

NEW SOUTH WALES COURT OF APPEAL

***B & R Stevens Transport Pty Ltd v Burkitt***

[2016] FICR 27; [\[2016\] NSWCA 259](#)

Macfarlan, Meagher and Leeming JJA

2 and 14 September 2016

*Contracts – Collateral agreements – Cannot be inconsistent with primary agreement – Rule in Hoyt’s Pty Ltd v Spencer – Goodwill – Term of variable meaning – Legal, accounting and business term – Difficult to define*

*Appeal – From judge alone with reasons – Whether judge was right or wrong*

Summary

This was an appeal from a decision of the District Court dismissing a claim by a purchaser on the basis of an alleged collateral contract.

Facts

A haulage company purchased a prime mover from a vendor under a largely oral contract and then performed haulage services for the vendor for a number of years. The vendor deducted sums totalling almost \$50,000 from each payment for the services and, after some years, the purchaser commenced proceedings to recover the amounts deducted. The vendor alleged that the deductions were in repayment of a loan it advanced to the purchaser to enable it to purchase the prime mover under a side deal done at the time of the sale. The side deal was not mentioned in settlement documents.

The trial judge found the side deal existed and dismissed the purchaser’s claim, from which the purchaser appealed arguing that effect could not be given to the side deal because it was inconsistent with the contract of sale to which it was collateral, in accordance with the rule in *Hoyt’s Pty Ltd v Spencer* [\[1919\] HCA 64](#); (1919) 27 CLR 133.

The purchaser also alleged goodwill was included in the transaction, relying on the inclusion of an amount for goodwill in a loan application it made to a bank. The judge dismissed this allegation also, from which the purchaser appealed.

*Held*, (per Leeming JA, Mcfarlan and Meagher JJA agreeing), dismissing the appeal:

- (1) A collateral agreement made in consideration of a main agreement cannot effectively subsist unless it is consistent with the main agreement. Once an agreement is made in writing it is treated, unless the parties are shown

otherwise to intend, as the full expression of their obligations. If it is established that the writing was intended to contain only part of a fuller agreement it may be otherwise. [38]

*Hoyt's Pty Ltd v Spencer* [1919] HCA 64 ;(1919) 27 CLR 133; *Maybury v Atlantic Union Oil Company Ltd* [1953] HCA 89; (1953) 89 CLR 507at 517; *Esanda Ltd v Burgess* [1984] 2 NSWLR 139; *Nassif v Fahd* [2007] NSWCA 269; *Gates v The City Mutual Life Assurance Society Ltd* [1986] HCA 3; (1986) 160 CLR 1;*Skyrise Consultants Pty Ltd v Metroland Funds Management Ltd* [2011] NSWCA 406 at [13]-[15], cited.

- (2) The rule applies to terms in collateral contracts, being contracts where the consideration is entering into the principal contract. [36]
- (3) The rule did not apply here because the primary judge did not make a factual finding that there was a collateral agreement. The additional terms said by the vendor to form part of the collateral agreement were in fact just terms of the agreement. The document relied upon by the purchaser was not the entirety of the agreement and may not even have been contractual. [39], [43]
- (4) Goodwill is not only a legal term but also an accounting and business term which has received a variety of definitions and which is notoriously difficult to define. [50]

*Commissioner of Taxation v Murry* [1998] HCA 42; (1998) 193 CLR 605 at [12]-[13], cited.

- (5) Nothing material turns on the use of a term of variable meaning such as goodwill in a loan application which the vendor never saw and which was materially incorrect in other aspects. [50]
- (6) Where an appeal is from a judge alone with the benefit of reasons, the question is not whether the conclusion of the primary judge was open, but whether it was right or wrong. [47]

*Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531 at 549, cited. *Waverley Municipal Council v Swain* [2003] NSWCA 61 at [14]; *Bell v Thompson* [1934] NSWStRp 34; (1934) 34 SR (NSW) 431 at 437, distinguished.

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