations sought at the trial because at the hearing of the appeal counsel for the appellants submitted that the action was in substance an action for the moneys owing under the contract of sale. It is sufficient to say that in the statement of claim the appellants claimed, inter alia, a declaration that $40,000.00 was payable to the appellants by two instalments each of which was said to be payable upon the happening of certain events.

The learned trial judge concluded that whilst he was satisfied that the original discussions went beyond the idea of merger - a matter denied by the male respondent - he was also satisfied that these discussions culminated at the most in the possibility of a sale of their business by the appellants to the respondents but that an enforceable agreement for the sale was not concluded. Although he was satisfied that the price of $40,000.00 was agreed between the parties as the price at which a sale might be effected, he was unable to find on the evidence whether the stock in trade was to be included in the sale price nor was he able to find any agreement by the parties as to how payment was to be made or the details of the security to be given. In short the learned trial judge concluded that the discussions between the parties never reached finality nor

matured into a concluded agreement although he was satisfied that a sale at $40,000.00 was to be a component of the agreement if and when the parties reached a concluded agreement.

The primary submission of counsel for the appellant was that the learned trial judge erred in not finding as a fact that the parties had agreed to a sale of the business at $40,000.00 plus stock at valuation in accordance with the evidence of the male appellant. It is implicit in the primary submission that the learned trial judge ought to have accepted the entirety of the evidence of the male plaintiff, or at the very least, the substance of it.

Concerning the inclusion or otherwise of the stock in the sale price the learned trial judge was faced with a conflict of evidence between the male appellant and the real estate agent Morton who in fact gave evidence for the appellants. Morton had said that an agreement had been reached for the sale of the business at $40,000.00 but that there was to be included in that price not only the stock but also the sum of $1,000.00 which Morton asserted was his commission. Indeed Morton had prepared a note headed "Proposed Sale of Shop 5 (K. Stanier) per C.R.E. (Central Real Estate)" which referred to an agreed price of $39,000.00. Since there was no evidence that either of the parties had seen this note the learned trial judge found that whilst it was indicative of Morton's understanding of their bargain it was otherwise unhelpful.

The difficulty for the trial judge in making a finding as to what was agreed to be included in the sum of $40, 000.00 is immediately obvious and this altogether and apart from his difficulty in concluding on the evidence what were the terms regarding mode of payment and the giving of security. This difficulty was heightened by the evidence that about a week after 22nd June, 1984, the date of the alleged oral agreement, both the male appellant and male respondent went to a solicitor named Anderson to give instructions for a written agreement. A draft agreement was

prepared in terms which provided for a sale at $40,000.00 plus stock at valuation with specific provision for payment by instalments. However this agreement was never executed. The respondents refused to sign it on the ground that it did not reflect their agreement. True it is that at the trial the learned trial judge rejected the male respondent's evidence as to the discussions between the parties on 22nd June. On the other hand the difficulty for the learned trial judge was enhanced by the fact that Anderson who was apparently available to give evidence was not called by either party.

The argument that the learned trial judge should have accepted the whole of the male appellant's evidence is based on at least two other matters of fact which emerged in the course of the evidence and which although not the subject of specific findings appear to have been common ground. I am prepared to assume that they were not in dispute.

After 22nd June the plaintiffs conducted a stock take of their business and this stock was actually moved into the respondents' premises along with items of plant and equipment, some if not all of which were the subject of lease arrangements with a finance company. Secondly at the male appellant's request the male respondent paid $469.57 in respect of a bill for newspapers which was ultimately to be taken into account at settlement.

The fact also emerged that Richardson the holder of the Bill of Sale in respect of the stock became aware of the fact that the parties were dealing with each other in respect of the appellants' business and was concerned to ensure the integrity of his own security. He had discussions with both parties. Later the respondents paid out Richardson to secure the release of his security in respect of the stock.

The learned trial judge considered all of this as a part of the totality of the evidence. It is clear from his judgment that he was not persuaded that these items of

evidence possessed the definitive quality for which counsel for the appellants contended and in my view he was entitled to so conclude. The fact that stock was being taken and that the male respondent accepted liability for the newspaper bill is equally consistent with the parties having concluded that it was expected that agreement would ultimately be reached in respect of all of their agreement. These matters would then be taken into account. At least however there then remained outstanding the terms of the payment of the purchase price which the agreement prepared by Anderson asserted was payable by instalments upon the sale by the respondents of other businesses then conducted by them. There was also outstanding the question of security.

However the learned trial judge was left with the fundamental difficulty of resolving the conflict of evidence in relation to a critical issue between Morton and the male appellant which he said he found impossible to resolve. Counsel submitted that the learned trial judge ought to have concluded that whatever had transpired between the parties in the presence of Morton on 22nd June the parties finally concluded their bargain in further discussions after Morton had left them. I am not persuaded that the evidence, in the state that it was, ought to have led the learned judge to the conclusion contended for by counsel. Again the learned trial judge was confronted by an inconsistency between the sworn evidence of the male appellant and the allegations in the statement of claim as to the alleged terms of payment. This sworn evidence was also inconsistent with the terms of the draft agreement prepared by Anderson.

I am unable to conclude that the learned trial judge erred in not finding that a completed and enforceable agreement was reached between the parties. Rather his finding that, at best, the possibility of a sale of the appellants' business was canvassed was perfectly consistent with the evidence which in his view he could safely act

upon. It follows that in my opinion the appeal should be dismissed with costs.