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UNIVERSITY OF LONDON
W.C.1.

19 OCT 1956

No. 54 of 1925
INSTITUTE OF ADVANCED
LEGAL STUDIES

In the Privy Council.

44620

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA, NEW SOUTH
WALES REGISTRY.

BETWEEN

WILLIAM HARRINGTON PALMER (Applicant) - *Appellant*

AND

RANDAL WESTROPP CAREY (Respondent) - *Respondent.*

Case for Respondent.

1. This is an appeal by special leave from a judgment of the High Court of Australia dated 10th June 1924 reversing by a majority (Isaacs and Starke, JJ., Sir Adrian Knox, C.J., dissenting) a judgment of the Judge in Bankruptcy in the State of New South Wales (Street, J.) in favour of the Appellant dated 19th December 1923.

RECORD.
—

2. The matters in dispute in this case arise from the bankruptcy of one Alfred Edwin Johnstone, who became bankrupt on 21st June 1921, the Appellant being appointed assignee in bankruptcy of his estate, and the question for decision is whether under the terms of a written agreement dated 30th April 1917, the Respondent was entitled to a security charge or lien upon certain goods the property of the bankrupt.

3. The said Johnstone had prior to his bankruptcy carried on business as an indenter and importer at 36 York Street, Sydney, New South Wales, and in order to finance his business entered on the 30th April 1917 into the said agreement with the Respondent, which, after reciting that the

Exhibit 22.
p. 73.

Respondent had agreed to advance for the purposes of the said business to the said Johnstone various sums of money up to an aggregate of £1,000, provided—

“ 1. The Borrower shall from time to time purchase goods or stock for the purpose of the said business and the lender agrees to advance the purchase moneys therefor and which will be applied exclusively for such purchases as aforesaid.

“ 2. In consideration therefor the Borrower hereby covenants with the lender as follows, viz. :—

“ 3. To sell such goods or stock as soon as possible after the purchase thereof and to pay the proceeds of sale forthwith into the credit of the lender at the Head Office of the Commonwealth Bank in Sydney. 10

“ 4. To attend to and carry on the business and sale of such goods or stock diligently during the continuance of this agreement and not absent himself therefrom.

“ 5. To keep proper books of account and to permit the lender or any accountant nominated by him to have free access to and to inspect and make extracts from such books.

“ 6. That during the continuance of this agreement an account shall be taken by the borrower and furnished to the lender on the twentieth day of each month of the purchases and sales and showing the net gross profits derived therefrom and on receipt thereof the lender after deducting the amount so advanced by him as aforesaid together with one $\frac{\text{half}}{\text{third}}$ of the gross profits pay to the borrower the remaining $\frac{\text{one half}}{\text{two-thirds}}$ of the gross profits for his own use and benefit absolutely. 20

sic, obviously meaning “ shall pay.”

“ 7. This agreement shall not in any way constitute or be deemed to constitute a partnership between the parties hereto and shall be terminable at any time at the option of the said lender.” 30

4. Originally the said agreement had provided for payment of one-third of the profits to the said Respondent, but on or about 16th May 1917 it was agreed that the Respondent should give his whole time to the business and that his proportion of the profits should be one-half and the agreement was altered accordingly and initialled by the parties.

p. 29, l. 43,
and p. 30,
ll. 6 and 7.

5. In accordance with the said agreement the Respondent advanced sums to the amount of £1,000 for the purchase of goods and also other sums which were employed in the manner agreed. Such further sums were obtained by the Respondent by means of a personal overdraft at the Commonwealth Bank, for which he was solely responsible and which at the time of the said bankruptcy amounted to about £8,000. 40

37, ll. 37-41

p. 89, l. 11.

6. Further sums aggregating on 13th May 1921 about £7,500 were advanced to the business by the Respondent's father and for these sums the Respondent was liable to his father either solely or jointly with the bankrupt. Such sums were expended on the purchase of goods for the purposes of the business. Exhibit Z.
p. 83.

7. The proceeds of all goods so purchased were, in accordance with the agreement, paid into the Respondent's sole account with the Commonwealth Bank. In several instances prior to October 1920 cheques received by the bankrupt in payment for goods sold were paid to his own account but in each such instance the bankrupt immediately provided the Respondent with a list of payments and a cheque for the total amount thereof. p. 24,
ll. 20-30.

8. On no occasion, so far as the Respondent's knowledge went, was there any failure to pay amounts received for goods into the Respondent's bank account and he never consented to any other course of dealing, but in the month of May 1921 the Respondent discovered that the bankrupt had collected a number of outstanding accounts and, in breach of his obligation under the agreement of 30th April 1917, had paid them into his own account and utilised them for his own purposes without the Respondent's knowledge or consent. p. 24,
ll. 12-40.

p. 34,
ll. 11-30.

9. For some time prior to the month of May 1921 the said Johnstone, also without the knowledge or consent of the Respondent, had been carrying on a similar business in Clarence Street, Sydney, in respect of which he had incurred liabilities for goods.

10. In the said month of May 1921 the Respondent discovered that the said Johnstone was in difficulties and after consulting his solicitor entered into an agreement in writing with the said Johnstone, by which, in consideration of the release of the sum of £18,999 16s. 3d. then acknowledged to be due by him to the Respondent and including both the bank overdraft and advances made by the Respondent's father, the said Johnstone sold and assigned to the Respondent all the stock and fittings upon the premises of the business together with all goods in bond, the Respondent paying the sums due in respect of such bonded goods. Such agreement was contained in letters dated 31st May 1921, 1st June 1921 and 7th June 1921. p. 44,
ll. 1-18.

Exhibit C.
p. 84.
Exhibit 24.
p. 85.

11. Shortly afterwards the said Johnstone became bankrupt on his own petition, and on 21st June 1921 the Appellant was appointed assignee of his estate. Proofs for debts amounting to £3,700 were put forward by creditors and all such proofs were in respect of the business p. 50,
ll. 36 and 38.
p. 20,
ll. 20 and 21.

p. 34,
ll. 10-12.
p. 34,
ll. 1 and 2,
10 and 11.

carried on by the said Johnstone personally at Clarence Street, Sydney, and none of the goods in respect of which proofs were lodged were supplied to the business carried on at York Street, Sydney.

p. 1.

12. By notice of motion dated 2nd June 1922 the Appellant gave notice that he would move the Supreme Court of New South Wales (in Bankruptcy) for an order declaring void the assignment referred to in paragraph 10 hereof of the said stock in trade book debts and assets to the Respondent and for consequential relief on the grounds (inter alia) that the same were the property of the bankrupt at the commencement of his bankruptcy and vested in the Official Assignee, that the said sale or assign- 10
ment was made by the bankrupt with the intent to defeat or delay his creditors and that the same was void against the Official Assignee.

13. The material sections of the Bankruptcy Act of New South Wales 1898 as amended by Act No. 6 of 1919 are as follows :—

“s. 134. (4) Whenever the Official Assignee or Trustee claims any property as part of the bankrupt's estate, or claims any right against any person, whether such person is or is not a party to the bankruptcy, the Court may upon motion by the Assignee or Trustee or any person interested in such property hear and determine, either upon affidavit or upon oral evidence, 20
or both upon affidavit and oral evidence, the question raised by such claim, and make such order thereupon as he may deem expedient or necessary, for the purpose of doing complete justice between all the parties interested.

“s. 56. (1) Every alienation, transfer, gift, surrender, delivery, mortgage or pledge of any estate or property, real or personal, every warrant of attorney of judicial proceeding made, taken or suffered by a person being at the time insolvent or in contemplation of surrendering his estate under this Act, or knowing that proceedings for placing the same under sequestration have 30
been commenced, or within 60 days before the sequestration thereof, and whether fraudulent or not, having the effect in any such cases of preferring any then existing creditor to another shall be absolutely void.

“(2) For the purposes of this section the word insolvent means the inability of a person to pay his debts as they become due from his own money.”

14. Such motion came on for hearing before Mr. Justice Street, Judge in Bankruptcy, on the 13th, 14th and 15th days of September 1922, and evidence was given for the Appellant and for the Respondent, and the 40
Respondent contended that upon the true interpretation of the dealings

between them, the Respondent and the said Johnstone had been joint owners of the said goods or had a joint interest therein or were partners in the said business.

15. By his Judgment, given on the 15th day of September 1922, the learned Judge rejected the Respondent's contentions, declared the sale void and ordered the Respondent to pay to the Official Receiver the value of the said goods and assets "subject to deductions in respect of any security over the same or the proceeds of the sale thereof which has been validly given before the bankruptcy herein to the Commonwealth Bank of Australia by the bankrupt or any person having authority on his behalf."

p. 53,
ll. 10-35.

16. By Notice of Appeal dated 7th October 1922 the Respondent appealed from such decision to the High Court of Australia on the grounds (inter alia) that the learned Judge was in error in holding that the said business and assets thereof were the sole property of the bankrupt, and in holding that the Respondent had no right or interest in the said business or assets, and that his Honour was in error in holding that the Respondent was merely in the position of an unsecured lender of money, and that his Honour was in error in holding the sale void.

p. 55,
Exhibit 19.

17. Such appeal came for hearing before the High Court of Australia on 31st July 1923, when, by consent of the parties, the decree of the Supreme Court of New South Wales in Bankruptcy was altered by adding thereto the words "and subject to deduction (if any) in respect of any security, lien or charge (if any) to which the Respondent is entitled under Clause 3 of the Agreement of 30th April 1917," and the said High Court referred the matter back to the Supreme Court of New South Wales (in Bankruptcy) to ascertain whether the Respondent was entitled to any such security, lien or charge. Subject to such variation the appeal was dismissed with costs.

p. 57,
ll. 36-42.

18. Such reference came before the Supreme Court of New South Wales in Bankruptcy (Street, C.J., in Equity) on the 18th and 19th days of December 1923, when, after hearing further evidence, his Honour held that the Respondent was not entitled to any security, lien or charge on the said assets.

p. 61,
ll. 2-10.

19. The Respondent appealed from such decision to the High Court of Australia, which on 10th June 1923 by a majority (Knox, C.J., dissenting) allowed the appeal and declared that the Respondent was entitled to a lien or security under Clause 1 on the moneys, the proceeds of goods purchased by means of advances made by him, to secure the amount of such advances and one-half of the gross profits in accordance with Clause 6 of the said agreement.

20. The Respondent begs respectfully to call attention to the fact that the Appellant in paragraph 26 of his petition for Special Leave to Appeal in this case indicates as one of his grounds of appeal the contention that the agreement of 30th April 1917 not having been registered as a bill of sale is void under the New South Wales Bills of Sale Act 1898 and that the decision of the High Court of Australia in *Malick v. Lloyd*, 16 C.L.R., 483, is wrong. The Respondent submits that no such point is open to the Appellant in the present appeal for it was never raised by the present Appellant either at the said hearing before Street, C.J., in Equity, or on the appeal to the High Court of Australia, and if the Judicial Committee entertained on the present appeal a discussion as to whether *Malick v. Lloyd* was rightly decided, it would be doing so with reference to a leading authority which has stood unchallenged in Australia for 12 years without the assistance of the views of any of the Australian Judges in the present case on the contention. 10

p. 68, l. 45,
to p. 69, l. 19.

21. In his judgment Mr. Justice Isaacs said "the dominant purposes of the instrument (the agreement of 30th April 1917) as evident from its tenor, was that Carey should not have to rely upon the personal undertaking of Johnstone to repay the money lent as a mere unsecured debt. He was to be entrusted with the money only upon the terms that it should be applied exclusively to purchasing goods for the business that it should be transformed into goods, and that the goods once purchased, were to be retransformed 'as soon as possible' by business operations into money and that money should be handed in specie, that is, the full actual proceeds, to the Appellant and these should be in the sole control of the Appellant for distribution according to agreement. All that Johnstone was entitled to was a certain proportion of the gross profits after deducting the money lent. 20

"In my opinion, there was a trust or interest created, beginning with the application of the money lent and following the goods and their proceeds. Clause 3 of the agreement is part of the arrangement creating the trust or interest. The goods came into existence before the bankruptcy, the doctrine of Equity usually called that of *Holroyd v. Marshall* (10 H.L.C., p. 191), though much older, as Lord Macnaghten says in *Tailby v. Official Receiver* (13 A.C., at p. 523) applies, and the Official Assignee became entitled to the goods but subject to the trust or interest in favour of Carey." 30

His Honour further held that the effect of the avoidance of the agreement of May 1921 was that "it never had any legal existence" and therefore it was impotent for all purposes.

p. 70,
ll. 7-43.

22. Mr. Justice Starke delivered judgment concurring with Mr. Justice Isaacs for the reasons assigned by him that the agreement did give the Respondent a security for advances made and held that the present 40

Appellant could not both approbate and reprobate the agreement of May 1921 and could not therefore be heard to say it was effective in discharging the Respondent's rights under the prior agreement but void in so far as it purported to confer rights upon him.

23. In his dissenting judgment the learned Chief Justice held that the agreement of 30th April 1921 did not create any trust or security and that the parties had no intention of creating any such trust or security.

24. The Respondent submits that the judgments of the majority of the High Court of Australia are right and should be affirmed for the
10 following amongst other

REASONS.

- (1) BECAUSE the intent and purpose of the said agreement was that the Respondent should have a lien or security on the proceeds of all goods purchased with moneys provided by him.
- (2) BECAUSE immediately on the purchase of goods with moneys so provided there arose a trust or interest binding on the conscience of the bankrupt to deal with them in the manner provided by the agreement, and because
20 any dealing with them otherwise than as so provided would have been a breach of trust restrainable by a Court of Equity.
- (3) BECAUSE the dominant purpose of the said agreement was that the Respondent should not have to rely upon the bare personal undertaking of the bankrupt to repay advances.
- (4) BECAUSE the agreement of May 1921 was void *ab initio* and therefore inoperative to take away from the
30 Respondent rights acquired by him under the earlier agreement.
- (5) BECAUSE the Appellant cannot be heard both to approbate and reprobate the said agreement of May 1921.
- (6) FOR the reasons given in their judgments by the majority of the judges of the High Court.

JOHN SIMON.

WILFRID BARTON.

No. 54 of 1925.

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BETWEEN

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AND

RANDAL WESTROPP

CAREY (Respondent) - *Respondent.*

Case for Respondent.

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