38,1960

IN THE PRIVY COUNCIL No. 32 of 1960

ON APPEAL FROM
THE HIGH COURT OF AUSTRALIA

B E T W E E N :

THE COUNCIL OF THE SHIRE OF ASHFORD
(Plaintiffs) Appellants

- and -

DEPENDABLE MOTORS PTY. LIMITED
(Defendants) Respondents

CASE FOR THE APPELLANTS

Record

1. This is an appeal by Special Leave, granted by Order in Council dated the 21st December 1959, against the Order of the High Court of Australia (Dixon C.J., McTiernan, Kitto, Taylor, and Menzies J.J.) dated the 8th May 1959 reversing by a majority decision (Dixon C.J. and Kitto J. dissenting) the Order of the Full Court of the Supreme Court of New South Wales (Owen, Herron and Hardie J.J.) dated the 10th September 1958 which by a majority decision (Hardie J. dissenting) had set aside the Order of Ferguson J. made on the 4th December 1956 whereby a verdict in favour of the Respondents had been entered. By the said Order of the Full Court of the Supreme Court of New South Wales a verdict and judgment in favour of the Appellants were entered in the sum of £4915.0.0. The said Order of the High Court of Australia discharged the said Order of the Full Court of the Supreme Court of New South Wales and confirmed the said Order of Ferguson J.

p.317, l.13 - p.319, l.6.
p.316 - p.317, l.12.
p.279
p.248, ll.21-22.
p.279
p.316 - p.317, l.12.

2. The action was commenced by the Appellants as Plaintiffs by a writ issued on the 30th March 1954, claiming damages from the Respondents in respect of the sale by the Respondents to the Appellants of a "Breda" tractor and fittings (including a cable

p.1, l.21

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p.320 dozer) at a price of £6,751.14.0. pursuant to a written order dated the 16th March 1951. The Appellants' Declaration dated the 2nd July 1954

p.1, 1.12 - p.3, 1.41. claimed damages under three counts, as follows:-

(i) Breach of the implied condition of fitness for purpose under s.19(1) of the Sale of

p.1, 1.25 - p.2, 1.30. Goods Act, 1923-1953 (New South Wales) which is in similar terms to s.14(1) of the Sale of Goods Act, 1893, (United Kingdom) and is set out in Paragraph 3 below.

(ii) Breach of the implied condition of merchantable quality under s.19(2) of the

p.2, 11.31-49. said New South Wales Act, which is in similar terms to s.14(2) of the said United Kingdom Act.

Both Ferguson J. and the Full Court of the Supreme Court decided against the Appellants upon this second count and the Appellants did not cross-appeal to the High Court in respect of this second count. The present appeal is accordingly not concerned with this second count.

p.3, 11.1-41. (iii) Breach of an express warranty relating to the said tractor. Ferguson J. held that

p.245, 11.5-7. "no evidence was offered in support of the third count" and the Appellants did not seek to disturb this decision upon

p.267, 11.4-10. their appeal to the Full Court. The present appeal is accordingly not concerned with this third count.

3. In the premises this appeal is only concerned with the first count of the Appellants' declaration,

p.1, 1.25 - p.2, 1.30. viz. whether the Respondents were in breach of an implied condition of the contract of sale relating to the said tractor that the said tractor should be reasonably fit for the required purpose. The purpose for which the Appellants required the said tractor (as was not disputed by the Respondents)

p.85, 11.22-30. was for road construction work, which involved (inter alia) the ability of the said tractor to push the said dozer blade in the course of such work and to operate a 6 - 8 yard scoop. The only material statutory provision is therefore s.19(1) of the Sale of Goods Act 1923-1953 of New South

Wales which is in the following terms: Record

> "Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:
>
> Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose."

4. At the trial before Ferguson J. the Respondents admitted that the tractor was goods of a description which it was in the course of the Respondents' business to supply. The Respondents did not contend that the sale of the tractor was the sale "of a specified article under its patent or other trade name", so that the proviso to s.19(1) has no bearing upon the present appeal. p.245, ll.18 - 21. p.278, ll.45 - 51.

5. The general issue between the Appellants and Respondents upon this appeal is whether upon the evidence, and as a matter of law, the Appellants as buyers made known to the Respondents as sellers that the tractor was required for the particular purpose of road construction so as to show that the Appellants relied upon the Respondents' skill or judgment to supply a tractor which was reasonably fit for this purpose. Five of the judgments in the Australian Courts decided this issue in favour of the Respondents and four of the said judgments decided this issue in favour of the Appellants. On the question whether the tractor was in fact reasonably fit for this purpose the learned Trial Judge, Ferguson J. held as follows:

> "There is abundant evidence, which I accept, that the tractor, by reason of its design and its inability to do the work required of it (as evidenced by its performance) was unfit for ordinary road work. I am therefore satisfied that it was not reasonably fit for the

p.246, ll.27 - 34.

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purpose for which it was required".

The appeals to the Full Court of the Supreme Court
p.254, 11.47-50 of New South Wales and to the High Court of Australia proceeded upon this finding, which the Respondents
p.283, 11.23-26 did not seek to disturb.

6. The evidence on the sole issue arising upon this appeal, as stated in the first sentence of Paragraph 5 hereof, may be summarised as follows:

p.85, 11.22-30. (i) In March 1951 the Appellants (whose Shire is situated in the North Western part of New South Wales) required a heavy tractor for
p.96, 1.28 - p.97, 1.12. road construction work. The Shire Clerk, one Heywood, got into touch with one Wilkins, the Respondents' agent at the nearby town of Inverell, and received a pamphlet relating to the "Breda" tractor from the said Wilkins and was informed by the said Wilkins that such a tractor could be purchased from the Respondents in Sydney.

(ii) The President and Councillors of the Appellants
p.283, 11.30-36. lived many miles apart and it was the practice of the Shire Clerk to obtain instructions from the Appellants by telephoning to the President and some of the Councillors. The
p.268, 11.13-22. purchase of this tractor required the concurrence of the Appellants Council. In March 1951 the Shire Clerk telephonedto one Black, the President of the Appellant Council, and
p.86, 11.2-8. was instructed by him to request one Bowman, who was then in Sydney attending the Local Government Engineers' Conference, to inspect the tractor at the Respondents' premises and to report to the Appellants whether or not it was suitable for the Appellants' purposes.
p.6, 11.16-18. The said Bowman had been appointed Shire Engp.7, 11.23-25. ineer to the Appellant Council in March 1951,
p.43, 11.7-21. but did not take up his duties with the Appellants until early April 1951. The Shire Clerk thereupon telephoned to the said Bowman in Sydney on the 12th March 1951 and asked
p.97, 11.15-18. him to "go to Dependable Motors [the Respondents] and have a look at the tractor and see if he thought that it was suitable for the work we required". The said Bowman was
p.48, 11.11-12. further told that "Corney was the man to see".

(iii) On the 12th or 13th March 1951 Bowman went to the Respondents' premises in Sydney and saw one Corney, the Respondents' then Joint Managing Director, and inspected the tractor together with Corney and had a lengthy discussion with Corney. At the trial there was a conflict of evidence as to what was said by Corney during the said discussion and in particular as to whether Bowman asked whether the tractor would be suitable for road construction work and whether Corney said that it would be. It was however admitted by Corney that Bowman began the discussion by introducing himself as the Appellants' Shire Engineer and that he told Corney that he had been instructed by the Appellants to give a report to the Appellants with a view to the purchase of the tractor by the Appellants. The learned Trial Judge did not conclusively resolve this conflict of evidence, though it is respectfully submitted that it is implicit in his judgment that he accepted the evidence of Bowman in this respect. The majority of the Full Court of the Supreme Court accepted Bowman's evidence in this respect or treated the judgment of Ferguson J. as having accepted Bowman's evidence. At the hearing before the High Court, Counsel for the (present) Respondents agreed that the High Court should follow the Full Court of the Supreme Court in accepting Bowman's evidence as to the discussion between him and Corney, and the appeal to the High Court proceeded upon this basis. The Appellants accordingly respectfully submit that the present appeal also falls to be determined on the basis that Bowman's evidence at the trial is accepted as to his discussion with Corney. The most important passage in Bowman's evidence in this connection is as follows:-

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p.191, 11.23-26.
p.8, 1.8 - p.10, 1.5.
p.46, 1.27 - p.54, 1.38.
p.192, 1.21 - p.196, 1.2.
p.199, 1.36 - p.201, 1.32.
p.192, 11.23-35.
p.195, 1.41 - p.196, 1.1.
p.199, 11.36-37.
p.245, 1.45 - p.246, 1.9.
p.252, 1.46 - p.253, 1.7.
p.263, 11.17-40.
p.298, 11.25-33.

"Then I said to him, 'Will this machine do the work we expect it to do?' and he replied, 'What do you expect it to do?' I said, 'It will be engaged entirely on road construction work', and he said, 'What does that entail?' I said, 'Clearing, some clearing and a lot of dozer work, and quite a lot of scoop work.' The Council had already purchased a six-eight yard scraper

p.9, 1.22 - p.10, 1.5.

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scoop. .....I then said, 'This tractor will be required to haul that scoop. Will it be capable of doing that?' and he replied 'Yes. That is the type of work the tractor is built for. It is just the type of work to suit it'. I then said, 'The Council does require a dozer blade', and he said, 'Yes. I know something about that. They want the dozer blade to fit on to the tractor'. I then said, 'That is right. Do you know a reputable firm which is capable of building a good blade?' And he replied, 'Yes'. ..... I then said, 'And one capable of doing the work and suitable for the machine?' and he replied, 'Yes. You leave that to me. I will see that the proper size blade is fitted to the machine'. After that we had some further discussion. I cannot recall very much of importance apart from that. I said, 'Alright. I will tell the clerk about this view and he will probably send you an order for the tractor'."

(iv) Following upon this discussion with Corney,

p.97, 11.26-28. Bowman telephone to Heywood, the Shire Clerk, and told him "that he had inspected the tractor. It seemed to him /Bowman/ to have plenty of horse-power and was big enough for the work we required".

p.97, 11.29-33. The Shire Clerk thereupon passed this information on to the President and other Councillors of the Appellants by telephone and thereupon received instructions from the President to purchase the tractor. The President of the Appellants gave the following evidence in this connection, and neither his nor the Shire Clerk's evidence on this point was challenged in cross-examination:

p.86, 11.9-35. Q: Subsequent to that conversation with the Shire Clerk did he contact you on the telephone again - subsequent to Mr. Bowman's visit to Mr. Corney? A: I cannot remember any other subsequent conversation, except that he rang me up at one period and asked for Council's - that was a later date, when I asked him to ring Council and get their approval.

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Q: That is what I want? A: He rang me up and I instructed him to ring other councillors. We had a report from Mr. Bowman, apparently, that the tractor was suitable for the work which we required it for.

Q: Had the Shire Clerk told you that? A: Yes. I instructed him to ring the other Councillors. Those Councillors live from 30 to 40 miles apart. It is not possible to call a meeting at all times. We ring them up. When he rang back and said the rest of the Councillors were quite in accordance with the buying of the new tractor I instructed the Shire Clerk to put in a formal order for the tractor.

Q: Did you rely on the Engineer's report? A: I had nothing else to rely on.

Q: Did you rely on it? A: Yes. I did.

Q: Was that the reason why you purchased the tractor? A: Yes.

(v) Following upon the foregoing instructions from the President to the Shire Clerk the Appellants sent a written Order to the Respondents dated the 16th March 1951 in the following terms:

"1 Breda 70 D. Crawler Tractor equipped with cable dozer but not a P.C.U. /Power Control Unit/ as quoted by your Inverell agent, A.V.C. Wilkins. p.320.

.....

The above goods are for Council's use and are not for re-sale.

A.N. Heywood. Clerk".

On the 28th April 1951 the Appellants paid £6751.14.0. for the tractor by a cheque of the same date. p.323, ll.1-13. The tractor was delivered to the Appellants in about the middle of May 1951. p.10, ll.20-23. At the trial the greater part of the evidence was that adduced on behalf of the Appellants as to the tractor's defective design and its inability to carry out the normal road making

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p.159, 11.30-35. p.162, 11.15-18. p.175, 11.15-18. p.154, 11.3-14. p.154, 1.15 - p.155, 1.23. p.32, 11.37-42. p.147, 11.1-31. p.156, 11.7-15. p.21, 1.40 - p.22, 1.40. p.38, 11.1-2. p.154, 11.31-33.

operations required of it. The design of the master clutch and its size was insufficient to transmit the power available and it was too light for road making operations. The driving sprockets (toothed wheels which engage in the track chains) were defective. The tracks (inter alia) were of insufficient strength. The oil consumption was excessive, and the track tensioning springs were unsatisfactory. The result of these and other defects was that the tractor broke down repeatedly and became unserviceable and was "grounded" in about the middle of August 1951 after being in use for 200 hours.

(vi) The resulting loss sustained by the Appellants was assessed at £4915.0.0. (being the difference between the cost of the tractor without the dozer blade and its disposal value without that blade) by the majority of the Full Court of the Supreme Court, and the Respondents' Notice of Appeal to the High Court did not challenge this assessment of damages; nor was it challenged during the hearing before the High Court.

p.258, 11.4-9. p.258, 11.25-29.. p.280 - p.281, 1.20.

p.246, 11.4-9. p.246, 11.27-34.

7. The learned Trial Judge held that the Appellants had expressly or impliedly made known to the Respondents the particular purpose for which the tractor was required, and also held (in the passage set out in paragraph 5 above) that the tractor was not reasonably fit for the required purpose. Neither of these findings was challenged by the Respondents in the subsequent appeals. Upon the said appeals, and upon the present appeal, the narrow issue between the Appellants and the Respondents was and is accordingly whether upon the evidence, and as a matter of law, the Appellants have brought the case within the words of section 19(1) of the New South Wales Sale of Goods Act 1923-1953 (cited in paragraph 3 hereof) "so as to show that the buyer relies on the seller's skill or judgment". The gist of the five judgments in favour of the Respondents on this issue was that the Appellants had relied upon the favourable report of their Engineer, Bowman, and had not relied upon Corney's statement to Bowman that the tractor was fit for the required purpose, since this statement was not thereafter communicated by Bowman to anyone else on behalf of the Appellants. The learned Trial Judge decided this issue against

the Appellants in the following terms, which are representative of the conclusions against the Appellants in the other four judgments delivered in favour of the Respondents:

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"Reliance by the buyer on the seller's skill or judgment is a pre-requisite to the implication of the condition (see Medway Oil & Storage Co. Ltd. v. Silica Gel Corporation 33 Com. Cas. 195). p.246, 1.49 - p.247, 1.17.

It seems to me that the evidence is more susceptible to the inference that there was no such reliance than that there was. What the Council required, before purchasing the goods, was a favourable report from its own engineer, which it received, and it seems to me that it was that report and not any reliance upon the seller's skill or judgment that induced the purchase. Indeed, so far as the President is concerned, he said so. When asked whether he relied upon the engineer's report he replied that he had nothing else to rely upon and that it was in view of the favourable report that the tractor was purchased".

The Appellants respectfully submit that this conclusion is erroneous, for the reasons set out in the following paragraphs.

8. For the purpose of the issue summarised in paragraph 7 hereof the Appellants accept and respectfully submit as correct the following analysis of the facts by Owen J. in his judgment in the Full Court of the Supreme Court:

(1) Corney knew that Bowman was inspecting the tractor on behalf of the plaintiff which was considering purchasing it. p.256, 11.1-15.

(2) Corney knew that Bowman was to make a report to the plaintiff on the suitability of the tractor for road construction work.

(3) Corney knew that Bowman, in forming his opinion and reporting on the suitability of the tractor, was relying to a material extent on Corney's skill and judgment.

(4) In making his report to the plaintiff, Bowman did in fact rely to a material extent on

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Corney's skill and judgment.

(5) The plaintiff purchased the tractor in reliance on Bowman's report.

9. The Appellants respectfully submit that upon the foregoing analysis of the facts the Appellants did rely upon the Respondents' skill and judgment in that they relied upon the statement of Corney, the Respondents' Joint Managing Director, that the tractor was suitable for the required purpose; for the following reasons:

(i) It is clear on the authorities (Manchester Liners v. Rea [1922] 2 A.C. 74, Medway Oil & Storage Co. Ltd. v. Silica Gel Corporation (1928) 33 Com. Cas. 195, and Cammell Laird & Co. Ltd. v. The Manganese Bronze & Brass Co. Ltd. [1934] A.C. 402) that the application of the sub-section is not ousted by the fact that the buyer may have employed an expert for the purpose of making enquiries about or inspecting or ordering the goods purchased, or that such expert may have placed some, though not exclusive, reliance upon his own skill and judgment. Accordingly, even if Bowman is to be treated as an expert on the suitability or otherwise of the tractor for the purposes for which the Appellants required it, and even if it be held that Bowman to some extent relied upon his own experience in forming the conclusion that the tractor would be suitable for the Appellants' purposes, this does not affect the application of the section if (as in the Appellants' submission is clearly proved) Bowman also relied to a substantial extent upon what he was told by Corney. In the Medway Oil Case (supra) Lord Summer (at p.196) said that "the section does not say that the reliance on the seller's skill or judgment is to be exclusive of all reliance on anything else...".

(ii) The Appellants respectfully submit that it is not a necessary ingredient of the sub-section that the servant or agent acting on behalf of the buyer who relies on the seller's skill or judgment should also be a servant or agent with authority to conclude the contract of purchase on behalf of the buyer. There is

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nothing in the section or at common law which precludes a buyer from acting through one servant or agent in relying upon the seller's skill or judgment and acting through another servant or agent in concluding the contract of purchase.

(iii) The Appellants respectfully submit that the fundamental fallacy underlying the judgments which concluded in favour of the Respondents is that they fail to give any effect to the fact, which was not in dispute, that when Bowman relied upon the statements made to him by Corney on behalf of the Respondents, Bowman was acting or purporting to act as the agent of the Appellants. (The question of Bowman's authority from the Appellants in this connection, so far as relevant, is referred to in paragraph 11(i) below). Throughout his discussion with Corney, Bowman acted or purported to act as Shire Engineer on behalf of the Appellants and Corney dealt with Bowman in that capacity, knowing that Bowman would make a report as to the advisability of purchasing the tractor as the result of (inter alia) Bowman's discussion with Corney. It is respectfully submitted that no distinction can, in this connection, be drawn between Bowman as agent of the Appellants and the Appellants themselves. The Appellants, being a corporate entity, could, in their capacity as buyer, only rely upon a seller's skill or judgment by acting through the reliance to this effect of a servant or agent of the Appellants. Bowman's reliance, it is respectfully submitted, was therefore the Appellants' reliance, and it is immaterial whether or not Bowman at any time prior to the purchase of the tractor communicated the fact of his reliance to any other servant or agent of the Appellants.

p.192, 11.23-35
p.195, 1.41 - p.196, 1.1.
p.199, 11.36-37

(iv) The Appellants respectfully submit that the correctness of the foregoing submissions can be tested by assuming a case in which Corney made a fraudulent misrepresentation to Bowman which induced Bowman to recommend the purchase of the tractor to the Appellants but without informing any other servant or agent of the Appellants of the contents of Corney's representation. It is respectfully submitted that

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if the Appellants had thereupon purchased the tractor pursuant to Bowman's recommendation to this effect, there could be no doubt but that the Appellants would have had a claim for damages for fraudulent misrepresentation, either against Corney or against the Respondents or against both.

10. The Appellants respectfully submit that the judgments of Dixon C.J., and Kitto, Owen and Herron J.J. correctly state the law in relation to the matters referred to in Paragraph 9 hereof and the Appellants respectfully adopt the whole of these judgments. The material passages of these judgments are too lengthy to be set out conveniently in this Case, but the Appellants respectfully in particular draw attention to and rely upon the following passages:

Dixon C.J.

p.286, l.25 - p.287, l.21.

"But what is said is that when he /Corney/ spoke he did not speak to an agent of the Shire Council authorised in that behalf. Any reliance on his skill and judgment or on that of his company was the reliance of the engineer designate, not of the Shire Council; the President and Councillors had obtained what guidance they needed from the Shire Clerk's report of what the engineer designate had said to the latter over the telephone, not from Mr. Corney. This view of the matter I am unable to accept. It appears to me to depend upon distinctions between the capacities of the persons by whom the corporation's part of the business was transacted which reflects nothing that the provision of the Sale of Goods Act requires, still less the law of agency. In effect it means a transfer of the responsibility for every step in the transaction to the President and Councillors and regards them as the persons who must exhibit a reliance, which is their own personally, upon the skill and judgment of Mr. Corney or of his company. Or if it does not do that it treats the engineer designate as a stranger to the Corporation who did not represent it in his discussion with Mr. Corney and could not speak on its behalf. In neither of these views can I agree. After all, when we speak of the Council of the Shire of Ashford

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and so name the plaintiff in the proceedings we are naming the corporate body, not the President and the Councillors. .....The corporation must act by servants and agents. In any transaction carried through by a corporation different steps may be taken by different persons on its behalf and it often may be that it is only by combining their various actions that legal completeness can be given to a transaction. I see no reason why this should not be so in the negotiation of a contract for the purchase of goods and why the process should not be thus accomplished of making it known to the seller that the corporation as buyer relies by its servants and agents upon the seller's skill and judgment."

Kitto J.

"The Council, being a corporation, had to get someone to carry out for it that portion of the transaction which consisted in interviewing the sellers and inspecting the tractor for the purpose of deciding whether the councillors should consider the sale on the footing that the machine was fit for the contemplated work. The fact that Bowman was being sent off to inspect the machine at the seller's premises as the Council engineer ad hoc, was enough, I should think, to convey to anyone, in the absence of anything to suggest otherwise, that this, and no less, was what the Council wanted him to do. The Appellant's /the present Respondents/ argument seizes upon the portion of the Shire Clerk's request which invited Bowman to report what he himself thought; it insists that what Bowman might think and what the Council might think were two different things.... In my judgment, that is not the natural sense of the matter. Obviously the Council was not contemplating that anyone but Bowman should look at the tractor in the Council's interests, or should discuss with the seller its technical features or its adequacy for the work in view, or should sit in judgment on Bowman's opinion. ..... From this it must follow that the making known by Bowman to the Appellant of the particular purpose of the Council was a making known by the Council itself so as to show a reliance by it on the Appellant's /the present Respondents/

p.300, l.33 - p.301, l.28.

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skill and judgment."

Owen J.

p.255, ll.31-42. "The second question is whether the plaintiff did in fact rely upon the seller's skill and judgment when it decided to purchase the tractor. It is true, as the learned Trial Judge said, that the plaintiff relied upon its agent Bowman's favourable report, but does that necessarily end the matter? If that report was made, as I think it was, in reliance to a material extent upon Corney's skill and judgment, and the plaintiff in its turn relied upon the report, can it not be said that it in fact purchased in reliance upon the skill and judgment of the seller? ....."

p.257, ll.2-17. "But no contractual promise moving from the buyer is imported by the sub-section. In my opinion it is sufficient for present purposes if the buyer relies upon the advice of his agent, whom he has appointed to examine the goods which he later buys, provided that agent's advice is itself based, to a material extent, on the seller's skill and judgment. Accordingly, I am of opinion that in the present case the plaintiff can properly be said to have relied upon the seller's skill and judgment since that skill and judgment was a material factor in influencing Bowman to make the report on which the plaintiff acted. The position is the same as it would have been had the plaintiff in person had the discussion with Corney."

11. Apart from the question whether or not the Appellants had relied upon the Respondents' skill or judgment, as referred to in paragraphs 9 and 10 hereof, some of the judgments against the Appellants in the Australian Courts also to some extent proceeded upon two other matters, viz. (i) whether Bowman had authority from the Appellants to rely upon the Respondents' skill or judgment in respect of the fitness of the tractor for the required purpose, and (ii) whether the statements made by Corney to Bowman were contractual in their effect for the purposes of sub-section 19(1). In relation to these matters the Appellants respectfully submit as follows:

(i) As regards the extent of Bowman's authority,

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the Appellant's first submission is that, in so far as this may be material, Bowman in fact had implied authority to satisfy himself about the suitability of the tractor for the Appellants' purposes in any way he chose, including by his making enquiries from the Respondents and relying upon what they told him. The Appellants respectfully submit that, in the absence of any express limitation upon the permissible activities of an agent instructed to inspect and report upon goods intended to be purchased by his principal, the agent has authority to make enquiries from the seller as to the suitability of the goods for the purpose for which they are required and to rely to a substantial extent upon the result of such enquiries. The instructions to Bowman did not contain any such express limitation. Secondly, the Appellants respectfully submit that it is irrelevant in law whether Bowman had authority from the Appellants to rely upon the Respondents' skill or judgment or whether he had no such authority. As pointed out by Owen J., section 19(1) does not imply that any contractual promise moves from the buyer. The authority of an agent of a buyer who in fact relies upon the seller's skill or judgment, and who does so to the seller's knowledge, is therefore irrelevant; and, if the seller makes a statement to the agent which is untrue, whether innocently or fraudulently, it is respectfully submitted that the seller cannot shelter behind the agent's lack of authority to rely upon the seller's statement when the agent is subsequently sued by the buyer for breach of warranty or deceit, as the case may be.

p.97, 11.15-18.

p.257, 11.2-4.

(ii) As regards the question whether the statements made by Corney to Bowman were contractual in their effect, the Appellants respectfully submit that they were contractual for the purposes of section 19(1). For the purposes of this sub-section, it is respectfully submitted, it is not necessary that the seller should have made a statement which, having regard to the manner in which it is made and the terms in which it is expressed, can be treated as having the characteristics of an

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express warranty. Thus, as pointed out by Lord Sumner in the Medway Oil Case (supra) at p.197, the sub-section may come into operation in cases where the seller says nothing specific but merely supplies a certain article in response to a request to supply an article which the buyer requires for a particular purpose. The Appellants respectfully submit that the discussion between Bowman and Corney (as quoted in paragraph 6(iii) hereof) amply justifies the inference that the statements then made by Corney bring the case within the sub-section, and that any other inference would deprive the sub-section of all or most of its efficacy and would be erroneous in law.

p.9, l.22 - p.10, l.5.

12. Finally, the Appellants respectfully submit that both the discussion between Bowman and Corney and the Appellants' written order for a "Crawler Tractor equipped with cable dozer" (the latter being required for road construction work) show that the tractor in question was ordered by the Appellants from the Respondents for the special purpose of road construction work. In the premises, as the Appellants respectfully submit, it follows that the Appellants relied upon the Respondents' skill or judgment to supply a tractor which was reasonably fit for this purpose. In this connection the Appellants will respectfully in particular refer to and rely upon the following passage in the speech of Lord Buckmaster in Manchester Liners v. Rea (supra) at p.79:

p.9, l.22 - p.10, l.5.

p.320

> "It then remains to be considered whether in the circumstances there was any warranty that the coal was suitable for the purpose for which it was required. It is plain that the order was expressed for the use of a particular steamship, and it must, therefore, be assumed that the Respondents knew the nature of her furnaces and the character of the coal she used, for it was this coal they contracted to supply.
>
> On this assumption, however, the Respondents have argued that by virtue of s.14 of the Sale of Goods Act 1893 no warranty can be implied unless "the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to

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show that the buyer relies on the seller's skill and judgment", and this the order in question fails to effect. This is, in my opinion, a misunderstanding of the statute, for the section embraces and restates the common law doctrine in the form which was clearly derived from the case of Jones v. Just (1868) L.R. 3 Q.B. 197. If goods are ordered for a special purpose, and that purpose is disclosed to the vendor, so that in accepting the contract he undertakes to supply goods which are suitable for the object required, such a contract is, in my opinion, sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment."

13. The Appellants respectfully submit that this Appeal should be allowed for the following amongst other

R E A S O N S

1. BECAUSE through the said Bowman and by the said written order dated the 16th March 1951 the Appellants made known to the Respondents that the Appellants required the said tractor for road construction work (being goods of a description which it was in course of the Respondents' business to supply) and the said tractor was not reasonably fit for the said purpose.

2. BECAUSE the said Bowman on behalf of the Appellants relied upon the skill or judgment of the said Corney on behalf of the Respondents that the said tractor was reasonably fit for the said purpose, but the said tractor was not reasonably fit for the said purpose.

3. BECAUSE the said Corney acting on behalf of the Respondents knew that the said Bowman was acting or purporting to act as Shire Engineer on behalf of the Appellants and knew that the said Bowman would make a report to the Appellants as to the advisability of purchasing the said tractor based (inter alia) upon the statements of the said Corney to the said Bowman to the effect that the said tractor was suitable for road construction work.

Record

4. BECAUSE the Appellants purchased the said tractor from the Respondents upon the recommendation of the said Bowman as the Appellant's agent, the said Bowman having relied upon the said Corney's skill or judgment in making the said recommendation.

5. BECAUSE the Appellants ordered the said tractor for the specific purpose of road construction work but the said tractor was not reasonably fit for the said purpose.

6. BECAUSE the decision of the majority of the High Court of Australia was wrong.

7. BECAUSE the judgments of Owen and Herron J.J. in the Full Court of the Supreme Court of New South Wales and the judgments of Dixon C.J. and Kitto J. in the High Court of Australia were correct, and accordingly the Order of the Full Court of the Supreme Court of New South Wales should be restored.

C.L.D. MEARES.

MICHAEL KERR.

No. 32 of 1960

IN THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N :

THE COUNCIL OF THE SHIRE OF ASHFORD
(Plaintiffs) Appellants

- and -

DEPENDABLE MOTORS PTY. LIMITED
(Defendants) Respondents

CASE FOR THE APPELLANTS

FISHER DOWSON & WASBROUGH,
7, St. James's Place,
London, S.W.1.
Solicitors for the Appellants.