[HIGH COURT OF AUSTRALIA.]

MARCUS CLARK (VICTORIA) LIMITED . . APPELLANT; PLAINTIFF,

AND

BROWN . . . . . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1928.

MELBOURNE, *May* 21, 22; *June* 7.

Knox C.J., Isaacs, Higgins, Powers and Starke JJ.

*Contract—Construction—Sale of goods—Motor-car—Written contract of sale—Hire-purchase agreement—Description of subject matter—Sale as new car—Delivery of secondhand car—Implied term—Guarantee—Condition—Warranty—Damages.*

The appellant, which was a company carrying on the business of selling new and secondhand motor-cars, accepted an order from the respondent for a motor-car, which was written upon one of the appellant's order forms—the order describing the same but not stating in the description whether it was to be a new or a secondhand car. In the order the respondent agreed to pay a deposit and the balance of the purchase-money by instalments and to execute the appellant's usual form of hire-purchase agreement. On the order form it was stated that all new cars were sold subject to a guarantee which was set out (which did not include a guarantee that the car was new); and that no guarantee was given with secondhand cars. The respondent also signed the plaintiff's usual form of hire-purchase agreement, by which the company agreed to let and the hirer to take the car described therein (the description being similar to that in the order form) and repeated the provisions as to guarantee above referred to; and this agreement excluded any implied "warranty undertaking or agreement other than is herein set forth." The car delivered by the appellant to the respondent was not new.

*Held*, that the contract between the parties was constituted by the order and the hire-purchase agreement; and that, when read together, they constituted an agreement for the sale, and not merely for the hire, of the car.

*McEntire* v. *Crossley Bros. Ltd.*, (1895) A.C. 457, applied.

*Held*, by *Knox* C.J., *Isaacs* and *Powers* JJ. (*Higgins* and *Starke* JJ. dissenting), that upon the proper construction of the two documents the actual transaction was one for the sale of a new car.

*Fowkes* v. *Manchester and London Life Assurance and Loan Association*, (1863) 3 B. & S. 917, applied.

Decision of the Supreme Court of Victoria (Full Court): *Marcus Clark (Victoria) Ltd.* v. *Brown*, (1928) V.L.R. 195; 49 A.L.T. 209, affirmed.

APPEAL from the Supreme Court of Victoria.

In an action in the County Court at Melbourne the plaintiff, Marcus Clarke (Victoria) Ltd., claimed from the defendant, Thomas Brown of Swan Hill, farmer, payment of the sum of £78 5s., due on 20th September 1926, for the use and hire of a motor-car. The defendant filed a special defence in which he alleged that he had been induced to enter into the agreement under which the claim was made, by the untrue, and false and fraudulent representations of the plaintiff, its servants and agents, that the motor-car was a new car and that it was a 1926 model. The defendant also filed a counterclaim for rescission of the agreement on the ground of those representations, and he further or alternatively alleged that there were terms and conditions of the agreement that the motor-car was a new car and a 1926 model and in perfect state, order and condition, whereas in fact it was a secondhand used car, a model of a much earlier year, and in a bad and defective state, order and condition: and, in addition to rescission of the agreement, the defendant claimed repayment of the sum of £300 paid or deemed to have been paid thereunder, with interest, or alternatively £500 damages. Further defences taken at the trial were that there was no agreement as alleged, that there had been a breach of the conditions and warranties alleged by the counterclaim, and that there was a further implied condition or warranty that the car was fit for the purpose for which it was required. In its defence to the counterclaim the plaintiff denied the misrepresentations alleged, denied that they were false and fraudulent and denied the terms and conditions alleged, and claimed that the contract was in writing and spoke for itself.

H. C. OF A. 1928.

MARCUS CLARK (VICTORIA) LTD. v. BROWN.

The plaintiff, which was a company carrying on business as a vendor of new and secondhand motor-cars, had as its agent at Swan Hill one Charles Wendell. Wendell, having in February 1926 offered to sell a Chandler car to the defendant for £585 and to allow him £200 on an old car, got the plaintiff to send up a Chandler car from Melbourne. On 8th March 1926 the defendant had a trial with the car and gave Wendell a cheque for £100, signed a document (exhibit A) and took possession of the car.

The material parts of exhibit A were as follows :—" Order Form. —8th March 1926.—Purchaser's full name : Thomas Brown; address : Beveridge Street, Swan Hill.—To Marcus Clarke (Victoria) Ltd., 20-26 Queen's Bridge Street, Melbourne.—Dear Sirs,—I . . . the undersigned hereby order and agree to pay for the goods specified hereunder upon the terms indorsed hereon :—30 (R.A.C.) h.p. Chandler, chassis 150116/139994 ; demountable rims—artillery wheels ; 5 Goodyear balloon 33-6 tyres ; American body ; painting —Chandler blue ; upholstering—leather ; equipment—deflectors and bumper bar : £585. Hupmobile car as part deposit—£200. Interest—8 per cent. Date of delivery—about 8th March 1926. I enclose £100 being deposit on the above goods and agree to pay a further sum of £ when notified by you that same are ready for delivery and to execute your usual form of hire-purchase agreement which provides *inter alia* for payment of balance within 24 months in equal 6-monthly instalments.—Purchaser's signature : Thomas Brown. Agent's signature : Chas. Wendell. Confirmed—Marcus Clarke (Victoria) Ltd., per M. W. Asher—Date 6/4/26."

Indorsed on this document were " Terms of Business," which included the following :—" 1. Prices are net cash without discount. 2. Orders taken by our agents . . . are subject to confirmation by Marcus Clarke (Victoria) Ltd. before the same shall be deemed to be definitely accepted. 6. In the event of the purchaser failing to complete this purchase within 30 days after notice in writing that the goods are ready for delivery the deposit shall be forfeited and such forfeiture shall not affect the vendors' rights against the purchaser in respect of his failure to complete or otherwise. 11. All new cars are sold subject to the following guarantee :—The chassis is guaranteed for 90 days from date of delivery to the original

purchaser against any defect in material or construction. . . . 13. No guarantee is given with secondhand cars. 14. Agents or employees are not authorized to give any guarantee verbal or otherwise on our behalf.

On 17th March 1926 the defendant signed the plaintiff's form of hire-purchase agreement (exhibit B) which witnessed "that the owner" (Marcus Clarke (Victoria) Ltd.) "agrees to let and the hirer" (Thomas Brown) "agrees to take the motor-car and fittings described by indorsement" thereon upon the terms and conditions set forth. Those terms and conditions included the following:— "1. The hirer shall on the signing hereof pay to the owner the sum of £300 in consideration of the option of purchase hereinafter granted and for which sum credit is not to be given on account of rent unless and until a purchase be effected as hereinafter mentioned. 2. The hirer shall pay to the owner or its authorized agents from and after this date the rental of £313 by consecutive payments half-yearly of £78 5s. payable on the 17th day of each and every half-year the first of such payments to commence and be made on the 17th day of September 1926 and the subsequent payments to continue until the total amount of rent so paid shall together with the sum paid under condition 1 hereof be equal to the value of the said motor-car and fittings as indorsed hereon with interest and insurance. 9. Should the hiring be terminated from any cause before full payment of the amount indorsed hereon as before mentioned and the said motor-car and fittings returned to the owner the hirer shall forfeit the sum paid by him or her under condition 1 hereof and shall not on any account whatsoever be entitled to any allowance credit return or set-off for any payments previously made. 9a. The hirer may at any time put an end to and terminate the hiring by returning the said motor-car and fittings to the owner at the hirer's own risk and cost without prejudice to any claim the owner may have against the hirer for arrears of rent or damages. 12. . . . The owner agrees . . . that the hirer may at any time during the continuance of this agreement become the purchaser of the said motor-car and fittings upon payment in cash of the amount indorsed hereon. . . . And it is hereby further agreed by and between the parties hereto that unless and until a purchase be effected in

H. C. OF A. 1928.

MARCUS CLARK (VICTORIA) LTD. v. BROWN.

accordance with the terms of this agreement the said motor-car and fittings shall be and remain the property of the owner and that the hirer shall be the bailee only of the said motor-car and fittings. It is hereby further agreed by and between the parties hereto that there shall not by virtue of this hiring or upon any purchase made in exercise of the option herein contained be implied any warranty undertaking or agreement other than is herein set forth and any warranty undertaking or agreement that would or might be otherwise implied is hereby expressly negatived. Guarantee: The chassis is guaranteed by the owner for 90 days from date of delivery to the original hirer against any defect in material or construction."

The " particulars indorsed " on the hire-purchase agreement were as follows:—" Chandler motor-car £585—engine No. 139994; chassis No. 150116; wheels—artillery; tyres—5 Goodyear balloon; body —American. Accommodation £28. Total £613."

On the trial of the action the view taken by the learned County Court Judge was that the real contract was contained in the order form (exhibit A), and that except as regards the hire the terms of the hire-purchase agreement (exhibit B) did not affect the matter; that there was in the contract on the delivery of the car to the defendant before the hire-purchase agreement was entered into a condition accepted by the parties that it was a new Chandler car, and that, on the evidence, the car which was delivered to the defendant was not a new car. His Honor gave judgment for the defendant on the claim with costs, and dismissed the counterclaim without costs.

From this decision the plaintiff appealed to the Full Court of the Supreme Court of Victoria, which by a majority (*Irvine* C.J. and *McArthur* J., *Mann* J. dissenting) dismissed the appeal: *Marcus Clarke* (*Victoria*) *Ltd.* v. *Brown* (1).

The plaintiff now appealed to the High Court from the decision of the Full Court.

Other material facts appear in the judgments hereunder.

*H. I. Cohen* K.C. (with him *Little*), for the appellant. The transaction with regard to the motor-car was not a sale at all,

(1) (1928) V.L.R. 195; 49 A.L.T. 209.

much less a sale by description. The subject matter of the transaction was the specific car tried by the respondent. It should have been found on the evidence as a fact that the car was a new car. The evidence for the appellant on the point was direct, while the primary Judge's decision to the contrary was based on inferences drawn by experts from its condition after it had been in use for many months. However, if there was a guarantee that the car was a new car, and it was not so in fact, the respondent has no ground for action up to the present, as the true nature of the transaction was not a sale but a hire-purchase, which may or may not have resulted in a sale according to the option of the hirer. Comparing the terms of the order form and the hire-purchase agreement, it is manifest that the intention of the parties was that the hire-purchase agreement should be entirely substituted for the order form. Many of the respective terms of these two documents are quite inconsistent with each other, and the only contract to be now considered is that set out in the hire-purchase agreement. [Counsel also referred to *Lee* v. *Butler* (1).]

[ISAACS J. referred to *McEntire* v. *Crossley Bros.* (2); *Helby* v. *Matthews* (3).

[STARKE J. referred to *Belsize Motor Supply Co.* v. *Cox* (4).]

The right of the hirer to return the goods, which is the essential feature of *Helby* v. *Matthews* (3), is present here. There is no warranty as to the car being a new one in either of the documents, and no such warranty can be implied, as the agreement expressly negatives any such implication. The decision of the majority of the Full Court proceeds on the assumption that there are only two classes of car—a new car and an old car. As *Mann* J. points out, there is an intermediate class of car, known as a "used car." It does not follow because a guarantee is given in the terms set out in the agreement, that the parties were contracting in relation to a new car, and that the appellant was giving a warranty that the car was a new car.

[KNOX C.J. referred to *Hart* v. *MacDonald* (5).]

(1) (1893) 2 Q.B. 318.
(2) (1895) A.C. 457, at p. 462.
(3) (1895) A.C. 471.
(4) (1914) 1 K.B. 244.
(5) (1910) 10 C.L.R. 417.

H. C. OF A. 1928.

MARCUS CLARK (VICTORIA) LTD. v. BROWN.

The respondent could not have been compelled to purchase the car. The *Goods Act* 1915 (Vict.) does not apply to this transaction as it did not amount to a sale. There could, therefore, be no implied warranty arising from a sale by description. Further, there was here no bill of sale as no property passed. As to the damages, these were assessed on a wrong basis. Seeing that this was not a sale to, but merely a hiring by, the respondent, the measure of damages is not the difference between the value of an old and a new Chandler car but merely the damage (if any could be shown) sustained by the respondent through his having to use an old instead of a new car during the period in question. [Counsel also referred to *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (1).] The case of *Varley* v. *Whipp* (2) is distinguishable from the present case, as in that case the machine which the defendant agreed to buy had never been seen by him, but in this case the car had been seen and tried by the respondent before the transaction was entered into.

*Walker* (with him *Eager*), for the respondent. The agreement in this case was an agreement for sale whether it was contained in one or both of the documents. Exhibit A, if looked at alone, is an agreement for sale, and nothing else. The hire-purchase agreement is not inconsistent with an agreement for sale (*Myerson* v. *Collard* (3) ). The transaction was a sale of a specific article by description. The terms of the documents show that this was a contract for the sale of a new car. The guarantee set out in exhibit B can apply only to a new car—not to a secondhand car; consequently the inference to be drawn is that the car was sold and was purchased as a new car. An order by an intending purchaser for a Chandler car sent to a man who deals in such cars means a new car.

[STARKE J. referred to *Benjamin on Sale*, 6th ed., p. 511.]

The respondent ordered the car by description; that being so, the position is that he ordered, and the appellant accepted the order for, a new car. The sale was not the mere sale of a specific

(1) (1867) L.R. 2 Q.B. 580, at p. 587. (2) (1900) 1 Q.B. 513.
(3) (1918) 25 C.L.R. 154, at p. 164.

article, but was the sale of a specific article by description (*Benjamin on Sale*, 6th ed., pp. 696-697). In the case of the sale of a specific article defects in which could not be discovered by the purchaser by inspection, the latter has to rely upon the seller's description, and that must be strictly complied with.

[STARKE J. referred to *Wallis, Son & Wells* v. *Pratt & Haynes* (1).]

On the question of damages, the proper interpretation of exhibits A and B, read together, being that the contract is in respect of a new car, the contract was broken as a new car was not delivered, and there is no question as to warranty (*Benjamin on Sale*, 6th ed., pp. 695-697]. There is no difficulty about the quantum of damages as they have been assessed by the learned County Court Judge.

*Cohen* K.C., in reply. Assuming the transaction amounted to a sale where the article has been seen prior to the agreement to purchase, the sale is a sale of a specific article—not a sale by description. [He referred to *Varley* v. *Whipp* (2); *Benjamin on Sale*, 6th ed., pp. 511, 697; *Anson on Contract*, 15th ed., pp. 172, 174; *Wallis, Son & Wells* v. *Pratt & Haynes* (1); *Goods Act* 1915 (Vict.), secs. 3 (1), 18, 19, 59; *Chalmers on Sale of Goods*, 10th ed., pp. 44-46; *Thornett & Fehr* v. *Beers & Son* (3).]

*Cur. adv. vult.*

June 7.

The following written judgments were delivered :—

KNOX C.J., ISAACS AND POWERS JJ. The agreement between the parties was constituted by the two documents exhibits A and B, the first dated 8th March 1926 and the second dated 17th March 1926. The confirmation of the first took place on 6th April 1926, after both were made, and when, consequently, if the first had been superseded, it would have been a useless piece of paper. No confirmation was given to the second. Without entering into details, it is plain, when the two are examined together in relation to the proved facts, that exhibit A was the main and root document, exhibit B being consequential and by way of security. The two have therefore to be reconciled on the principle laid down by the

(1) (1911) A.C. 394.
(2) (1900) 1 Q.B. 513.
(3) (1919) 1 K.B. 486.

H. C. OF A. 1928.

MARCUS CLARK (VICTORIA) LTD. v. BROWN.

KNOX C.J. ISAACS J. POWERS J.

House of Lords in *McEntire* v. *Crossley Bros. Ltd.* (1). When they are so read, there is no doubt the transaction was for the sale and not merely for the hire of the car. (See also *Smith* v. *Chadwick* (2) and other cases cited in *Salmond and Winfield* on the *Law of Contracts*, at p. 111.)

The clause contained in exhibit B, and excluding any implied "warranty undertaking or agreement other than is herein set forth," has been relied on to prevent the implication necessary to the respondent's case, that the car was sold on the basis of its being a new car. There is some room for argument that, adhering simply to the words of the written documents, the appellant can avoid the responsibility of delivering a much used car instead of a new one, though at the price of a new one. But reading the agreement in a business way, that argument should not prevail. The actual transaction between the parties was one of sale, at the price of £585 cash, as a new car, and it was understood that the agreement was to be put in writing. On 8th March part of the agreement was put in writing (exhibit A), and later the rest of it (exhibit B). As finally recorded it contained a guarantee. Had that guarantee been omitted by mutual error, and assuming honesty on the part of the appellant the omission must have been by error, its insertion could, in the circumstances, have been insisted on by rectification. That is so because the car had been actually bought and sold as new, and the business terms stated in exhibit A entitled the purchaser to the guarantee as for a new car (*United States of America* v. *Motor Trucks Ltd.* (3) ). This is pointed to because it was argued that the guarantee might have been voluntarily given irrespective of the car being new. The guarantee being inserted, and as of the purchaser's right, what is the true interpretation of the contract as to the car being described or warranted as new by the contract itself and consistently with the exclusive clause referred to ? The central principle for this purpose is thus stated by *Blackburn* J. in *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (4): "In all deeds and instruments the language used by one party is to be construed in the sense in which it would be reasonably understood

(1) (1895) A.C. 457, and see particularly at pp. 462-463.
(2) (1882) 20 Ch. D. 27, at p. 62.
(3) (1924) A.C. 196.
(4) (1863) 3 B. & S. 917, at p. 929.

by the other." Applying that principle to the two documents A and B, the proper conclusion is that the written contract declares or asserts the car to be a "new car." That arises in the following way:— Exhibit A, the primary document, states: "I the undersigned" (Brown) "hereby order and agree to pay for the goods specified hereunder upon the terms indorsed hereon." The terms indorsed are called "Terms of business." Par. 11 says: "All new cars are sold subject to the following guarantee"—and the guarantee is set out. Par. 13 says: "No guarantee is given with secondhand cars." A purchaser reading those terms would reasonably understand that the selling company's cars were divided for purposes of "terms of business" into two classes, namely, "new" and "secondhand," and that if he purchased a car as a "new car" he would be entitled to the stated guarantee. Further, when on receiving exhibit B he found that guarantee included, he would naturally believe it was given in pursuance of the 11th paragraph of "A." There is no doubt Brown did so believe. The just and true construction of the contract—that is, of its actual words—is that it asserts the car to be "new."

It was argued for the appellant that the expressions "new" and "secondhand" were not exhaustive, since the latter is confined to cars purchased from others, and that there is a third possibility, namely, that the appellant sold also "used cars," that is, cars used only by itself. That is a rather strange argument on the part of the appellant, having regard not only to the form of the documents it prepares, but also to the fact that it appears from the evidence of a former sales manager of the appellant there was a "secondhand department" of the company, and a "new car department"—but nothing is said as to any other department. But in any case it is not a conclusive argument. "Secondhand" may mean simply used so as to destroy its character as new—used, that is, not simply for experiment or demonstration for selling purposes, but for what may be called the consumer's purpose, that for which the article was made. In the *Oxford Dictionary*, under "secondhand," in division B (2), the definition is: "Not new, having been previously used or worn by another, as secondhand clothes, books," &c. And it may not be out of place to quote the first illustration there given, going

H. C. OF A. 1928.

MARCUS CLARK (VICTORIA) LTD. v. BROWN.

KNOX C.J. ISAACS J. POWERS J.

back to 1673, by Wycherley: "I will have no . . . dirty, secondhand charriot new furbish'd, but a large, sociable, well-painted coach." Whether the assertion of newness is called a condition or a warranty is immaterial: in the words of the exclusive provision it is "herein set forth," and the appellant is bound by it. Neither does it matter whether it be thought to be express or implied: it is sufficient that it arises on a fair construction of the agreement, and not extraneously (*Hart* v. *MacDonald* (1)). The finding of fact that the car was not new cannot be disturbed.

The judgment of the learned County Court Judge, affirmed by the Supreme Court, is not quite in regular form. But form is not here in question. The substance, both in broad justice and in actual result, is the same as would be reached by the most precise form.

We may add that it is satisfactory to note that the construction of the contract we have independently come to, accords with the view taken by both sides at the trial; for Judge *Woinarski* said: "The contract is recognized by both sides to be that the car was purchased on the basis of it being a new car." We would refer to the case of *Taylor* v. *Combined Buyers Ltd.* (2).

The appeal should be dismissed.

HIGGINS J. The plaint is for £78 5s., the first of four instalments of the same amount payable for the hire of a motor-car. The only defence is fraudulent representation that the car was new; but no finding has been given on the issue of fraudulent representation. Then there is a counterclaim of the defendant for rescission of the agreement on the ground of the fraudulent representation; and further, or alternatively, on the ground that it was a term and condition of the agreement that the car was new; and alternatively "damages £500." The judgment of the learned Judge of County Courts was for the defendant on the claim, although there was no finding as to fraudulent representation; and the counterclaim was dismissed, although damages £313 were awarded to the defendant on the ground of warranty that the car was new. The price of the car, with interest on unpaid instalments, was £613; £300 had been

(1) (1910) 10 C.L.R. 417.

(2) (1924) N.Z.L.R. 627, at p. 647.

paid at the contract; and the difference £313 has, in effect, been set off against all four unpaid instalments amounting to £313 in all. *Accepting the findings of the learned Judge* it would seem that rough, romantic justice had been done; for the plaintiff retains the £300 paid, and the defendant retains the car at the true value, £300. The Full Court of Victoria has affirmed the decision; no argument has been adduced as to the form which the judgment has taken; and I suppose it is not for us to cavil as to the form so long as substantial justice has been done. But I find great difficulty in accepting the conclusion that there was a term or condition, or a warranty that the car was, or was to be, a new motor-car. On this subject, indeed, I feel constrained to agree with *Mann* J., who dissented from the judgment of the majority of the Full Court. There is, certainly, no express agreement that the car was new or to be new; and I cannot find in the words of the written agreement any *necessary* implication to that effect.

I cannot accept the theory of Mr. *Cohen*, counsel for the vendor, that the agreement of 17th March was *substituted* for the agreement of 8th March 1926. For the execution of the vendor's usual form of hire-purchase agreement was an essential term of the earlier agreement; the earlier agreement made by the vendor's agent was actually "confirmed" by the vendor on 6th April, after the later agreement, and the earlier agreement contained terms vital to the transaction, which the later agreement did not contain—e.g., the provision that the defendant's Hupmobile car was to be accepted as part of the deposit of £300 to the amount of £200. It is difficult to bring this position within ordinary legal categories; but probably it may be fairly stated that the later agreement is a graft on the earlier agreement, varying the earlier agreement so far as the earlier agreement is inconsistent. Under the later agreement the plaintiff company remains the owner of the car and the defendant the hirer; the hirer is to pay £300 down "in consideration of the option of purchase hereinafter granted"; credit is not to be given for the £300 on account of rent "unless and until a purchase be effected." The hirer agrees to pay a rental of £313 by four half-yearly payments of £78 5s. each. The hirer has to repair, to insure, to be responsible for damage, to keep the car in his own possession, to pay the rent

H. C. OF A. 1928.

MARCUS CLARK (VICTORIA) LTD. v. BROWN.

Higgins J.

of the premises. If the hirer make default "the agreement shall be terminated," but the owner keeps his right to rent until the car be restored, and can retain the £300. Should the hiring be terminated before full payment and return of the car, the hirer is to forfeit the £300. The hirer (clause 9a) may at any time terminate the hire by returning the car, without prejudice to any claim of the owner for arrears of rent or damages; and (clause 10) "in consideration of the very easy terms" (*sic*) "under which the motor-car," &c., "are leased" the hirer agrees, if the car be returned before half of the £613 has been paid as rent, that the hirer is to pay to the owner, "as . . . compensation for deterioration," £156 10s. exclusive of any sums *paid* or *due*. But the owner agrees (a) that the hirer may at any time "become the purchaser" upon payment in cash of the £613, credit being given for the £300; and until such a purchase be effected the car remains the property of the owner, with the hirer as bailee only.

Now, if the later document, the "agreement for hire," stopped at this point, what possible ground is there for the contention that it contains, expressly or by implication, a stipulation that the car was to be new—either as a term of the contract or as a warranty? It does not seem to matter, for this purpose, whether this was a contract for a specific car or a contract for a car by description; though if the point had to be decided I should be strongly inclined to think, with *McArthur* J., that it was a contract for the specific car which had been shown to the purchaser (see *Varley* v. *Whipp* (1)). It is not contended that in the earlier document the words "chassis 150116/139994" were inserted after the purchaser had signed, or that they did not refer to "engine No. 139994; chassis No. 150116" in the particulars under the later document. The words "new car" appear twice in the so-called "*terms of business*" indorsed on the earlier document and incorporated expressly in that document; but they are used in a neutral way, not as fixing a term of the contract. In clause 7 of the "*terms of business*" it is stated that "customers requiring the use of any of our drivers . . . either in taking delivery of a new car or making adjustments," &c., "to customer's car" must accept full responsibility; and in

(1) (1900) 1 Q.B. 513.

clause 11 it is stated that "all new cars are sold subject to the following guarantee"; and a guarantee "against any defect in *material or construction*" is set out. But, as expressed, clause 11 leaves the question of newness of the car sold quite open. It is true that clause 13 says "no guarantee is given with secondhand cars," and clause 14 says "agents or employees are not authorized to give any guarantee verbal or otherwise on our behalf"; and in the later document a guarantee "against any defect in material or construction" is set out. But these "terms of business" are, in their nature, rather an announcement to intending purchasers of the vendor's usual practice, and would not prevent the operation of any specific guarantee which the vendor should elect to give. What we have to find is a warranty, or a term of the contract, that the car is new; and it must be found by necessary implication, not by logical or quasi-logical inference. It is not enough to show that a guarantee of some sort is given by the contract, and that the practice of the vendor is as stated to the public, not to give a guarantee unless the car is new; it must be affirmatively shown that the vendor stipulated that the car was (or should be) new. A statement that "no guarantee is given with secondhand cars" is not convertible into a statement that the car sold is new. The "terms of business" (so-called) make it clear, or at least probable, that no guarantee of any sort will be given with a secondhand car; but they do not show any affirmative guarantee to the effect that the car is new. Such an implication is not to be adopted unless it is necessary, unavoidable. This is clearly shown in the decision of the Judicial Committee of the Privy Council in *Douglas* v. *Baynes* (1), where Lord *Atkinson*, speaking for the Committee, adopted the language of *Kay* L.J. in *Hamlyn & Co.* v. *Wood & Co.* (2): "The Court ought not to imply a term in a contract, which the parties have reduced into writing, unless there arises from the language of the contract itself, and the circumstances under which it was entered into, such an inference that both parties *must* have intended the stipulation in question, that the Court is *necessarily driven* to the conclusion that the stipulation *must* be implied."

(1) (1908) 78 L.J. P.C. 13, at p. 15. (2) (1891) 2 Q.B. 488; 60 L.J. Q.B. 734.

H. C. OF A. 1928.

MARCUS CLARK (VICTORIA) LTD. v. BROWN.

Higgins J.

But there is yet more against the alleged implication. The later agreement says: "It is . . . further agreed by and between the parties hereto that there shall not by virtue of this hiring or upon any purchase made in exercise of the option herein contained be implied *any warranty undertaking or agreement other than is herein set forth* and any warranty undertaking or agreement that would or might be otherwise implied is hereby expressly *negatived*." These words cannot be treated as idle and inoperative. They do not mean that express words used are not to have their full implications, but that there is to be no implication beyond the express words used. The "pound of flesh" for which Shylock bargained would probably in our Courts be treated as implying the blood which the flesh carries, but it would not be treated under such a clause as implying something which appears to be a probable inference. The case of *Hart* v. *MacDonald* (1) does not force me to hold the contrary. There the contract was to erect a dairy plant, the plant to be paid for out of the proceeds of butter produced by the defendant's cows; and there was this provision: "It is to be understood that there is no agreement or understanding between us not embodied in this tender and your acceptance thereof." It was held in an action to recover the price, that a contract to commence the business of dairying and to carry it on and to manufacture butter in sufficient quantities to pay the plaintiff the price of the plant within a reasonable time was implied "upon a proper construction of the *express words*" (per *Griffith* C.J. (2)). The words of the clause in question in this case are much more explicit; but, at all events, there is no decision that such a clause is to have no effect on the construction of the contract. I should have thought, indeed, that the provision in *Hart's Case* merely negatived any independent, collateral agreement of warranty outside the written contract (the subject is discussed in *Heilbut, Symons & Co.* v. *Buckleton* (3)), and that the case might have been decided on this simple ground. In each case of construction of a written contract all the words have, of course, to be considered to find what they mean as a whole; but there is a clear difference between finding the meaning of the words used, on the one hand,

(1) (1910) 10 C.L.R. 417.
(2) (1910) 10 C.L.R., at p. 421.
(3) (1913) A.C. 30.

and, on the other hand, drawing an inference that they imply also some "warranty undertaking or agreement" not directly within the meaning of the actual words. In my opinion, therefore, even if the absence of express words that the car was or should be new were not sufficient to negative such a stipulation, this clause in the later document is conclusive on the subject.

What, then, is to be done? The trial Judge was misled by the plaintiff's conduct of the case before him into the belief that there was a stipulation for a new car. As he says:—"The fight here has been as to whether it was in fact a new Chandler car or a secondhand car in the sense of a much-used car. . . . That has been the whole fight, and I think it has been on the basis of this that the contract is recognized by both sides to be that the car was purchased on the basis of it being a new Chandler car." There is no ground shown for interfering with the finding that the car was not new when delivered, for there was evidence on both sides. It would obviously be unjust, under the circumstances, to set aside the judgment *simpliciter*; for the learned Judge did not give any finding on the issue of deceit, or fraudulent representation that the car was new, or as to the claim for rescission, if rescission is now possible. No doubt, he was glad to be relieved of finding whether there was fraud or not on the part of the plaintiff, as the same consequential damages followed from breach of the contract, as both parties construed it, as would follow from the alleged representation if fraudulent. The fair course, as it seems to me, is to direct a new trial; though I should like to exclude from the new trial the issue as to the car having been in fact new (see Victorian *Rules of the Supreme Court*, Order XXXIX., r. 7).

I am of opinion that a new trial should be ordered.

STARKE J. The learned Judges of the Supreme Court rightly held, in my opinion, that the agreement between the parties was embodied in two documents—an order dated 8th March 1926, confirmed by the appellant on 6th April 1926, and an agreement for hire of a motor-car dated 17th March 1926. As the Chief Justice said below, "the latter" document "was not intended to "supersede the earlier but to implement it." Consequently, I

H. C. OF A. 1928.

MARCUS CLARK (VICTORIA) LTD. v. BROWN.

Starke J.

think that the transaction between the parties may be properly described as an agreement to sell the specific motor-car mentioned in the documents (cf. *Lee* v. *Butler* (1) ). " The general rule of the common law, to which there were many exceptions, was that no warranty of the quality or fitness of a chattel is implied from the mere fact of sale, a rule tersely summed up in the phrase Caveat emptor " (*Smith's Mercantile Law*, 11th ed., p. 694). The rule is now contained in *sec.* 19 of the *Goods Act* 1915 (Vict.). " Quality of goods " includes their state or condition (see Act sec. 3). Again, one of the stipulations in the hire agreement is that there shall not, by virtue of the hiring or upon any purchase made in exercise of the option to purchase therein contained, be implied *any warranty, undertaking or agreement other than as therein set forth* and any warranty, undertaking or agreement that would or might be otherwise implied is expressly negatived. It may be that this stipulation refers to an agreement collateral to the main purpose of the contract and not to a condition of the contract (see *William Barker (Junior) & Co.* v. *Edward T. Agius Ltd.* (2) ). It is impossible, therefore, to infer from the mere agreement to sell, any warranty or condition that the car sold was a new car. However, " as a matter of documentary interpretation " the majority of the learned Judges of the Supreme Court (*Irvine* C.J. and *McArthur* J.) have held " that the subject matter of the sale was a new car." The documents do not expressly so state, but the learned Judges found in the documents a dictionary, so to speak, which expounded the meaning of the words Chandler motor-car. The terms of business indorsed on the order stipulated: —" All new cars are sold subject to " a certain " guarantee. . . . No guarantee is given with secondhand cars." The guarantee mentioned in the business terms was in fact given with the car, the subject matter of the sale. Of course the learned Judges do not conclude that the car is therefore a new car. They do, however, say that the business terms and the guarantee taken together would convey to the mind of any reasonable person that the subject matter of the sale was a new car. With this view I am unable to agree. If the seller chose to give the guarantee with a secondhand car, or the parties so arranged their bargain, is the subject matter of the

(1) (1893) 2 Q.B. 318.

(2) (1927) 33 Com. Cas. 120.

sale then a new car by force of the so-called interpretative clauses of the agreement? Or, if the seller refused to give a guarantee with a new car, or the parties arranged that the guarantee should not be given with a new car, is the subject matter of the sale then a secondhand car by force of the same clauses? No: the truth is that the guarantee contained in the documents attaches to the car sold, whatever its description may be, and in no way defines or describes the car the subject matter of the sale. This is a hard conclusion in this case, for the learned Judge of County Courts who tried the action said that the whole fight before him was whether or not the Chandler car was new at the time it was delivered to the defendant—"that the contract is recognized by both sides to be that the car was purchased on the basis of it being a new Chandler car." If this had been the only issue submitted to the learned Judge, as I suspect it was, then I should have been prepared to affirm the judgment. There are, however, some passages in the judgment which suggest that the interpretation of the contract was in dispute, and the case was so dealt with in the Supreme Court. Consequently, I have felt bound to deal with the case on the same lines.

In my opinion the judgments below should be set aside and, as the defence based on fraudulent representation has not been dealt with, a new trial should result.

*Appeal dismissed with costs.*

Solicitor for the appellant, *T. Caples.*

Solicitors for the respondent, *Shaw & Turner* for *E. Edgar Davies & Co.*, Swan Hill.