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Article 14

Elliot v. Wedlake, [1963] S.C.R. 305

R. F. E.

Elliott v. Wedlake, [1963] S.C.R. 305.

The respondent (Wedlake) and E. (The late G. A. Elliott) were partners in a hardware business. They made an agreement in 1954 terminating the partnership and purporting to set up a limited partnership (under the Limited Partnership Act, R.S.O. c. 208). Recital 3 of the agreement was as follows:

> And whereas it is the intention of the parties hereto that the Party of the Second Part [the respondent] shall purchase the interest of the Party of the First Part [E] in the said Limited Partnership in accordance with the terms hereinafter set forth in this agreement.

The agreement set out a number of covenants, those material to the issue being:

> 6. Interest at 5% is to be paid to the Party of the First Part on said sum of $90,000 [which E covenanted to contribute to the partnership capital] or on such capital of the Party of the First Part as may remain in the partnership from time to time, payable quarterly or as may be required, and the Party of the Second Part is also to pay the sum of $2,000 on account of the purchase of the share of the Party of the First Part each year during the remainder of the lifetime of the Party of the First Part, such payments to be made on the 31st day of January in each year commencing January 31st, 1955.
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> 7. In the event of the death of the Party of the First Part during the continuance of the partnership, the personal representatives of the Party of the First Part shall continue the partnership as limited partners on the same terms and conditions as are herein contained excepting that the Party of the Second Part shall be entitled to increase the annual payment on account of the purchase of the share of the Party of the First Part . . .

Pursuant to the agreement, E contributed $90,000 to the partnership capital, and the respondent made the annual payments towards the purchase of E's share until 1961, when $53,000 remained unpaid. E died in 1955 and the partnership was continued by E's executors (the appellant) and the respondent until 1961. The partnership was then dissolved, the assets liquidated and the debts paid. A balance of $36,000 remained.

The appellant applied to court for a declaration of his rights concerning this balance and the respondent's liability to the appellant. The appellant contended that by the agreement the respondent agreed to purchase E's interest for $90,000, hence claimed the balance of the partnership's assets of $36,000 and judgment against the respondent for the difference between that amount and the $53,000. Judgment on the motion was given in favour of the appellant but the Ontario Court of Appeal reversed that. The Supreme Court affirmed the Court of Appeal.

Martland J. giving the judgment of the Supreme Court dismissed the appeal. The partnership agreement did not include an agreement for sale. The essential purpose of the agreement was to govern the operation of the partnership. The respondent did not covenant to buy E's capital interest, but only undertook to make specified annual payments reducing E's capital account while the partnership lasted. The agreement did not govern the distribution of the partnership assets or dissolution, hence the statutory rules applied. The appellant received only his proportionate share on the dissolution, the proportions being determined by the capital interests of the partners at the date of dissolution.

The appellant contended that clauses 6 and 7 coupled with recital 3 constituted a binding agreement by the respondent to buy E's interest for $90,000. The court held that the clauses (which were covenants) only obliged the respondent to pay E $2,000 a year during

E's life, and did not constitute an agreement for sale. The clauses were not equivocal since they were not capable of alternative constructions, hence did not give rise to the right to refer to the recitals for assistance in interpretation. The clauses by themselves do not support a construction which would lead to the establishment of an enforceable contract of purchase and sale. Resort to recitals (which are not covenants) may not be had to incorporate the words necessary to give rise to such a contract.

The Court also pointed out that the $90,000 was a capital contribution by E to the partnership, not an advance giving rise to a debt. Hence the appellant's claims failed. R.F.E.