

AUSTRALIA / JUDGMENT

Sinclair v SSET Constructions Pty Limited [2002] NSWCA 125

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New South Wales Court of Appeal

CITATION : Sinclair v SSET Constructions Pty Limited [2002] NSWCA 125 FILE NUMBER(S) : CA 40834 of 2001 HEARING DATE(S) : 13/06/02 JUDGMENT DATE : 31 July 2002

David Sinclair t/as Alexander Dyce & Dodd PARTIES : v SSET Constructions Pty Limited
JUDGMENT OF : Meagher JA at 1; Davies AJA at 13; Foster AJA at 23

LOWER COURT JURISDICTION : District Court LOWER COURT DC 7984 of 1999 FILE
NUMBER(S) : LOWER COURT Finnane DCJ JUDICIAL OFFICER :

COUNSEL : A: Mr Simpkins SC R: Mr R Angyal & Miss J Rawlings SOLICITORS : A: Henry Davis
York R: Keith Hurst & Associates CATCHWORDS : Professional negligence - appeal against
damages flowing from negligence - appeal allowed. Hungerfords v Walker (1989) 171 CLR 125
CASES CITED: The Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64 at 78-9 Medlin v
The State Government Insurance Commission (1995) 182 CLR 1 at 6 Malec v J.C. Hutton Pty
Limited (1990) 169 CLR 638 at 642-3 DECISION : 1. Appeal allowed; 2. Orders 5, 6 and 8 below be
set aside; 3. Order that the respondent to pay the appellant's costs of the appeal and have a
certificate under the Suitors' Fund Act.

IN THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL CA 40834 of 2001 DC 7984
of 1999

MEAGHER JA DAVIES AJA FOSTER AJA

Wednesday, 31 July 2002 DAVID SINCLAIR t/as ALEXANDER DYCE & DODD v SSET
CONSTRUCTIONS PTY LIMITED

FACTS

The appellant, Mr Sinclair, a solicitor, was retained by the respondent, SSET, a development company run by four brothers (by the name of Khattar), for the sale of certain units (the Willoughby Property). The trial judge found that the appellant was negligent and liable in damages for failing to extinguish, modify or release a drainage easement running across the land expeditiously. This appeal was against one of the alleged heads of damage flowing from that negligence.

By reason of not having the proceeds of sale of the Willoughby property in time, the respondent, SSET, successfully claimed that it lost the opportunity of buying further real estate, thereby losing whatever profit would accrue from the sale of that further property (the Turramurra Property).

The Turramurra Property was owned by a Mr and Mrs D who sold the property to a company called Ventus Construction Pty Ltd on 5 May 1999. The trial judge found that an agreement was reached between Mr K (one of the 4 brothers in SSET), and a Mrs S, a real estate agent acting for Mr and Mrs D, to sell to SSET the Turramurra Property for \$1.48 million. This agreement was conditional upon (a) an exchange of contracts on Monday 3 May 1999, and (b) a settlement four weeks after that.

HELD: Per Meagher JA (Davies AJA, Foster AJA) .

- (i) It was not open to the trial judge to make a finding, from the evidence, that an agreement was reached between Mr K and Mrs S. (ii) The trial judge's finding that as a result of the appellant's negligence, SSET lost the opportunity of exchanging contracts with Mr D. on Monday 3 May for the Turramurra land in the sum of \$1.5 million, was an unjustifiable one.

ORDERS

- (i) Appeal allowed. (ii) Order 5, 6 and 8 below be set aside; (iii) Order that the respondent should pay the appellant's cost of the appeal and have a certificate under the Suitors' Fund Act.

IN THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL CA 40834 of 2001 DC 7984 of 1999

MEAGHER JA DAVIES AJA FOSTER AJA

Wednesday, 31 July 2002 DAVID SINCLAIR t/as ALEXANDER DYCE & DODD v SSET CONSTRUCTIONS PTY LIMITED

Judgment

1 MEAGHER JA: This is an appeal by Mr Sinclair, a solicitor, from a judgment and verdict against him by Judge Finnane in the District Court. The respondent, SSET Constructions Pty Limited ("SSET"), is a corporation which was once one of his clients and which sued him for professional negligence. 2 SSET is a development company whose business is to buy real estate sites, develop them, sell them and (with the proceeds of sale) buy yet more sites and develop them. It is run by four brothers of the name Khattar. 3 SSET bought some land at a Sydney suburb called Willoughby and built certain units on it. It then retained Mr Sinclair on the sale of 12 of those units. He was negligent in the performance of his retainer. There was a drainage easement running across the land, and he was, to put it mildly, sluggish in extinguishing, modifying or having released that easement. For this negligence his Honour found that he was liable in damages. There is no appeal against that finding. 4 However, there is an appeal against one of the alleged heads of damage flowing from that negligence. SSET claimed – and claimed successfully –

that, by reason of not having the proceeds of sale of the Willoughby property in time, it lost the opportunity of buying further real estate at an address in Turramurra, (which is also a suburb of Sydney), thereby losing whatever profit would accrue from the sale of that further property. 5 The Turramurra property was owned by a Mr and Mrs Davey. They sold the property to a company called Ventus Construction Pty Ltd ("Ventus Constructions") on 5 May 1999. 6 His Honour found that, in a conversation between Mr Tony Khattar, one of the four brothers in SSET, on the one hand, and a Mrs Skeve, a real estate agent acting for the Daveys, on the other hand, an agreement was reached on 1st May 1999 for the Daveys to sell to SSET the Turramurra land for \$1.48 million. This agreement was conditional on (a) an exchange of contracts on Monday 3 May 1999, and (b) a settlement four weeks after that. 7 It is difficult, if not impossible, to see how such an agreement could possibly have been reached. It was supposedly reached, as I have said, in a conversation between Mr Tony Khattar and Mrs Skeve. There were no other parties to the conversation. Mrs Skeve gave evidence of the conversation, and said that in it no such agreement was reached. Mr Tony Khattar, the other party to the conversation, did not give evidence at all. Mr Simon Khattar, one of Mr Tony Khattar's brothers, did give evidence of the conversation (although how his testimony was admitted is not easy to see), and he admitted in cross-examination that he did not really know what transpired in the conversation. He was relying on what he heard his brother say into the telephone, and what his brother told him Mrs Skeve had said. Why Mr Tony Khattar did not himself give evidence nobody seems to know; he is alive and apparently in good health, living in Sydney. In these circumstances, the alleged agreement cannot be believed. 8 Mrs Skeve denied that she had made an offer to sell at a price of \$1.48 million, or that she had accepted an offer from Mr Tony Khattar to buy at such a price. It is true that his Honour made some findings adverse to her credibility. Even if these findings be accepted, there is still no evidence of such an agreement. 9 Further, she denied that she had authority to accept such an offer, or to make such an offer; nor was it her habit to act without authority from her principals. That such should be the position is hardly surprising. And again, even if his Honour's discounting of her evidence be accepted, the plain fact is that SSET did not adduce any evidence of her authority. Her testimony is confirmed by her principal, Mr Davey, who said that he did not make or accept any offer arising out of the conversation in question, and did not authorize Mrs Skeve to make or accept any offer. Again, even if his evidence be discounted heavily, there would still be a deficiency in evidence of the agreement alleged. 10 But there is further, and weightier, reason to doubt SSET's case. By 1st May, when the supposed conversation took place, the vendor, Mr Davey, had accepted a higher offer, viz. \$1.5 million, from Ventus Constructions. This deal had been arranged on 29/30 April. Mrs Skeve knew all about it when she was talking to Mr Tony Khattar on 1st May. It was later reduced to writing. Terms of this deal included (a) exchange of contracts on Wednesday 5 May, and (b) a promise by Mr Davey not to treat with any other purchases between 1 May and 5 May. In these circumstances, it is almost impossible to resist Mrs Skeve's evidence that she did not accept SSET's offer of \$1.48 million, but informed him that she had a higher offer. 11 His Honour, having made an unjustifiable finding about an agreement between Mr Davey and Mr Khattar on Saturday 1 May 1999, then proceeded to make an even more unjustifiable finding that, because of Mr Sinclair's negligence, SSET had lost the opportunity (which, according to his Honour, they probably would have taken) of exchanging contracts with Mr Davey on Monday 3

May for the Turramurra land in the sum of \$1.5 million. This finding involves a finding that, if SSET had tried to exchange contracts at \$1.48 million, on Monday 3 May, Mr Davey would have demanded an extra \$20,000 (his Honour says \$200,000, but that is obviously a typographical error). This involves guesswork. The vendor, Mr Davey, never, either personally or through Mrs Skeve, made any demand that the purchase price payable by SSET should be raised to \$1.5 million. And, in view of Mr Davey's agreement with Ventus Constructions, not to interfere with the potential contract of Ventus Constructions between 1 May and 5 May, it would be unlikely that he would accept \$1.5 million from SSET if that company had offered to buy it on 3 May. That Mr Davey took his obligations to Ventus Constructions seriously in this regard (whatever may be said of his conduct during negotiations beforehand) is demonstrated by the fact that he rejected an offer of \$1.53 million which was made by another willing purchaser between 1 May and 3 May. 12 I am of the view that the following orders should be made:

1. Appeal allowed;
2. Orders 5, 6 and 8 below be set aside;
3. Order that the respondent should pay the appellant's costs of the appeal and have a certificate under the Suitors' Fund Act. 13 DAVIES AJA: I agree with the reasons of Meagher JA and with the order which his Honour proposes. 14 On 29 April 1999, the vendors of a property suitable for development, Mr and Mrs Davey, entered into terms with a potential purchaser, Ventus, which terms were set out in a letter from Ventus to the real estate agent, Ms Bridgid Skeve, which read as follows: "This is to confirm our expression of interest to purchase the above property by us or our nominee, which is to be advised at the time of contracts being entered into, on the following terms:
 1. The purchase price for the property is \$1,500,000.00 and the property is purchased together with all rights, title and interest in the Development and Building Approvals obtained by the vendor to be assigned to the purchaser.
 2. The deposit of 5% to be paid under the contract is to be released to the vendor subject to the vendor returning an undertaking duly executed by the vendor's mortgagee assuring that the certificate of title in respect of the property namely Folio Identifier 1/575661 and 2/575661 will be released on the payment of the outstanding balance of money due to such lender which sum shall not exceed \$900,000.00.
 3. Contracts for sale of land to be exchanged no later than 12 noon on Wednesday 5 May 1999.
 4. Settlement of the purchase is to take place by or before 9 June 1999.
 5. This offer is subject to and conditional upon the contracts exchanging on 5 May 1999.
 6. A preliminary deposit is payable by the close of business on Monday 3 May 1999 pending exchange and such deposit shall form part of the deposit payable under the contract as set out in 2 above. We note that you will immediately submit the offer to the vendors and obtain the vendors' acceptance of the above terms subject always to a formal exchange of contracts

and the vendor will not sell the property to any other person or corporation pending exchange ." (emphasis added) 15 Mr Davey gave evidence that he signed that letter on 1 May 1999. He said that he and his wife abided by the undertaking required in the last paragraph and declined to consider a higher offer of \$1.53 million which was made prior to 3 May 1999 by another interested party. The sale to Ventus proceeded on the basis set out in the letter. 16 The respondent claimed damages below for delay in the receipt of moneys which had been caused by the appellant's negligence. Such damages are usually compensated by an award of interest. See e.g. *Hungerfords v Walker* (1989) 171 CLR 125. The trial judge made such an order and it is not contended that the award was inadequate. 17 The subject claim of the respondent was based upon the loss of a chance to acquire the property which Mr and Mrs Davey sold to Ventus. However, by the time the respondent made an offer of \$1.48 million on 1 May 1999, Mr and Mrs Davey had already entered into terms with Ventus, including the term that they would not sell to any other person pending the exchange of contracts on 3 May 1999. 18 In this circumstance, it is pure speculation to conclude that the respondent had any reasonable prospect of acquiring the property. 19 In the assessment of damages, the common law prefers reasonable certainty to speculation. See *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR at 64 at 78-9. The basic rule is that stated by Deane, Dawson, Toohey and Gaudron JJ in *Medlin v The State Government Insurance Commission* (1995) 182 CLR 1 at 6: "For the purposes of the law of negligence, the question whether the requisite causal connexion between a particular breach of duty and a particular loss or damage is essentially one of fact to be resolved, on the probabilities, as a matter of common sense and experience." 20 Of course, possibilities may be relevant and, if so, must be evaluated. This is particularly so where the allegation is that an event would have occurred but for the default of the defendant. *Malec v J.C. Hutton Pty Limited* (1990) 169 CLR 638 at 642-3. Relevant to the facts in the present case is the remark of Mason CJ and Dawson J in *The Commonwealth v Amann Aviation Pty Limited*, at 93: "Where compensation is sought in respect of the deprivation of a possible benefit which is dependent upon the unrestricted volition of another it may be impossible to say that any assessable loss results from the breach The court does not reach a conclusion by reference to an improbable factual hypothesis."

21 By the time the respondent had formed the view that it should make an offer, Mr and Mrs Davey had already entered into an arrangement with Ventus, with which arrangement they complied. Whether or not they would consider selling the property to the respondent depended on them. They declined to consider an offer from another party that was higher than that proposed by the respondent, and they sold the property to Ventus. 22 The possibility that, had the respondent had the funds to do so, the respondent might have persuaded Mr and Mrs Davey to break their agreement with Ventus and to sell the property to them for \$1.5 million, was far too speculative to be taken into account in an assessment of damages when an appropriate means of compensating the respondent for its loss, an award of interest, was available. 23 FOSTER AJA: I agree with the reasons of Meagher JA and Davies AJA. 24 With respect, I find it quite impossible to accept the findings of the learned trial judge as to the agreement allegedly entered into

between the plaintiff and the agent on 1 May 1999. Nor, with respect, am I able to accept that the plaintiff had any chance, capable of evaluation, of entering into an agreement with Mr and Mrs Davey for the purchase of the Turramurra property on 3 May 1999, for the price of \$1.5 million. The countervailing facts referred to in the judgment of Meagher JA and Davies AJA, take these findings, in my opinion, out of the area of the reasonable assessment of a chance into the realm of speculation. 25 I agree with the orders proposed by Meagher JA.

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