applied 160 CLR 1

Ref to 1973 VR 385

Adopted & applied [1984] 2 NSWLR 139.

Foll. 79 NTR 38.

[HIGH COURT OF AUSTRALIA.]

MAYBURY AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

ATLANTIC UNION OIL COMPANY LIMITED . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 9, 10.

Dixon C.J., Fullagar and Taylor JJ.

Contract—Oral collateral agreement—Consideration—Inconsistency with written contract.

Appeal—Interlocutory order of judge of Supreme Court—Judgment entered by consent without trial.

To an action by the respondent for money owing under written agreements between the parties, the appellants set up, in a plea by way of cross action, an oral collateral agreement, and claimed damages for its breach.

Held, that the alleged collateral agreement, being inconsistent with the written agreements, could not stand with them and was unenforceable.

Hoyt's Pty. Ltd. v. *Spencer* (1919) 27 C.L.R. 133 applied.

Decision of the Supreme Court of New South Wales (*Kinsella* J.) affirmed.

The question whether an appeal lies as of right from the judgment of a judge of the Supreme Court of New South Wales, entered by consent without going to trial, discussed.

APPEAL from the Supreme Court of New South Wales.

The respondent issued a writ out of the Supreme Court of New South Wales on 3rd July 1952, claiming £1,491 14s. 10d. from the appellants. On 1st September 1952 an order was made entering the matter in the list of commercial causes, and on 22nd September 1952, the respondent filed its declaration. The declaration set out the terms of three written agreements, the first being between the respondent and the appellant J. E. Maybury. This agreement was dated 13th February 1951, and provided, *inter alia*:—

1. The producer (the appellant) will prepare supply and broadcast from a commercial broadcasting station or stations to be determined

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by the company (the respondent) fifty-two (52) radio productions (hereinafter called packages) the purpose of which shall be the advertising . . . of the products of the company . . .

3. The said packages shall be broadcast over a network of Australian and/or New Zealand radio stations to be determined from time to time by the company and the first of such packages shall be broadcast by the producer on 24th March 1951, and thereafter a package shall be broadcast weekly up to and including 22nd March 1952. The date hour or time for each broadcast shall be as determined by the company.

4. Notwithstanding anything herein contained the company may from time to time during the term of this agreement or any extension thereof vary the broadcasting stations over which the packages shall be broadcast.

8. The title "Atlantic Show" and any other title connected with the name of the company shall at all times be and remain the sole and exclusive property of the company. Any other titles routines ideas scripts and recordings supplied by the producer or by the company and used or intended to be used for the purposes of this agreement shall be and remain available to the company for its use at all times during and after the termination of this agreement or any extensions thereof.

10. Should it transpire that time and/or facilities are not available at any suitable radio station for the "live" broadcast of any of the said packages or if for any other reason which shall seem good and sufficient to the company a "live" broadcast thereof is not possible the same may with the consent of the company be made by means of mechanical recordings . . .

11. The company will pay to the producer the sum of two hundred pounds (£200) for each package broadcast by him in terms of this agreement by "live" broadcast or (where the company has given its approval) by means of mechanical recordings.

13. The producer shall include in each of the said packages a comedy quiz session and shall during the continuance of this agreement provide and expend out of his own moneys a sum of not less than five thousand two hundred pounds (£5,200) that is to say an average of one hundred pounds (£100) per package for the purpose of providing prizes for the contestants taking part in such sessions.

Clause 18 provided that the company could, by notice, extend the agreement for two further periods of fifty-two weeks, and in such event the producer was to receive a larger sum for each package.

The second agreement set out in the declaration was dated 1st July 1951, and provided, in effect, that both appellants, under the firm name of "Jack Maybury Telerad Productions," should adopt and carry out the original agreement in place of the appellant J. E. Maybury. The respondent agreed to accept the firm as contractor under the original agreement. There were reservations not relevant to this report.

The third agreement was made on 13th February 1952, between the respondent and the appellant J. E. Maybury, "representing himself and Telerad Productions." It contained clauses making provision for the winding up of the previous agreements, and included the following:—

5. Maybury acknowledges that any amount by which the sum of five thousand four hundred pounds (£5,400) may be found to exceed the total prize moneys actually paid out by him between the commencement of the agreement dated 13th February 1951 and its termination after the date hereof will notwithstanding anything contained in cll. 11 and 13 of the agreement of 13th February 1951 be a debt owing by him to the company and he agrees that he will account for and repay to the company such debt on or before 4th April 1952.

The declaration then alleged that the appellants had paid moneys amounting to £3,908 5s. 2d. for prizes, and that after the performance and broadcasting of the last of the productions the amount by which the sum of £5,400 was found to exceed the total moneys paid out by the appellants was £1,491 14s. 10d., and that the appellants had not repaid such amount to the respondent.

The appellants filed four pleas. An order was made, pursuant to the *Commercial Causes Act* 1903 (N.S.W.), that the second plea be disregarded. The first plea was abandoned at the hearing of argument on preliminary points of law. The third and fourth pleas were pleas of cross action, and were in the following terms:—

3. . . . the defendants for a plea of cross action say that in consideration of the defendants entering into the agreements with the plaintiff which are set forth in the declaration herein the plaintiff warranted that the packages of radio entertainment to be prepared by the defendants for the plaintiff would not be broadcast in such a manner as to compete with and be in opposition to a session conducted on any other broadcasting station by one Bob Dyer who had previously conducted a broadcast session of entertainment for the plaintiff; and the defendants entered into the said agreements with the plaintiff; yet the said packages of radio entertainment were broadcast in such a manner as to compete with

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and be in opposition to a session conducted on another broadcasting station by the said Bob Dyer; whereby the defendants lost the benefit of their said agreements and were injured in their business and professional reputation and were otherwise damnified.

4. . . . the defendants for a plea of cross action say that it was a term and condition of the agreements set forth in the declaration herein that each package of radio entertainment supplied by the defendants to the plaintiff should be broadcast once weekly during the continuance of the agreement and not more and all conditions were fulfilled and all things were done and all times elapsed necessary to entitle the defendants to have the said conditions performed by the plaintiff yet the said packages of radio entertainment were broadcast more than once weekly whereby the defendants lost the benefit of their said agreement and were injured in their business and professional reputation and were otherwise damnified.

The defendants claimed £10,000 damages.

On 21st November 1952 an order was made that certain preliminary points of law should be argued with respect to the first, third and fourth pleas. The points to be argued with respect to the third and fourth pleas were :—

Whether the third plea is demurrable on the ground that the agreement therein alleged is inconsistent with the written agreement made between the parties and dated 13th February 1951. Whether the fourth plea is demurrable on the ground that the writing constituting the agreement between the parties gives no cause of action under this plea ?

On 24th March 1953 *Kinsella* J., before whom the points were argued, answered both questions " Yes." His Honour suggested, there being no plea left on the record, that " the practical thing, and probably the most economical in costs, would be for me now to record my verdict for the plaintiff in the sum of £1,491 14s. 10d. and to enter judgment for the plaintiff on the defendants' cross action ". Counsel for the appellants sought and obtained an adjournment for a week to consider the position, and, on the matter being relisted, counsel for the respondent asked his Honour to enter verdict for the respondent on its claim and on the cross action, and to enter judgment accordingly. Counsel for the appellants said that he thought that would be the shortest way of dealing with the matter, there being no further pleas which he desired to put on. His Honour then stated :—" since the defendant does not desire to take any further steps in respect of pleading, the only course now is for me to record my verdict for the plaintiff in the

sum of £1,491 14s. 10d. and to enter judgment for the plaintiff on the defendant's cross action. So, there will be judgment in all for the plaintiff in the sum of £1,491 14s. 10d". The appellants appealed to the High Court. The respondent lodged notice of objection to the competency of the appeal. On 19th June 1953 the respondent had the matter restored to the list in the Supreme Court, and asked *Kinsella* J. to withdraw his verdict and judgment, and merely answer the questions submitted. His Honour refused to do so. The appeal and the objection were ordered to be heard together.

K. S. Jacobs, for the appellants. In entering judgment for the respondent the court acted as if on an ordinary demurrer. Judgment was entered—it would not have been so if judgment had merely been signed for want of a plea. Thus there is a final judgment of the court. The court acted under s. 3 of the *Supreme Court Procedure Act* 1900. It is submitted that, although that section refers only to facts, it applies to questions of law. [He referred to s. 5.] If the statute provides that the court gives judgment, then the judgment of the judge is the judgment of the court.

[TAYLOR J. This did not happen "at or after the trial".]

When the judge indicated the course he was going to take, it became the trial of the action. As in a demurrer, where the demurrer is upheld there is nothing to try. If these points had been argued at the hearing of the action, and the points of law had been decided in this way, the trial judge could give his reasons. When it became the hearing of the action, after the judge indicated his views on the law, his decision on the law and the subsequent action he took became the judgment of the court. The hearing of a commercial cause without a jury is regulated by the *Supreme Court Procedure Act* 1900. [He referred to *Minister for Army* v. *Parbury Henty & Co.* (1).] The trial judge acted and sat as the Supreme Court. As a preliminary objection he was asked to decide whether the pleas were good or bad. Parties may ask a judge to decide preliminary points at the hearing. Judgment is then entered on the hearing. It would not be open then to anyone to say that it was not the trial of the action.

[DIXON C.J. But for your agreement that judgment be entered, you would have had only a decision on an interlocutory matter against you.]

An indication that it would be made. The next step would be the striking out of the pleas.

(1) (1945) 70 C.L.R. 459, at p. 485.

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[TAYLOR J. In fact there is an order—that of 19th June 1953.] It was not intended that there should be two orders—it was to be dealt with as a matter in court. Having commenced in chambers, it was taken into court, and then became the judgment of the court for the whole matter. The final order on which appeal lies is the order directing judgment to be entered. A final order in an action commenced in the Supreme Court can be made by a judge of the court. It would be made in chambers—a reference to a judge is a reference to a judge in chambers. In the *Commercial Causes Act* 1903 there is provision for reference to a judge in chambers which deals with matters incidental to the trial. There is no intention shown to take the commercial cause out of the Supreme Court and vest it in a judge.

[TAYLOR J. What if the judge had merely answered the questions and struck out the pleas. That would be final—you could appeal to the Full Court, or amend. It could not be suggested that it was an order of the Supreme Court.]

It would not be final in that something remained to be done—judgment would have to be signed. Here there was never any separation of the orders; at no stage was there an interlocutory order. As to the substance of the appeal, the words used in cl. 3 of the agreement of 13th February 1951 are not sufficient to exclude the operation of a collateral agreement of the nature of that set out in the third plea. There must be a distinct contradiction. The fact that the same subject matter is dealt with in the written agreement is not of itself sufficient to exclude the collateral agreement. A discretion is given to the respondent as to the date, hour or time of the broadcast, but there is nothing to prevent it from agreeing that in a certain respect the discretion will be exercised in a certain way. The basis of the rule as to collateral agreements is not so wide that no different consideration can be shown. Provided the consideration is not in direct conflict with the consideration in the agreement it could be a valid collateral agreement. Although the plea refers to " the agreements ", it might be necessary to limit the collateral warranty to the second agreement. There is here no contradiction sufficiently distinct: *Morgan* v. *Griffith* (1); *Erskine* v. *Adeane* (2). If a power is reserved, it is not a contradiction if there is in a collateral agreement an undertaking to exercise the power in a certain way. Where a landlord has agreed that he will give a certain number of weeks' notice, no evidence could be given

(1) (1871) L.R. 6 Ex. 70, at pp. 72, 73.

(2) (1873) L.R. 8 Ch. App. 756, at p. 766.

that he had agreed otherwise: *Hoyt's Pty. Ltd.* v. *Spencer* (1). But, in this case, there is a mere power, which the respondent can contract to exercise or not in a certain way. There can be an agreement to exercise a discretion in a certain way which will not be contradictory of the agreement creating the discretion: *Frith* v. *Frith* (2). Additional consideration does not contradict the instrument. There can, likewise, be a qualification of a discretion.

[TAYLOR J. In *Erskine* v. *Adeane* (3) a collateral agreement to shoot game might have been inconsistent. Their Lordships did not deal with that problem.]

Their approach is not to regard it as a contradiction. It would be a contradiction if he had duties to shoot and preserve.

[TAYLOR J. It seems to be different from this case.]

Here there is no derogation from a power. The collateral agreement does not take away anything granted by the appellants. The fourth plea involves the construction of the agreement of 13th February 1951. Clause 3, in the light of the whole agreement, imposes an obligation on both parties to broadcast, and to broadcast weekly. The discretion as to the date, hour or time gives no right to the respondent to give a recorded rebroadcast at any hour it thinks fit. Recorded broadcasts are expressly dealt with in cl. 10. In cl. 8 the word " recordings " does not refer to a recorded version of the show—its context would not permit such a construction. It is a reference to incidents in the preparation of the package. The agreement envisages that there will be a broadcast—cl. 4. It was the duty of the respondent to provide a broadcasting station and to undertake the expenses of the broadcast. Duties under the agreement were reciprocal. The respondent did not merely have to pay; it had a duty to broadcast, and to do so not more than once a week. Should the objection to the competency of the appeal succeed, special leave to appeal is sought.

The respondent was called on to make submissions as to whether the third plea set up an inconsistent agreement, and on the fourth plea.

B. P. Macfarlan Q.C. (with him *T. E. F. Hughes*), for the respondent. The purpose of the agreement was that advertising should be done for the respondent. The agreement distributes the obligations to that end, and the functions are clearly defined. The producer was to prepare a script and to do a live broadcast. Other

(1) (1919) 27 C.L.R. 133.
(2) (1906) A.C. 254, at p. 259.
(3) (1873) L.R. 8 Ch. App. 756.

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matters were to be determined by the respondent, having regard to what it considered the best hours for advertising. Accordingly, its right to set the date, hour and time of each broadcast was an essential term of the agreement. The inconsistency is that the appellants allege that the agreement is the consideration for the collateral agreement. But they say that it is not the execution of the agreement with all its terms which is the consideration, but only with some of its terms, or with all its terms qualified. Any consideration for the alleged collateral agreement which qualifies the rights of the respondent under cl. 3 in a material respect is a point of inconsistency: *Hoyt's Pty. Ltd.* v. *Spencer* (1). It is significant that *Knox* C.J. cites *Erskine* v. *Adeane* (2) as not being inconsistent with the propositions he is putting (3). *Hoyt's Pty. Ltd.* v. *Spencer* (4) has expressed a clear and strong view on what amounts to inconsistency. If the collateral agreement here is enforced, the last words in cl. 3 cannot be given effect to. The appellants are saying that, for the purpose of the consideration for the collateral agreement, the discretion is limited. [He referred to *Hoyt's Pty. Ltd.* v. *Spencer* (5).] It is significant that the last sentence of cl. 3 is important for the agreement. It is a considerable factor in excluding any argument that it is permissible to read down that power. *Frith* v. *Frith* (6) decides that to give evidence that the consideration is greater than that expressed is not to vary a written agreement. That was not dealing with the question of collateral contracts. It is a closely confined doctrine, anomalous and limited. [He referred to *Hawke* v. *Edwards* (7).] It is not suggested that the rule applies to questions of collateral warranties. As to the fourth plea, the scheme of the agreement is that packages should be prepared by the producer, and broadcast by him as live broadcasts once a week, but that they might be broadcast by means of mechanical recordings for any sufficient reason. "Recordings" are those made for the purposes of cl. 10, or recordings of live shows—any recordings which come into existence. The clause says "during the agreement". Clause 8 contemplates something over and above the weekly broadcasts in cl. 3. It refers to another use of the recordings, at the discretion of the respondent. We respectfully adopt the reasons of *Kinsella* J.

K. S. Jacobs in reply.

(1) (1919) 27 C.L.R. 133.
(2) (1873) L.R. 8 Ch. App. 756.
(3) (1919) 27 C.L.R., at p. 139.
(4) (1919) 27 C.L.R. 133, at pp. 140, 141.
(5) (1919) 27 C.L.R. 133, at p. 143.
(6) (1906) A.C. 254.
(7) (1947) 48 S.R. 21; 64 W.N. 211.

The judgment of the Court was delivered by DIXON C.J.

We are of opinion that this appeal should be dismissed.

The appeal arises from an action which was placed in the commercial causes list. The cause of action upon which the plaintiff sued is one which the appeal does not bring before us. It was conceded in the Supreme Court that to that cause of action the defendants appellants had no valid answer. But there were two pleas filed by way of cross action, and it is matter raised by those pleas which does come before us upon this appeal. The proceeding in the Supreme Court took not a usual course. Before the action came to trial an order was made raising as preliminary questions certain questions of law. Two of those questions are now submitted for our consideration. They were decided by the learned judge in favour of the plaintiff and judgment in the action was then entered for the plaintiff without the action going to trial. The judgment was entered in the action without going to trial by consent of the defendants, and a difficulty certainly exists in the path of the defendants as appellants by reason of the course the proceedings took. For it seems reasonably clear that any right of appeal from the decision against them on the points raised which they had prior to judgment being entered would only be by leave, because it was an interlocutory order. Their consent to the entry of a judgment without going to trial was no doubt logical, because the intervening proceedings could not have served a useful purpose. But the course taken may be insufficient to convert what was an interlocutory order into a final order for the purposes of their bringing an appeal as of right. There are also other difficulties which it is not useful at the moment to discuss, for we base our judgment upon the substance of the matter.

The agreements upon which the plaintiff respondent sued are for establishing an arrangement, for a period or periods of time, with a broadcaster, described as a radio producer, the company being desirous of using his talents for the purposes of advertising. The main agreement is long, and it was made with one only of the two defendants appellants. Its provisions placed upon him the obligation of broadcasting a series of weekly advertising programmes called in the jargon of the agreement " packages ", and by various clauses it gave to the respondent company which employed him under the agreement a substantial amount of control. It seems obvious from the tenor of the agreement that it rested with the plaintiff company to provide broadcasting time and arrange a network for the broadcasts, whilst the obligation was placed upon

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the defendant to provide the programme and make arrangements for it. A very substantial remuneration was to be paid.

In two pleas by way of cross action the defendants appellants sue for damages, the pleas being numbered (3) and (4). The third plea claims for a breach of a collateral agreement, the fourth for breach of an agreement which the defendants find in the terms of the main written instrument itself. The first written instrument was made, as I have said, with one defendant alone. Another written instrument followed, converting that into an agreement with himself and his wife, who is his fellow defendant appellant. The third written agreement which was mentioned in the plaintiff's declaration merely brings the arrangement to a conclusion.

The third plea, being the first of the two pleas by way of cross action, is in the following terms:—" . . . the defendants for a plea of cross action say that in consideration of the defendants entering into the agreements (and I emphasise the word 'agreements' in the plural) with the plaintiff which are set forth in the declaration herein the plaintiff warranted that the packages of radio entertainment to be prepared by the defendants for the plaintiff would not be broadcast in such a manner as to compete with and be in opposition to a session conducted on any other broadcasting station by one Bob Dyer who had previously conducted a broadcast session of entertainment for the plaintiff; and the defendants entered into the said agreements with the plaintiff; yet the said packages of radio entertainment were broadcast in such a manner as to compete with and be in opposition to a session conducted on another broadcasting station by the said Bob Dyer; whereby the defendants lost the benefit of their said agreements and were injured in their business and professional reputation and were otherwise damnified ".

It is reasonably clear, if the substance of the matter is looked at, that the allegation that the agreement alleged in that plea was in consideration of the defendants entering into the agreements must be wrong. The making of the three agreements at intervals of time could not have afforded the consideration. During the argument it has been treated as an allegation in effect that the consideration was the entering into the second of the two agreements, by which both the defendants became parties to the transaction embodied in the first agreement. The plea, it will be seen, alleges a collateral agreement made in consideration of the making of a main agreement. It sets forth a term, introduced by way of collateral agreement, which seeks to control the action of the

plaintiff respondent under the main agreement. A collateral agreement made in consideration of a main agreement cannot effectively subsist unless it is consistent with the main agreement. Once an agreement is made in writing it is treated, unless the parties are shown otherwise to intend, as the full expression of their obligations. If it is established that the writing was intended to contain only part of a fuller agreement it may be otherwise. That, however, is not the present case. But it may be established that an entirely separate agreement was made by the parties. One of them may give a collateral promise in consideration of the other entering into the principal agreement. But if such a collateral agreement is to have effect as a contract it must be consistent with the provisions of the main agreement, the making of which by the other party provides the consideration. If the promise sought to modify, control or restrict the principal agreement it would detract from the very consideration which is alleged to support the promise.

Turning to the main agreement, the clause upon which the plaintiff company relies as conferring rights which would be controlled by the collateral agreement, were it valid, is a clause giving to the company a full discretion. It is cl. (3) of the first agreement. That clause begins by saying that the so-called "packages", that is, in effect, the entertainment for the radio time concerned, shall be broadcast over a network of radio stations to be determined from time to time by the company. It then proceeds to give the date when they should commence, and says that thereafter a package shall be broadcast weekly up to and including a determinable date. The clause then adds "The date hour or time for each broadcast shall be as determined by the company". It is clear on its terms that that clause invests the plaintiff company with a discretion to determine any hour and any time at which the broadcasts shall be made.

The plea by way of cross action alleges a collateral agreement which would limit that discretion by preventing the plaintiff company from appointing a broadcast for any time which would be in opposition to a session conducted on any other broadcasting station by Bob Dyer. It is true that the plea speaks of the manner and not the time, but strictly speaking the manner of broadcasting is under the main agreement a matter for the defendants and not the plaintiff company, and it is clear enough that what is meant is an occasion which competes with the broadcast of Bob Dyer.

We think that the oral collateral agreement alleged conflicts with the main agreement and cannot stand with it. As is said in

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Hoyt's Pty. Ltd. v. *Spencer* (1) by *Isaacs* J.: "The truth is that a collateral contract, which may be either antecedent or contemporaneous . . . being supplementary only to the main contract, cannot impinge on it, or alter its provisions or the *rights created by it*" (2). The collateral agreement which is alleged does impinge on the clause which I have read, and does affect to alter the rights created by it. We therefore think that the collateral agreement cannot stand with the main agreement and is unenforceable. This was the view of *Kinsella* J., who gave full reasons for his conclusion, and we think that he was right.

The other plea by way of cross action—the fourth plea—does not depend upon a collateral agreement. It depends upon the construction of, or an implication found in, the provisions of the three agreements sued upon. The plea alleges that it was a term and condition of the agreements set forth in the declaration that each package of radio entertainment by the defendants appellants should be broadcast once weekly during the continuance of the agreement and not more, and all conditions were fulfilled, and so on, and yet the packages of radio entertainment were broadcast more than once weekly whereby the defendants lost the benefit of their agreement and were injured in their business and professional reputation and were otherwise damaged by it. It will be noticed that the plea does not itself allege who did the broadcasting more than once weekly. It does not, in other words, allege a breach by the plaintiff respondent. Passing by that consideration, it appears to find, in so much of the agreement as it refers to, an obligation upon the plaintiff respondent not to broadcast more than once weekly. As appeared during the course of the argument, the facts which the defendants appellants set up are that broadcasts were made at a late hour from recordings in addition to the weekly live broadcast. There was, in other words, a recorded rebroadcast. The provisions of the agreement do not in our opinion impose upon the plaintiff a duty which would be broken by what is alleged by this plea by way of cross action. I shall not go through the clauses of the agreement on this subject. They have just been discussed. It is sufficient to say that they do contemplate recordings. It is true that the provision which deals in full with recordings does so as an alternative to live broadcasting. But the main clause dealing with recording contains the provision that "Any other titles routines ideas scripts and recordings supplied by the producer or by the company and used or intended to be used for the purposes of this agreement shall be and remain available to the company for its

(1) (1919) 27 C.L.R. 133.

(2) (1919) 27 C.L.R., at p. 147.

use at all times during and after the termination of this agreement ". There is nothing positive in the agreement to impose upon the plaintiff respondent a duty not to rebroadcast in addition to the weekly live broadcast, and we think that this provision is inconsistent with the view that any implication of that sort should be made or extracted from the agreement. In fact it enables the company to use recordings at all times. The contention that the word " recordings " applied only to a limited recording of some portion of what is called the package we think is not in accordance with the language used. It is, of course, applicable to a portion, but on its natural meaning it would include a recording of the whole of a package.

For these reasons we think that the fourth plea by way of cross action also fails. His Honour *Kinsella* J. gave his reasons for that conclusion, and in those reasons we concur. The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants, *R. D. Meagher, Sproule & Co.*
Solicitors for the respondent, *Hughes, Hughes & Garvin.*

G. D. N.