

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Vivers v. Tuck, from New South Wales; delivered 1st December, 1863.*

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Present:

LORD KINGSDOWN.

LORD JUSTICE KNIGHT BRUCE.

SIR JOHN TAYLOR COLERIDGE.

THE question in this case is not whether an action can be maintained, or should be brought, on the agreement in dispute (that of the 27th September, 1859), nor is it whether that agreement should be delivered up to be cancelled. Consistently with the Decree under Appeal, an action may be brought against the Respondent by the Appellant for damages for the non-performance of the agreement, and it would have been quite consistent also with it that, if the Respondent had filed a Bill for the purpose of having the agreement delivered up to be cancelled, that Bill should have been dismissed. The question is only whether a Court of Equity shall decree a specific performance of it against the Defendant.

The principles by which Courts of Equity are guided in cases of specific performance have long been established and are well known; but there is (so to speak) this addition to the great and leading authorities, by which we are all more or less guided in controversies of this description,—that of late years the Defendant has been examinable as a witness for himself; and, therefore, when he is so examined the practical value of his statements in opposition to the Plaintiff does not rest merely upon

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his answer, which may or may not be used by the Plaintiff; but his allegations are to be read as those of a witness,—a witness under a bias, no doubt, but possibly to be trusted, possibly to be believed, possibly a man whose testimony ought to be acted upon; and in this case the Defendant has been examined and cross-examined as a witness. He states, in effect, that he did not understand the true nature and terms of the agreement as written; that he did not intend to bind himself by any such contract, and that the agreement, as prepared, is one highly disadvantageous to him and to a portion of his property not involved in the agreement. How, then, was the agreement obtained? The agreement was prepared and written by the Plaintiff. The signature of the Defendant was obtained to it without the presence or advice of any professional man, and without any advice whatever. The agreement, as far as mere property is concerned, independently of any particular value, if any, to be derived from the circumstance of having the Plaintiff as a partner is—(perhaps it might be said on the very face of it, but certainly on the face of it combined with the evidence of Mr. Goodall and the evidence of the Defendant himself)—one much more favourable to the Plaintiff than to the Defendant; very favourable to the Plaintiff and damaging to the Defendant.

Their Lordships see no reason to distrust the evidence of Mr. Goodall, who appears to be a respectable and competent person, and who was not cross-examined; and whether his evidence be considered or be not considered, their Lordships think that the language of the agreement with respect to the property affected by it is vague and obscure,—too vague and obscure to be safely acted on. In the mode of viewing it upon which the Plaintiff insists, Mr. Goodall declares specifically that it is highly disadvantageous to the property of the Defendant. Their Lordships believe that statement.

It is not the habit of a Court of Equity to decree the specific performance of an agreement more favourable to the Plaintiff than to the Defendant, involving hardship upon the Defendant and damage to his property, if he entered into it without advice or assistance, and there be reasonable ground for doubting whether he entered into it with a knowledge and understanding of its nature and its con-

sequences. In these particulars the present agreement, in their Lordships' judgment, fails. The Defendant had no adviser. The Plaintiff drew the agreement and acted for himself. The Defendant swears that he did not understand its terms, and that he did not mean what those terms import, whatever that may be. Their Lordships think that he thus swears with considerable probability of truth ; and they are, upon the whole materials before them, satisfied that undue advantage was taken of a man without professional or other advice, who did not understand what he was doing, to the great detriment of his property.

Their Lordships come to the conclusion that the Bill was properly dismissed, and they will therefore humbly advise Her Majesty that this Appeal should be also dismissed with costs.

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