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38,1960

IN THE PRIVY COUNCIL

No. 32 of 1960

UNIVERSITY OF LONDON
W.C.I.
- 7 FEB 1961
INSTITUTE OF ADVANCED
LEGAL STUDIES

59001

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA

BETWEEN THE COUNCIL OF THE
SHIRE OF ASHFORD
Appellant
- and -
DEPENDABLE MOTORS PTY.
LIMITED Respondent

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CASE FOR THE RESPONDENT

1. This is an appeal by special leave granted on the 21st December, 1959 against an Order of the High Court of Australia dated the 8th May, 1959 allowing an appeal from the Supreme Court of New South Wales whereby a judgment and verdict for the defendant was set aside and a judgment and verdict for the plaintiff (appellant) was entered in the sum of £4,915. p.317-319 p.316 p.279

20 2. The issue for determination on this appeal is whether the condition implied by Section 19 Sub-section (1) of the Sale of Goods Act, 1923 (New South Wales) was a term and condition of a contract made between the appellant and the respondent respecting the sale of a tractor.

3. The appellant is a Shire Council constituted under the provisions of the Local Government Act, 1919 situated in North Western New South Wales. Such Act provides, inter alia:-

30 "22. (1) For the local government under this Act of each city municipality and shire there shall be a council.

(2) The council shall be a body corporate, with perpetual succession and a common seal, and may sue and be sued in its corporate name; and shall, for the purposes and subject to the provisions

of this Act, be capable of purchasing holding granting demising disposing of and alienating real and personal property, and of doing and suffering all such other acts and things as bodies corporate may by law do and suffer.

(3) The corporate name of the council shall be 'the council of the (city municipality or shire, as the case may be) of'. 10

24. (1) Each shire council shall consist of councillors elected by the electors (except where otherwise provided).

(2) The number of councillors of a shire council shall be the number now constituting such council, or as determined or altered by the Governor from time to time.

(3) The number shall not be less than six nor more than nine: 20

Provided that in any special case where, after inquiry, he deems it advisable so to do, the Governor may fix a number exceeding nine.

(4) The respective ridings of a shire shall be represented on the council by an equal number of councillors.

(5) Any alteration in the number of councillors shall not have effect until the next ordinary election of the council. 30

(6) If a vacancy in the office of councillor continues after the time prescribed for election thereto the Governor may appoint any qualified person to the vacant office:

Provided that where he deems it expedient the Minister may authorise the holding of an election to fill the vacant office. " 40

4. In the year 1951 the Council was possessed of a piece of equipment known as a power control unit designed to receive power from a tractor and a six to eight yard carry-all scoop designed to be operated by a tractor and the Council desired to

- purchase a tractor to which the power control unit could be fitted and which could be used to haul the scoop. p.9 1.29-30
5. Some time prior to the events hereinafter set forth the Shire President and the Shire Clerk had interviewed one Bowman, a candidate for appointment as Shire Engineer and Bowman had been told that he would be appointed. p.85 1.31-43
- 10 6. On or about 12th March, 1951 Bowman who was then an employee of the Glen Innes Municipality was in Sydney attending the Annual Local Government Engineers Conference. p.7 1.18-20
7. Prior to the 12th March the Shire Clerk had had a discussion with a Mr. Wilkins at Inverell a town in North Western New South Wales concerning a Breda tractor. Wilkins had given him a pamphlet and advised him that it could be purchased from the Respondent Company. p.96. 1.28-34
- 20 8. The Shire Clerk then consulted the various Councillors by telephone and he received instructions to communicate with Bowman and request Bowman to look at the tractor while he was in Sydney and report on it to tell the Councillors whether it was suitable or not. p.97 1.13-21
9. The Shire Clerk on or about the said 12th March telephoned Bowman and asked him would he go to the Respondent Company and have a look at the tractor and see if he thought that it was suitable for the work for which the Council required it. p.97 1.13-19
- 30 10. On the same or the following day Bowman called at the premises of the Respondent Company and saw a man named Corney who was its Managing Director. He said he was there on behalf of the Appellant Council and he made some examinations of a Breda tractor and had a conversation with Corney in the course of which he informed Corney that the tractor would be engaged entirely on road construction work involving clearing a lot of dozer work and quite a lot of scoop work. He alleges that 40 he informed Corney that the tractor would be required to haul a 6-8 yards scraper scoop and that Corney informed him that the tractor was capable of doing that. p.7 1.26-35
p.191 1.26
p.9 1.22-29
p.9 1.29-36
- 50 He also informed Corney that a blade was required in addition and that it was to be fitted to the tractor. Bowman alleges that at the conclusion of the inspection and interview he said "All right, I will tell the Clerk about this view and he will probably send you an order for the tractor". p.9 1.36-39
p.10 1.2-5

- p.97 1.22-28 11. Thereafter Bowman rang the Shire Clerk and told him he had inspected the tractor - that it seemed to have plenty of horsepower and was big enough for the Council's work.
- p.97 1.29-33 12. The Shire Clerk then communicated with the various Councillors including the President and the latter then instructed its purchase when informed by the Shire Clerk that the rest of the Councillors agreed.
- p.86 1.17-30

13. The Local Government Act Section 516 provides as follows:- 10

- "516.(1) The Council may enter into any contract for any of the purposes of this Act.
- (2) This section shall be deemed to extend to -
- (a) any contract for the execution of any work directed or authorised by or under this or any other Act to be done by the Council, or for furnishing materials, or for any other things necessary for the purposes of this or any other such Act; 20
- (b) any contract for the performance of any service directed or authorised by or under this or any other Act to be performed by the council. 30
- (3) Ordinances may be made for or with respect to the mode of making and the form of and the management and carrying out of contracts. "

Ordinance 23 made in pursuance of sub-section (3) of Section 516 so far as is relevant provides in Clause 3 thereof :-

- "3. Every contract entered into by the Council may be made, varied or discharged as follows (that is to say) - 40
- (a) any contract which if made between private persons would be by law required to be in writing and under seal the Council may make in writing and under the common seal of the Council and in the same manner may vary or discharge the same;

(b) any contract which if made between private persons would be by law required to be in writing signed by the parties to be charged therewith or which if made between private persons would be by law valid although made by parol only and not reduced into writing the Council may make in writing signed by the Mayor or President or Clerk or any other servant of the Council acting by the authority and on behalf of the Council and in the same manner may vary or discharge the same."

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14. On or about the 16th March, 1951 the Shire Clerk sent an Order on the Shire Council's Order form to the Respondent in Sydney. Such Order was expressed to be for "1 Breda 70D Crawler Tractor equipped with cable dozer but not a P.C.U. as quoted by your Inverell Agents".

Exh. "A"
p.320

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15. Thereafter the tractor was invoiced and delivered to the Council. In the invoice the implement delivered was described as "One (1) only new Breda crawler tractor Model 70D Serial No. 4942 and one (1) only cable controlled Trailbuilder fitted to tractor". The invoice stated "P.C.U. not supplied" and the net price ex store was stated to be £6,745. The Council duly sent a cheque for the amount specified in this invoice.

Exh. "A"
p.321

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16. The appellant sued the respondent on three counts only one of which now calls for consideration. That is a count alleging a breach of Section 19(1) of the Sale of Goods Act (N.S.W.) 1923 which is in terms identical with Section 14 (1) of the English Act and provides as follows:-

Exh. "A"
p.323

p.1 1.24 to
p.2 1.24

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"19. (1) 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:

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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."

- p.15 1.8-11 17. This action came on to be heard before Ferguson, J. and a jury of four persons on the 14th day of November, 1956 and on the 15th day of November by consent of both parties the jury was discharged and the trial proceeded before the Judge sitting alone. This procedure was adopted under the provisions of the Supreme Court Procedure Act, 1900-1957. 10
- p.248 1.21-22 18. The learned trial Judge found a verdict for the defendant (Respondent) and judgment was entered accordingly.
- p.247 1.5-17 The main basis of His Honor's decision as it related to the count based on Section 19 (1) was that he was of opinion that the evidence relating to the issue whether there was a reliance by the buyer on the skill and judgment of the seller was more susceptible to the inference that there was no such reliance than that there was. 20
- p.247 1.18-25 His Honor was also of the view that there was no contractual privity between the parties calling for the implication relied upon - that the reliance, if any, was not the basis of a contractual obligation.
- p.248-250 19. The appellant appealed against his decision to the Full Court of New South Wales. Such an appeal from a Judge sitting alone is governed by Section 5 Sub-sections (6) to (13) and Section 7 of the said Supreme Court Procedure Act, 1900-1957 which provide:- 30
- "5. (6) Any party may appeal to the Court against any judgment so directed by the judge to be entered.
- (7) The appeal shall be by way of rehearing, and on the appeal the Court shall -
- (a) have all the powers and duties of the judge as to amendment or otherwise, including the power to make findings of fact and to assess damages or compensation; 40
- (b) have full discretionary power to receive further evidence upon questions of fact such evidence

to be taken either by oral evidence in Court, by affidavit, or by deposition taken before a commissioner or examiner, and to be admitted on special grounds only and not without special leave of the Court.

- 10 (8) The Court may direct the appeal to stand over for further consideration, and direct such issues or questions to be tried or determined, or the amount of any damages or compensation to be assessed, by a judge either with or without a jury, as it may think fit.
- 20 (9) The Court may on the appeal give any judgment and make any order which ought to have been given or made in the first instance, and may make such further or other order as the case requires, and in particular may make
- (a) any order which it might make under section seven of this Act;
 - (b) such order as to the whole or any part of the costs of the appeal or of the cause or matters as may be just.
- 30 (10) The powers conferred by this section may be exercised by the Court, notwithstanding that the notice of appeal is that part only of the judgment be reversed or varied, and such powers may be exercised in favour of all or any of the respondents or parties, although such respondents or parties have not
- 40 appealed from or complained of the judgment.
- (11) Where the judge leaves any party to move the Court for judgment, or refers the case to the Court for its determination, the powers conferred on the Court by subsections seven and eight of this section shall extend to the motion or reference.
- (12) Except as rules of Court otherwise specially provide, every application

for a new trial or to set aside a verdict finding or judgment, or to have a nonsuit or verdict entered, in any case where any action issue or question has been tried before a judge without a jury, shall be made by appeal to the Court and not otherwise.

(13) An appeal, motion for judgment, or reference to the Court under the Provisions of this section shall be to the Court in Banco. 10

7. (1) In any action, if the Court in Banco is of opinion that the plaintiff should have been nonsuited, or that upon the evidence the plaintiff or the defendant is as a matter of law entitled to a verdict in the action or upon any issue therein, the Court may order a nonsuit or such verdict to be entered. 20

(2)"

p.279 20. The Full Court by majority, Owen and Herron, JJ (Hardie, J. dissenting) allowed the appeal and ordered that the verdict and judgment for the Respondent on the first count (based on Section 19 (1) of the Sale of Goods Act, 1923) be set aside and in its place a verdict and judgment be entered for the appellant for £4,915.0.0. In so doing the Court was exercising the powers conferred by Section 5 (7) (a) of the Supreme Court Procedure Act, 1900-1957 above. 30

p.255 1.23 to 21. Owen, J. based his decision on the proposition that if a buyer appoints a person to examine goods which he later buys then if he relies upon the advice of such person and such person had himself relied to a material extent on the seller's skill and judgment the Section applies. His Honor described such person as an 'Agent'. Herron, J. appears to have come to his decision on a different basis. His Honor thought that an inference should be drawn from the evidence that Bowman was not appointed merely to inspect and report but "to introduce the question of the purchase of the tractor to the defendant and to initiate the transaction although he was not an agent to purchase the tractor." 40

p.262 1.46 His Honor also thought that it was implicit in the instructions given to Bowman, that if it became appropriate he could interview someone in 50

the position of a salesman for the seller in order to satisfy himself that the tractor was suitable for the work required by the Council. Having thus expanded by inference the scope of Bowman's mandate from the Appellant His Honour went on to say:- "Having regard to Mr. Bowman's position in the transaction and the fact that within some four days after the interview an order was sent by the Appellant to the Respondent for the purchase of the tractor I hold that there was, in fact, a reliance by the buyer on the seller's skill and judgment."

p.263 1.34-40

22. In his dissenting Judgment Hardie, J. was of the view that Bowman was a person who had not been asked by the Shire Council to obtain the opinion or view of the seller's salesman but to inspect the tractor and report his opinion to the Council. His Honor's view was that he complied with this request and reported his opinion and not his grounds for it.

p.275 1.29-49

His Honor held that Bowman's knowledge as to what the seller's Sales Manager had said relative to the capacity and performance of the tractor could not, in any relevant sense, be treated as knowledge of the Council; much less could it be treated as knowledge of the Council upon which the Council relied or acted.

p.275 1.43-49

His Honor was of the opinion that the reliance called for by the Section is not some sort of notional or imputed or vicarious reliance; it requires an actual reliance. His Honor thought that the Trial Judge reached the only conclusion open to him on the evidence.

p.276 1.7-11

p.276 1.21-23

23. From this order the Respondent appealed to the High Court of Australia.

The appeal was heard on 26th and 27th November 1958 and on 8th May 1959 the Court by majority McTiernan, Taylor and Menzies, JJ (Dixon, C.J. and Kitto, J. dissenting) allowed the appeal with costs, discharged the order of the Full Court and in lieu thereof ordered that the appeal to the Full Court of the Supreme Court be dismissed with costs and that the verdict and judgment in the action for the defendant with costs be confirmed.

p.316

24. McTiernan, J. took the view that when Bowman talked with Corney if he was exhibiting any reliance it was his own reliance and not that of the buyer and His Honor thought that it was clear from the evidence that the Appellant's intention was to rely upon Bowman's advice, he had no

p.296 1.20-22
1.45-47

p.297 1.7-12

- instructions to report what Corney or any salesman said, that he was asked to base a report on what he observed, not on what he was told and that the Council expected that Bowman would make up his own mind about the tractor, not merely gather information from the seller upon which the buyer could make a decision.
- p.297 1.12-15
- Having regard to the exposition of the Section by the House of Lords in *Medway Oil & Storage Co. Ltd. -v- Silica Gel Corporation* (1928) 33 Comm. Cas. 195 His Honor held it was not a correct application of the sub-section to impute Bowman's reliance, if any, to the Council and thus he held that the Council was not led by reliance on the seller's skill or judgment to purchase the tractor and the trial Judge was right.
- p.296 1.48-50
25. Taylor, J. was of opinion that Bowman was not invested with any authority to represent or act for the Council, he was merely asked to inspect the tractor whilst he was in Sydney and to report on it.
- p.307 1.17-28
- His Honor was quote unable to understand how this request could constitute Bowman an agent of the Council for any purpose; it gave him no authority to speak for the Council or to engage in discussions concerning, or negotiations with respect to, the purchase of the tractor. On this view of the status of Bowman, His Honor was of opinion that it could not be said that there was any reliance by the Council on the seller's skill and judgment, unless that conclusion should be reached upon the line of reasoning which appealed to Owen, J.
- p.307 1.29-34
- p.307 1.45-52
- His Honor said that Owen, J's. final conclusion did not depend upon a characterisation of Bowman as an agent of the Council to report on the tractor but was reached merely by asserting that because Bowman relied on Corney's statements in making his report and thereafter the Council relied upon the report it must be taken to have relied on Corney's skill or judgment.
- p.308 1.31 to p.310 1.2.
- In His Honor's opinion it was impossible to say that the Council which was not a party to and had no knowledge of what had passed between Bowman and Corney relied upon the skill and judgment of the latter in deciding upon the purchase.
- p.306 1.21-28
p.310 1.3-9
- His Honor doubted the validity of the other steps which Owen, J. had set out categorically as leading to his ultimate conclusion. His Honor also thought that the Council's case failed in
- p.308 1.9-17

that it did not make known its purpose through Bowman so as to show reliance. In His Honor's view when Bowman discussed the tractor with Corney he did so on his own behalf and not on behalf of the Council.

10 26. Menzies, J. in considering the evidence as to what Bowman was asked to do thought that the conversation deposed to could not have been the whole of it but took the view that what more was said was a matter only for speculation. His Honor agreed with the trial Judge's finding of fact as to absence of the requisite reliance and he did not think, having regard to the instructions that the evidence showed Bowman to have received, that it was possible to treat Bowman as part of the Council so that his reliance could be regarded as that of the Council itself.

p.312 l.16-21
p.314 l.42 to
p.315 l.15
p.315 l.16-24

20 His Honor then disagreed with the proposition of Owen, J. that "second-hand" reliance could bring a case within the Section. He was of the view that communicated reliance which the Section requires was lacking on the evidence as it stands.

p.315 l.31-40
p.315 l.48-50

27. Dixon, C.J. in his dissenting judgment was prepared to infer "notwithstanding the brevity of the account given in his instructions" that Bowman was meant:-

p.287 l.21-37

- (a) to go into the proposal to purchase a tractor;
- 30 (b) to discuss the technical or engineering aspects with the suppliers;
- (c) to inspect the implement;
- (d) to advise the Council.

40 His Honor having taken this view as to Bowman's mandate said that although Bowman was only proleptically the servant of the Council that did not prevent him being its agent for the purpose of dealing with the fitness of the implement and moreover he held himself out as the engineer and further that for the purposes of ascertaining the suitability of the implement for the Shire Council's purposes he "represented" the corporation on that question. On this basis the Chief Justice took the view that it should be accepted as a fact that Bowman relied on Corney's skill and judgment and it then followed that such reliance was that of a duly authorised agent of the Council and thus a reliance in fact by the corporate body.

p.289 l.49 to
p.290 l.3
p.290 l.10-12
p.288 l.26-31

28. Kitto, J. in the second dissenting judgment thought that the first question was whether Bowman's position was such that his making known to Corney of the purpose for which the tractor was required was a making known by the Council. His Honor thought that this question depended upon the interpretation to be placed upon the conversation between Bowman and the Shire Clerk.
- p.299 1.28-30
- p.299 1.35-38
- p.300 1.28-33
- p.300 1.33-45
- p.301 1.24-28
- p.301 1.44
- p.302 1.8-24

His Honor thought that by concentrating too much on the limited terms of the conversation given in evidence the true significance of the occasion would be missed. 10

His Honor was of the opinion that the request to Bowman carried an implication that Bowman should interview the seller and discuss with him the technical features and adequacy for the work in view.

On this basis His Honor held that it followed that the making known by Bowman 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 seller's skill and judgment. 20

His Honor then dealt with a submission that the reliance must continue up to the time of sale and that Bowman's reliance ceased with the making of his report.

His Honor took the view that the report must have been intended to convey and must have conveyed in fact more than it said and that what it did convey was that Bowman had done what he considered a prudent buyer would do in order to satisfy himself on the subject of fitness and that in the light of all that had happened in the course of his attending to the matter he had decided to report in favour of the purchase. 30

On the basis of such an extended interpretation of his report His Honor's view was that reliance continued up to the time of the contract.

29. A consideration of the four judgments which are adverse to the Respondent shows, it is submitted, that three of them are dependent upon an inference that the instructions given by the Shire Clerk to Bowman were wider in import than would appear from the conversations given in evidence. 40

These are the judgments of Dixon, C.J. and Kitto, J. in the High Court and of Herron, J. in the Full Court. Two of the majority Judges (Taylor, J. and Menzies, J.) appear to have been of the opinion that if Bowman had been appointed to do the things which such three Judges believe he was

then they may have decided the question differently.

10 30. It is submitted that this question of fact was rightly decided by the trial Judge and by the majority of the High Court and that it is not permissible to expand the plain and unambiguous words either by implication or by an assumption that something more was said than was given in evidence particularly in view of Bowman's positive evidence that it was the whole of the conversation "besides a few pleasantries".

31. It is contended by the Respondent that Bowman was not the agent of the Council to act for it so as to bind it or affect its legal relations with others in any way and that any reliance which Bowman may have placed upon the Seller's skill and judgment is not to be imputed to the Council.

32. The Respondent humbly submits that this appeal should be dismissed with costs for the following (among other)

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R E A S O N S

1. Because the condition the breach of which is sued upon was not a term of the contract.
2. Because the Appellant did not make known to the Respondent the particular purpose for which it required the goods sold.
3. Because even if it did it did not do so in such a way as to show that it relied on the seller's skill and judgment.
- 30 4. Because the Appellant did not in fact rely on the Respondent's skill and judgment.
5. Because the findings of fact of the trial Judge were right and even if open to question should not be disturbed.
6. Because the judgment appealed from is correct.

Sgd. R. G. REYNOLDS.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH
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B E T W E E N :-

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- and -

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LIMITED Respondent

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Temple,
LONDON, E.C.4.