Privy Council Appeal No. 32 *of* 1960

The Council of the Shire of Ashford - - - - - - *Appellants*

v.

Dependable Motors Pty. Limited - - - - - - - *Respondents*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH NOVEMBER, 1960

Present at the Hearing :

VISCOUNT SIMONDS
LORD REID
LORD RADCLIFFE
LORD TUCKER
LORD MORRIS OF BORTH-Y-GEST

[*Delivered by* LORD REID]

This is an appeal from an Order of the High Court of Australia dated 8th May, 1959 which by a majority decision (McTiernan, Taylor and Menzies J.J.; Dixon C.J. and Kitto J. dissenting) reversed an Order of the Supreme Court of New South Wales (Owen and Herron J.J.; Hardie J. dissenting) and restored the Order of Ferguson J. in favour of the respondents, the defendants in this action.

The action was commenced by the appellants on 30th March, 1954. The appellants on 16th March, 1951 ordered from the respondents a Breda motor tractor with accessories, the price being £6,751 14s. 0d. The tractor was duly delivered in May 1951. The appellants required it for road construction work in their shire and it was used on this work for some time. It developed a number of defects, and the appellants claim damages for breach of the implied condition set out in section 19 (1) of the Sale of Goods Act 1923-53 of New South Wales. The defence is that the requirements of this section have not been satisfied. Damages were assessed by the Full Court of the Supreme Court of New South Wales at £4,915 and it is admitted that, if this appeal succeeds, that sum should now be awarded to the appellants.

Section 19 (1) is in the following terms :—

> " 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."

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 section 19 (1) has no bearing upon the present appeal.

The greater part of the evidence at the trial dealt with the performance of the tractor and the defects which it developed while in use by the appellants. It is now admitted that the tractor was not in fact reasonably fit for the purposes of road construction and the argument before their Lordships was concerned with the question whether the other requirements of the section were satisfied: whether the buyer made known to the seller the particular purpose for which the tractor was required, whether the buyer made that known to the seller " so as to show that the buyer relies on the seller's skill or judgment ", and whether the buyer in fact relied on the seller's skill or judgment.

The facts which give rise to these issues are somewhat unusual and it is necessary to state them in some detail. Early in 1951 the appellants wished to acquire a tractor for use in their road construction work. The Shire Clerk Mr. Heywood heard of a Breda tractor which the respondents had for sale in Sydney. Early in March the appellants appointed a new Shire Engineer Mr. Bowman after seeing him and satisfying themselves as to his qualifications. Mr. Bowman was still employed on other work and did not take up his duties or become the servant of the appellants until after the events with which this case is concerned. It was to be part of his duty to supervise road construction work and he had some experience of this and of the working of tractors in this connection. On or about 12th March Mr. Bowman was in Sydney. Mr. Heywood was aware of this and, after consulting Mr. Black the President of the Shire Council and certain Councillors, he telephoned to Mr. Bowman. This telephone conversation is very important because much turns on the inferences which should be drawn from it.

Mr. Bowman said in evidence that Mr. Heywood told him that the Council was interested in purchasing a tractor and asked him whether he would be so kind as to go and have a look at the tractor which could be seen at the respondents' show room. He replied, " Yes. I will probably go and see them to-morrow ". He added that nothing else was said besides a few pleasantries. Mr. Heywood's evidence is brief. " Q. Did you then ring up the Engineer? A. Yes. I rang Mr. Bowman. He was in Sydney at the time. Q. What did you ask him to do? A. I asked him would he go to Dependable Motors and have a look at the tractor and see if he thought that it was suitable for the work we required. Q. Was that something which you did on the instructions of the Council? A. Yes." There was no cross-examination. Mr. Bowman said that he was told to ask for Mr. Corney but it does not appear whether or not he was told that by Mr. Heywood. It is not disputed that Mr. Bowman was aware of the type of work for which the tractor was required.

The next day Mr. Bowman went to the respondents' premises and met Mr. Corney who was their Joint Managing Director. Again it is important to have in mind exactly what took place and their Lordships will set out the important part of the evidence. It appears that Mr. Bowman spent half an hour or an hour with Mr. Corney. Their Lordships quote from Mr. Bowman's evidence in chief: he did not depart from or modify it in cross-examination:

> " Q. Would you tell us in direct speech what was said and done by both of you then? A. In the first place I said to Mr. Corney—I gave him my name and so on and I said, ' I am here on behalf of the Ashford Shire Council. I understand they are interested in a tractor which you have for sale and I would like to see it.' He said, ' There is the tractor over there '—it was towards the front of the building. We walked over to the tractor and I said to Mr. Corney, ' Can you tell me anything about it? ' and he proceeded to point out a few good points about the tractor—such as its robust construction. I think he bent down to look at it underneath and I bent down too. He pointed out the framework underneath and then he

mentioned something about the construction of the tractor—which was unorthodox so far as tractors were concerned. He pointed out that the tracks were made on what you would call unitary construction. The pads and the rails of the tracks were cast in one piece rather than assembled in two pieces, as is usual with tractors.

"Mr. Reynolds (for the respondents): Q. Is that what he said or what you observed? A. Really, what I observed. I mentioned the fact to him—that they were constructed somewhat along unorthodox lines and he said, 'Yes. That is a special construction of this company. It is their own particular method. The tracks are made of a particular type of steel—specially treated to give very long life and work, and it has very high wear-resistance qualities'. I think he then started the motor up. The motor seemed quite good actually. It ran for a few minutes. This was a fairly big tractor and it made a big noise in the showroom. He turned it off after a few minutes. We discussed it further and I said to him, 'Tell me something about it. What are its capabilities? What is its horse-power?' and he said, '85 h.p.' I said, 'What about the weight?' and he said, 'It is about 7 tons in weight'. I then asked, 'Do not you think that is a bit low for the horse-power?' and he said, 'Oh, no. There are 7 or 8 others in this particular make of tractor in operation at the moment'. He mentioned one up the North Coast—I think it was at Casino. I am not sure on that point. There was another one up round Tamworth somewhere, I think, and he said they were giving good service. We had quite a lengthy discussion on the actual tracks of the machine. They were of a kind that I was a bit worried about—(Objected to).

"His Honour: Q. Would you give the conversation as well as you can? A. Well, it is difficult, of course. I cannot remember much that was said. He pointed out to me that the firm that had made the tractor—he said, 'It is a very reputable firm. It is a very big firm engaged in the manufacture of locomotives as well as tractors. It is quite an outstanding firm in Italy', and he added that there was no doubt about the quality of the machine or the quality of the tracks. 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 6-8 yard scraper scoop'. It was a Le Tourneau make, purchased from Tutt Bryants. 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.'"

Their Lordships will not quote from the evidence of Mr. Corney because the argument before them proceeded on the footing that Mr. Bowman's evidence could be accepted. They will only note that Mr. Corney said that Mr. Bowman introduced himself as the Shire Engineer and said that he had been instructed to give a report on the tractor to his Council with a view to purchase; and that, while Mr. Corney denied that Mr. Bowman asked him whether the tractor was suitable, he admitted that he believed that it was suitable for Council work and would have said so if he had been asked.

The other matter of fact to which great importance was attached in argument is the report made by Mr. Bowman after his conversation with Mr. Corney. There was no written report. Mr. Heywood said "Q. Did Mr. Bowman subsequently ring you up? A. He rang me back within a day or two: I could not just be sure when. Q. What did he report on it? A. He told me that he had inspected the tractor. It seemed to him to have plenty of horse power and was big enough for the work we required. Q. Did you communicate that to the various Councillors including the President? A. Yes. Q. Did you then receive instructions from the President as to its purchase? A. Yes." The President, Mr.

Black, was asked whether in giving these instructions he relied on Mr. Bowman's report and he answered " Yes. I had nothing else to rely on."

On these facts the respondents' main contentions were briefly, (first) that Mr. Bowman had no authority from the appellants to make known to the seller on their behalf the particular purpose for which the tractor was required and had no authority to place reliance on the seller's skill or judgment, because the sole duty entrusted to him was to make up his own mind about the suitability of the tractor; and (secondly) that, whatever reliance Mr. Bowman may have put on the seller's skill or judgment in deciding what report to make, the buyer (the appellants) cannot have so relied if only because no councillor and no servant of the Council was aware of what had passed between Mr. Bowman and Mr. Corney when the appellants bought the tractor.

The first question to be decided is the nature and extent of the authority given to Mr. Bowman by the appellants. That depends on the proper interpretation to be put on Mr. Heywood's brief telephone conversation with Mr. Bowman on 12th March. It must in their Lordships' judgment be held that Mr. Bowman was given sufficient authority to enable him to perform the task which was then entrusted to him, and so the real question is—what was the task which Mr. Bowman then undertook to perform? That question must be answered by considering the words which Mr. Heywood used in light of the circumstances known to both parties.

The respondents' submission is that what Mr. Bowman was asked to do was merely to go and inspect the tractor and use his own judgment in deciding whether he thought it suitable for road work, and that he should be regarded as an independent expert commissioned by the appellants to give them his expert advice about the tractor. The other interpretation is that he was to act on behalf of the appellants in the same way as he would have done if he had already entered on his duties as Shire Engineer. There is, their Lordships apprehend, no doubt that, if he had already taken up his duties as Shire Engineer, it would have been part of his duty to advise the Council if asked to do so, and that if he had been asked while Shire Engineer to do what in fact he was asked to do on 12th March, he would have had authority to ask for and receive assurances on behalf of the appellants: if as Shire Engineer he had received the assurances which in fact he received from Mr. Corney the appellants could have relied on these assurances as having been given to them. The appellants being a corporate body must act through some person and in a case like the present the obvious person would be the Shire Engineer.

The opinions of the learned judges of the High Court and of the Supreme Court of New South Wales were sharply divided on this matter and their Lordships have given it their anxious consideration. In their Lordships' view the words of a brief conversation of this kind should not be considered in isolation, and Mr. Heywood's words should not be regarded as intended by themselves to define the legal basis on which Mr. Bowman was to act. The question is rather what meaning Mr. Heywood's words were calculated to convey to Mr Bowman, and that involves consideration of the facts which were known to them when the conversation took place. Mr. Bowman had a good working knowledge of the use of tractors in road construction but he was not a technical expert in tractor construction. He was not asked to submit a written report and he was not paid for what he was asked to do. He was asked and agreed to carry out his task as an obligement to his future employers. He would become responsible to them in due course for working the tractor and his task was one which would naturally have fallen to him as part of his duties if he had already assumed the duties of the post to which he had been appointed. In these circumstances their Lordships, while recognising that no inference can be drawn with absolute certainty, have come to be clearly of opinion that the proper inference in this case is that Mr. Bowman was being asked to anticipate his duties as Shire Engineer and to do gratuitously what it would have been his duty to do

if he had already become the appellants' servant. Certainly that was Mr. Bowman's understanding: he said in evidence that he told Mr. Corney that he had come on behalf of the appellants, and Mr. Corney said that he introduced himself as the Shire Engineer. In their Lordships' judgment Mr. Bowman was correct.

The extent of an agent's authority, if in doubt, must be determined by inference from the whole circumstances. If the task entrusted to Mr. Bowman was to act for the appellants as if he were already their servant then in their Lordships' judgment it must be inferred that he was given such authority as he would have had if he had already become their servant. It may be that, if a technical expert is called in to give independent advice to a buyer on the merits of certain goods, the terms of his engagement will not authorise him to disclose to the seller the particular purpose for which the goods are required, or to accept assurances from the seller as the basis of the independent advice which he is being paid to give. But Mr. Bowman was not called in because he was an independent technical expert; neither Mr. Heywood nor Mr. Black had any ground for supposing that he was an expert in these matters; and he was not being paid. If he was to act as if he were already performing the duties of Shire Engineer the natural thing for him to do would appear to be just what in fact he did: to disclose to the seller the purpose for which the tractor was required and to seek assurances about it. The seller as agent for this make of tractor might be expected to know better than Mr. Bowman what work it was capable of doing. In their Lordships' judgment Mr. Bowman was acting within the scope of his authority in disclosing to the seller on behalf of the appellants the particular purpose for which the tractor was required. And if he had authority so to act on behalf of the appellants that must cover disclosing that purpose so as to shew that he was relying on the seller's skill or judgment in making his report to the appellants.

Their Lordships turn to Mr. Corney's position. Did Mr. Bowman shew him that the buyer was relying on his skill or judgment? Mr. Corney thought that Mr. Bowman was the Shire Engineer and knew that after their conversation he was going to report to his Council with a view to their buying the tractor. He must have realised—any reasonable man would have realised—that in making his report Mr. Bowman intended to rely on the assurances which he had given, and he had no reason to suppose that the appellants were not so relying when they placed their order.

The respondents argue that that is not sufficient because in ordering the tractor the appellants did not in fact rely on what had taken place between Mr. Bowman and Mr. Corney: Mr. Bowman never told them about this and a person cannot rely on something of which he is ignorant. The respondents found on well known statements of the law.

"Such a reliance must be affirmatively shewn: the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation." (*Cammell Laird & Co.* v. *Manganese Bronze & Brass Co.* [1934] A.C. 402 per Lord Wright at p. 423). "The reliance in question must be such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity" (*Medway Oil & Storage Co.* v. *Silica Gel Corporation* (1928) 33 Com. Cas. 195 per Lord Sumner). They argue that what Mr. Corney said cannot have been an inducement leading the appellants to purchase the tractor: the appellants relied solely on what Mr. Bowman told them and he said nothing about his conversation with Mr. Corney.

Such general statements of the law do not deal with the position of a buyer who acts through agents or servants as a Corporation must do. There is no doubt that the making known to the seller of the buyer's particular purpose may take place during negotiations which precede the making of the contract of sale and that there need be no reference to this in the contract itself. What is necessary is that the buyer shall contract

in reliance on what took place during the negotiations, and that his reliance at the time when the contract is made "is a matter of reasonable inference to the seller and to the Court" (per Lord Sumner in *Manchester Liners* v. *Rea* [1922] 2 A.C. 74 at p. 90. If the agent who conducts the negotiations is the same person as the agent who makes the contract on behalf of the buyer there is no difficulty. But the case where they are different persons has to be considered. In the present case Mr. Bowman conducted the negotiations on behalf of the appellants and Mr. Heywood made the contract on their behalf. The question is whether it is necessary that the former should have made the latter fully aware of what took place during the negotiations before the latter agent made the contract.

The appellant, being a Corporation, cannot itself rely on or be induced to act by anything: it can only rely or be induced or act through its agents or servants. Mr. Bowman was its agent when obtaining Mr. Corney's assurances. Equally Mr. Black, the President of the Council, and Mr. Heywood were only its agent and servant when deciding to order and ordering the tractor. Mr. Black and Mr. Heywood were induced to do this by Mr. Bowman's report and that report was induced by the seller's assurances received by Mr. Bowman on behalf of the appellant. Mr. Black was not the appellant Corporation, and their Lordships cannot hold that their answer to the question whether the appellant Corporation is to be held to have relied on the seller's skill or judgment should be affected by the fact that Mr. Black was not told what had taken place between Mr. Bowman and the seller.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and that the Order of 10th September, 1958, of the Full Court of the Supreme Court of New South Wales should be restored. The respondents must pay the appellants' costs in the High Court of Australia and before their Lordships.

(39347) Wt. 8109—53 100 12/60 D.L.

In the Privy Council

THE COUNCIL OF THE SHIRE OF ASHFORD

v.

DEPENDABLE MOTORS PTY. LIMITED

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LORD REID

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