

IN THE HIGH COURT OF AUSTRALIA

ANAGNOSTOU AND OTHERS

V.

BROWN

REASONS FOR JUDGMENT

Judgment delivered at..... Sydney

on..... Friday 23rd May 1969

ANAGNOSTOU AND ORS.

v.

BROWN

ORDER

Appeal dismissed with costs.

ANAGNOSTOU AND ORS.

v.

BROWN

JUDGMENT

MENZIES J.
WINDEYER J.
OWEN J.

ANAGNOSTOU AND ORS.

v.

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Upon proceedings by way of originating summons Helsham A.J. made a declaration that the plaintiff therein - the present respondent - had, on the 6th day of June, 1967, effectively exercised an option granted to her by the defendants thereto - the present appellants - to purchase the property known as No. 83 Nicholson Street, St. Leonards.

The option was in the following terms:

"AGREEMENT made the Sixth day of June, 1967, BETWEEN Leonidas Anagnostou, John Anagnostou and Evangelos Anagnostou, herein called "THE GRANTORS" and Miss Joan Margaret Brown, 148 Pacific Highway, Roseville, herein called "THE GRANTEE", WHEREBY IT IS AGREED that in consideration of the sum of One hundred Dollars (\$100.00) paid by the Grantee to the Grantors (the receipt whereof the Grantors hereby acknowledge) the Grantors HEREBY GRANT to the Grantee or her nominees a sole and exclusive Option up to and including 30th June, 1967, to purchase the property known as 83 Nicholson Street, St. Leonards, for the sum of Fourteen Thousand Five Hundred and Twenty Dollars (\$14,520.00), Deposit of \$1,452.00 to be paid to the Estate Agent hereinafter named within seven (7) days of exercise of Option. Balance \$12,968.00 to be paid on Completion. This Option is to be exercised by notice in writing signed by or on behalf of the Grantee or by any nominee of the Grantee and addressed to the Grantors and or their agent delivered to them personally or posted in a prepaid envelope addressed to their known place of address on or before the 30th June, 1967 next and in the event of the same being so exercised the Grantors will sell the said property to the Grantee or to such nominee for the price and on the terms above stated AND IT IS HEREBY AGREED that the conditions of sale shall be those contained in the printed form of conditions of sale for the time approved by the Real Estate Institute of New South Wales together with such special conditions (if any) as appear hereunder with provision for adjustment of rates and Vacant Possession, on Completion, and settlement to be effected within eight (8) weeks from 30th June, 1967.

The Grantors also agree that the Agent, Messrs. Harrie Murrell Pty. Ltd., will be entitled to receive Commission upon the amount of the purchase price if the hereinbefore mentioned Option is exercised and the sale of the subject property settled at the rate for the time being approved by the Real Estate Institute of New South Wales.

The Grantors also agree that in the event of this Option being exercised by the Grantee, the amount paid as consideration for granting this Option shall become

part of the agreed full Purchase Price of Fourteen Thousand Five Hundred and Twenty Dollars. The Grantee to accept the Zoning of the land as it shall be on completion."

The learned judge stated that, in general, originating summons procedures are not apt to enable the court to come to a conclusion where there are real contested questions of fact, but his Honour thought that the plaintiff's case was so clearly established that he could, in this case, safely make the finding of fact to support the declaration. The critical finding of fact was that the plaintiff had exercised the option which the defendants had granted to her.

The evidence which brought his Honour to the foregoing conclusion was principally the evidence of the plaintiff herself given partly upon affidavit and partly orally in the course of cross-examination upon her affidavits. Much of the evidence upon affidavit was rejected. It is sufficient, we think, to consider the course that was taken with respect to para. 3 of the plaintiff's affidavit of the 10th May, 1968, and para. 2 of the plaintiff's affidavit of the 9th August, 1968. These paragraphs did bear directly upon the contentious fact. The former paragraph as sworn was as follows:

"On the 26th June, 1967 I gave notice pursuant to the said Agreement to each of the said Defendants of my exercise of the Option granted by the said Agreement. The said notice was given by the posting on the said 26th Day of June, 1967 of a notice, a true copy whereof is hereunto annexed and marked "B", by pre-paid post addressed to the Defendants at 83 Nicholson Street, St. Leonards, being the address of the said Defendants as then known to me."

The admitted part of this paragraph was as follows:

"On the 26th June, 1967 I gave notice to each of the said Defendants of my exercise of the Option granted by the said Agreement."

Paragraph 2 of the latter affidavit as sworn was as follows:

"On the 26th June, 1967 I gave notice of exercise of the option referred to in my Affidavit of the 12th May sworn and filed herein by enclosing the same in an envelope stamped and addressed to the three Defendants at their address 83 Nicholson Street, St. Leonards. I personally posted the said notice at the General Post Office, Sydney, on the 26th June, 1967 by

depositing the same in the appropriate postal box between 5 and 5.30 in the afternoon. At the same time I gave notice of option to Mrs. and Miss McKenzie at 85 Nicholson Street, St. Leonards. Pursuant to this latter notice a contract of sale was received from Messrs. McMaster Holland & Company, Solicitors for Mrs. and Miss McKenzie and that sale proceeded to completion."

The portion of this paragraph which was admitted was as follows:

"On the 26th June, 1967 I gave notice by enclosing the same in an envelope stamped and addressed to the three Defendants at their address, 83 Nicholson Street, St. Leonards. I personally posted the said notice at the General Post Office, Sydney, on the 26th June, 1967 by depositing the same in the appropriate postal box between 5 and 5.30 in the afternoon."

The copy notice exhibited to the first affidavit was as follows:

"TO LEONIDAS ANAGNOSTOU,
JOHN ANAGNOSTOU and
EVANGELOS ANAGNOSTOU,

I hereby exercise option to purchase property 83 Nicholson Street, St. Leonards, pursuant to option granted by you dated 6th June, 1967.

It is noted that the conditions of sale are those shown on the printed form with provision for adjustment on completion, settlement to be effected within Eight (8) weeks from the 30th June, 1967.

Please arrange for submission of form of Contract pursuant to the option. The deposit of One thousand four hundred and fifty-two dollars (\$1,452) will be paid to the Agent within Seven (7) days of date of exercise of this option.

The Contract will be in favour of my nominee whose name will be notified at the time of exchange of Contracts.

DATED this Twenty-sixth day of June, 1967.

Joan Brown

Witness

Kenneth W. Tribe
Solicitor
Sydney."

The oral evidence of the plaintiff was to the effect that she had typed the document, of which the foregoing exhibit was a carbon copy, and had typed upon the envelope in which the original of the exhibit was posted the address of the defendants. The plaintiff also identified the notice exhibited to the affidavit of the 10th May, 1968.

Before this court counsel for the respondent conceded that so much of paragraph 3 of the affidavit of the 10th May, 1968, as had been admitted had been wrongly admitted. Instead of setting out the facts from which an inference might or might not be drawn, the paragraph foreclosed the very matter in issue by expressing as a conclusion the ultimate fact to be determined by the court on evidence. While conceding this counsel contended that to identify the notice referred to as "the same" in para. 2 of the plaintiff's affidavit of the 9th August, 1968, it was legitimate to refer to para. 3 of the affidavit of 10th May, 1968, as it had been sworn. This contention we accept. When regard is had to para. 3 of the affidavit of the 10th May, 1968, there can be no doubt that the notice referred to as "the same" in para. 2 of the affidavit of the 9th August, 1968, was sufficiently identified. It is not that the earlier paragraph, which was inadmissible, was incorporated with the latter paragraph - that would merely make the latter paragraph itself inadmissible - but that the earlier paragraph can be used to identify the document to which the latter paragraph relates.

His Honour was, therefore, rightly satisfied by para. 2 of the affidavit of the 9th August, 1968, and by the oral evidence that the notice in question was sent by the plaintiff to the defendants on the 26th June, 1967. His Honour very naturally found support for his conclusion that the notice had been posted by the plaintiff to the defendants from a letter dated 27th June, 1967, whereby solicitors purporting to act on behalf of the defendants forwarded to the solicitor for the plaintiff a contract reflecting the terms of the option. His Honour said this "leaves me in no doubt whatever that it (i.e. the contract) was forwarded as a result of the exercise of the option".

Counsel for the appellant, however, in the

course of his interesting and careful argument, contended that the notice was not an effective exercise of the option because of the inclusion of the statement:

"The Contract will be in favour of my nominee whose name will be notified at the time of exchange of Contracts."

The argument was that, according to the terms of the agreement of option, an effective notice by the grantee of the option had to be signed by or on behalf of the grantee and an effective notice of exercise on behalf of a nominee of the grantee had to be signed by or on behalf of the nominee. So it was contended that the option could not be effectively exercised by the grantee in a case where it was intended that the contract should be in favour of a nominee. We are not prepared to accept this argument. As we read the notice, the grantee effectively exercised the option and informed the defendants that, when the time came for the signing of a formal contract, that contract would be in favour of a nominee to be named rather than the grantee herself. It is perhaps worthwhile recording the following sentence from the judgment of the learned trial judge:

"The evidence discloses to my complete satisfaction that on 26th June, 1967 the plaintiff duly exercised the option by posting a letter to the defendants. It seems to me that the terms of this letter, which is Exhibit "B" in the proceedings, are adequate to exercise the option, and no argument has been addressed to me to the contrary."

Accordingly we consider that the appeal should be dismissed.