[HIGH COURT OF AUSTRALIA].

INTERNATIONAL HARVESTER COMPANY OF AUSTRALIA PROPRIETARY LIMITED . . . DEFENDANT, — APPELLANT; (RESPONDENT)

AND

CARRIGAN'S HAZELDENE PASTORAL COMPANY . . . . . PLAINTIFF, — RESPONDENT. (APPELLANT)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

H. C. OF A. 1958.

SYDNEY, *Mar.* 26, 27; *Apr.* 22.

Dixon C.J., McTiernan, Williams, Fullagar and Taylor JJ.

Contract—Sale of goods—Agricultural machine—Manufacturer of machines—Distributing agents appointed in country areas—Machine sold to purchaser by such an agent—Warranties on sale—Breach—Action by purchaser against manufacturer—"Agent"—Use of word in legal sense—Significance in business world—Purchaser not brought into contractual relationship with manufacturer.

Agency is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties. But in the business world its significance is by no means thus restricted. The word "agent" is often used in business as meaning one who has no principal but who on his own account offers for sale some particular article having a special name.

Wheeler and Wilson v. *Shakespear* (1869) 39 L.J. Ch. 36; *W. T. Lamb & Sons* v. *Goring Brick Co. Ltd.* (1932) 1 K.B. 710, at pp. 717, 720 and *Kennedy* v. *De Trafford* (1897) A.C. 180, at p. 188, referred to.

It is not to be implied from the fact that a manufacturer appoints "distributing agents" or "exclusive agents" in a particular "territory" for a proprietary commodity or specific kind of article or machine that in a sale by such an "agent" the manufacturer contracts with the ultimate buyer or "consumer" as vendor.

Accordingly, where C. had bought a machine manufactured by I.H. from H. & K., a company carrying on business as machinery and general agents at Gunnedah, N.S.W., and the agent in that area for the products of I.H., and which company had paid I.H. the price of the machine less discount,

Held, that the whole of the evidence was not capable of supporting an inference that the contractual relationship of vendor and purchaser arose between I.H. and C. from the transaction.

Decision of the Supreme Court of New South Wales (Full Court), reversed.

APPEAL from the Supreme Court of New South Wales.

On 16th February 1955 Carrigan's Hazeldene Pastoral Company, a firm registered under the *Business Names Act* 1934, of Boggabri, New South Wales, issued a writ out of the Supreme Court of New South Wales against International Harvester Company of Australia Pty. Ltd. claiming damages for breaches of certain warranties and collateral warranties alleged to have been given by the defendant upon the purchase by the plaintiff firm from Hassan & Kensell Pty. Ltd. of Gunnedah, New South Wales, of a certain International automatic pick-up hay baler manufactured by the defendant. Hassan & Kensell Pty. Ltd., was a company carrying on business at Gunnedah as machinery and general agents and was the local dealer in goods of the defendant's manufacture. The plaintiff firm claimed to recover against the defendant upon the basis that Hassan & Kensell Pty. Ltd. acted in the transaction as the agent of the defendant.

The action came on for hearing at Narrabri, New South Wales, before *Ferguson* J. and a jury of four. His Honour directed the jury to return a verdict for the defendant on the issues relating to alleged breaches of the alleged collateral warranties and upon the other issues of breaches of warranties contained or implied in the alleged sale the jury returned a verdict for the plaintiff firm in the sum of £1,836 5s. 3d. and judgment was entered accordingly.

From this decision the defendant appealed to the Full Court of the Supreme Court (*Owen* J., *Roper* C.J. in Eq. and *Maguire* J.) seeking an order setting aside the verdict and judgment for the plaintiff and an order entering judgment for the defendant or in the alternative a new trial. The Full Court allowed the appeal, set aside the verdict and judgment for the plaintiff firm and, *Owen* J. dissenting, ordered a new trial limited to the issues of breaches of warranties contained or implied in the alleged sale. *Owen* J. was of opinion that a verdict should be entered for the defendant.

The defendant by leave appealed to the High Court seeking an order setting aside the judgment of the Full Court with costs and in its stead an order directing the entry of a verdict and judgment for the defendant with costs. The plaintiff firm cross-appealed seeking an order setting aside the judgment of the Full Court and the restoration of the verdict and judgment in its favour with costs.

Further facts appear in the judgment of the Court hereunder.

A. Larkins Q.C. and *T. E. F. Hughes*, for the appellant in the appeal and the respondent in the cross-appeal.

H. C. OF A. 1958.

INTERNATIONAL HARVESTER CO. OF AUSTRALIA PTY. LTD. v. CARRIGAN'S HAZELDENE PASTORAL CO.

April 22.

R. L. Taylor Q.C., *H. W. Robson* and *D. Mahoney*, for the respondent in the appeal and the appellant in the cross-appeal.

Cur. adv. vult.

THE COURT delivered the following written judgment :—

By the order of the Supreme Court which is the subject of this appeal and cross-appeal a verdict for the plaintiff in an action for breach of contract was set aside and a new trial ordered. The defendant, who obtained the order for a new trial, had contended before the Supreme Court that the Court should go further than setting aside the verdict for the plaintiff, that the Court should order a verdict and judgment for the defendant. Now by leave the defendant appeals to this Court from the refusal of the Supreme Court to follow that course. On the other hand the plaintiffs complain of the order setting aside the verdict which they had recovered and by a cross-appeal they seek to have that verdict restored.

The action was brought by a firm of farmers and graziers for breach of warranty on the sale of an agricultural implement or machine, namely an International automatic pick-up hay baler a model called No. 50-T. In buying the machine the plaintiffs dealt, not with the defendant, the International Harvester Company of Australia Pty. Ltd., but with a company carrying on business at Gunnedah in New South Wales called Hassan & Kensell Pty. Ltd. That company is now in liquidation. The plaintiffs did issue a writ against Hassan & Kensell Pty. Ltd. claiming damages for breach of warranty by them as vendors of the machine but that action has not been brought to trial. The defendant company in the present action denies that any contractual relations ever existed between it and the plaintiffs ; it maintains that Hassan and Kensell Pty. Ltd. sold the machine as principals to the plaintiffs, that they did not sell as agents for the defendant company and had no authority to contract on behalf of the defendant company but on the contrary bought the machine from the defendant company and resold it to the plaintiffs. It was also contended for the defendant company that in any case a written instrument constituted or at least formed part o the contract of sale and that by the terms of that instrument the very warranty or warranties on which the plaintiffs had recovered were negatived or excluded. The appeal and cross-appeal covered between them no inconsiderable number of other points but this Court having heard the foregoing questions discussed by counsel for the appellant and for the respondents formed a provisional opinion that the defendant's contention

as to both the matters was correct. It seemed more satisfactory in these circumstances to take time to consider the question whether this provisional opinion we had formed should be given effect to before entering on the argument of the matters which merely affected the question whether the former trial had so miscarried that a new trial must be had. Having considered what must be the basal question in the case, namely whether the defendant company came under any contractual liability to the plaintiffs, we are confirmed in the view that clearly it did not do so. We think that on that simple ground the action ought to have failed. We state the conclusion positively in this form because we do not think that upon the evidence there was any question for the jury on this point.

There were six counts in the declaration. The fourth, fifth and sixth counts were based upon supposed collateral warranties given by the defendant company in consideration of the plaintiffs' buying the machine from Hassan & Kensell Pty. Ltd. There was no sufficient evidence to support these counts: the judge at the trial properly so held and directed the jury accordingly to find for the defendant upon the issues the fourth, fifth and sixth counts raised. It is unnecessary to say more about them.

The first three counts were based on warranties contained or implied in an alleged sale by the defendant company to the plaintiffs of the machine. The jury seem to have been regarded as returning upon these counts without discrimination a verdict for the plaintiffs of £1,836 5s. 3d. damages. Reading the declaration with the particulars thereunder the first count alleged breach of an implied warranty that the machine was reasonably fit for the purpose for which it was required by the plaintiffs namely baling and tying hay, the second count breach of an express warranty that the machine was completely automatic in operation with no man required on the machine for its efficient working, and the third count breach of an express warranty that the machine would in a good and proper manner automatically bale hay.

The case made for the plaintiffs begins with a visit of one of them to the agricultural show in Sydney of Easter 1952. The plaintiffs' firm consisted of four brothers who carried on business in partnership at Boggabri as farmers and graziers. At the showground, according to the evidence of the brother in question, he went to the stand of the defendant company, engaged in conversation with a man apparently representing the defendant company, was given a pamphlet relating to hay balers of the No. 50-T model and was told to see the defendant company's agents at Gunnedah, a company called Hassan & Kensell Pty. Ltd. The latter company was well-

H. C. OF A. 1958.

INTERNATIONAL HARVESTER CO. OF AUSTRALIA PTY. LTD. v. CARRIGAN'S HAZELDENE PASTORAL CO.

Dixon C.J. McTiernan J. Williams J. Fullagar J. Taylor J.

known to the plaintiffs. It carried on a business under the description of machinery and general agents. It was described also as a dealer for certain named machinery, and for all farm and pastoral requirements, refrigerators and electric welding. The machines named were in fact chiefly well-known products of the defendant company's manufacture.

Hassan & Kensell Pty. Ltd. employed a man named Eather whom the plaintiffs knew. On 15th September 1952 Eather came to see the plaintiffs and discussed the buying of a hay baler with two of them. He produced some of the literature of the International Harvester company about their hay balers. At length the two plaintiffs decided to buy a model No. 50-T baler. Eather said that it would be necessary to obtain one from Geelong. The price was given as approximately £1,620 plus transport charges. The amount of the freight from Geelong, whence it was to come by road, was not known definitely. The two plaintiffs present expressed their desire to pay cash. Eather asked that an order form should be signed and, according to one of the two brothers, when asked what the form was, answered " To get release from the International Harvester firm at Geelong ". One of them signed an order form. The document was put in evidence without proof under a general admission, covering this among other documents, that they were signed or executed as they purported respectively to have been. The document begins " To Hassan and Kensell Pty. Limited Gunnedah ". The witness, however, said that at the time it was signed he did not think the name of the person to whom it was addressed was filled in. " As far as I can recollect it was not ". When asked whether he might not be in error in saying that, he replied " I do not think I would be ". In fact the order was addressed in ink to " Hassan and Kensell Pty. Limited Gunnedah " and no one would suppose from the ink or penmanship that this was not filled in at the same time as the remainder of the document. The document is a long form of order for purchase by instalments on hire-purchase terms. There is a printed clause however that if the total rental be paid on delivery, an allowance of £ . . . being the difference between the total rental and the net cash retail selling price of the machine effective at the date of the document will be made. The blanks for the instalments the price and the amount of the allowance were not filled in but in the margin was written " invoice at date of delivery ". After the direction to Hassan & Kensell Pty. Ltd. Gunnedah, the opening words of the order are " Please forward to me on hire on or about the ". There is then written " as soon as possible ". The clause proceeds in print and writing " f.o.b. Geelong consigned at my

risk to Gunnedah freight from the f.o.b. point to be paid by me the following 1 50-T Pick Up Hay Baler". The order is dated 15th September 1952, signed by one of the plaintiffs for the firm and witnessed by Eather. The document nowhere refers to the defendant company but beside the word "Dealer" is written "Hassan and Kensell Pty. Limited". The print contains a clause excluding all implied and statutory warranties and conditions and another clause dealing with the course which will be followed if the machine fails to work properly. This clause ends "No agent of the Owner has authority to alter add to or waive the above warranty which is agreed to be the only warranty given." The expression "owner" is defined at the beginning of the document where, after the space in fact filled in with the name Hassan & Kensell Pty. Ltd., are printed the words "(herein referred to as 'the Owner')".

The machine arrived from Geelong within a little over a week and delivery was accepted by the plaintiffs. An invoice dated 19th September 1952 was sent from the Sydney district office of the defendant company to Hassan & Kensell Pty. Ltd. at Gunnedah for the baler. It describes the machine as 1 US 10 20 50-T pick-up baler and indicates that one was ordered and one was shipped: it gives the date of shipment as 17th September 1952 and the mode as "road". The invoice includes some twine and states the total price as £1,463 0s. 0d. There is a note "please complete the attached form and return as soon as possible". In compliance apparently with this, the invoice was sent back bearing an ink deduction of "less 2½% £36 11s. 6d." leaving a price of £1,426 8s. 6d. There is a note upon it "cheque 10/11/52". In fact Hassan & Kensell Pty. Ltd. sent to the defendant company at Sydney their cheque for £1,427 17s. 6d. bearing that date. The difference in the amounts £1 9s. 0d. is for exchange as is shown by an accompanying document. It is called "Dealer's Cash Remittance" and states the description of the charge against Hassan & Kensell Pty. Ltd. (that is, it names the machine), the net price, the discount therefrom and the net amount remitted. In the meantime Hassan & Kensell Pty. Ltd. had rendered to the plaintiffs an account for the machine. The amount charged was £1,672 for the baler £64 5s. 3d. for freight from Geelong to Gunnedah making up a price of £1,736 5s. 3d. which was brought up to £1,772 4s. 1d. by the addition of the price of ten balls of baler twine. On 10th November 1952 the plaintiffs gave their cheque for this amount in favour of Hassan & Kensell Pty. Ltd. and obtained a receipt from that company. In the course of cross-examination a witness called for the defendant who was formerly secretary for Hassan & Kensell

H. C. OF A. 1958.

INTERNATIONAL HARVESTER CO. OF AUSTRALIA PTY. LTD. v. CARRIGAN'S HAZELDENE PASTORAL CO.

Dixon C.J. McTiernan J. Williams J. Fullagar J. Taylor J.

Pty. Ltd. summarised the relations between his company and the defendant company thus: "The position is we buy the machines from I.H.C. and sell them". From a notice to admit reproduced for some reason in the transcript record it appears that there was a "Dealer-Sales and Service Agreement", doubtless governing the relations between the defendant company and Hassan & Kensell Pty. Ltd., but the document was not put in evidence. But without that document the materials referred to up to this point make it clear enough that the summary by the witness was correct. There is nothing to indicate that the defendant company ever authorised Hassan & Kensell Pty. Ltd. to contract on the former's behalf and nothing to indicate that Hassan & Kensell Pty. Ltd. purported to do so. The employment of the word "agents" in the description of their business supplies no reason for making any contrary assumption. There was no "holding out" of Hassan & Kensell Pty. Ltd. as having authority—such a case was in fact disclaimed on the argument of this appeal—and there was no authority in fact from the defendant company to contract on their behalf whether as an agent of an undisclosed or of a disclosed principal.

The plaintiffs, however, rely on some subsequent documents as affording sufficient evidence to find the facts to be the contrary. The documents are letters written as a result of the difficulties which the plaintiffs experienced in the working of the machine. It is not necessary to go into the cause of the trouble with the baler. It is enough to say that even before the plaintiffs paid for the machine, they had been unable to obtain a satisfactory performance from it and the efforts of Eather and one of the Hassans of Hassan & Kensell Pty. Ltd. had been no more successful. According to the story of the plaintiff concerned, Eather had persuaded him to pay for the baler by saying that he and Hassan had not known enough about the machine but by the following year they would have learned about it and would give the plaintiffs another two years free service. There is no point in tracing the subsequent history of the machine in the plaintiffs' hands. What matters for present purposes is some correspondence with an officer of the defendant company in Sydney. On the advice, it would seem, of the Hassan already mentioned, one of the plaintiffs wrote a letter to a Mr. S. Chapman at that office.

For the defendant it is objected that it is not made to appear that Mr. Chapman could speak for the defendant company as to anything material to the question whether Hassan & Kensell Pty. Ltd. contracted as principals or as agents and, if the latter, whether they had authority to bind the defendant company as the contracting

party. The objection which seems formal rather than substantial may be put on one side. For when the correspondence is read in the light of the facts as they are known it does not provide any basis upon which the jury could find that the defendant company was liable as principal in the contract of sale made by Hassan & Kensell Pty. Ltd. with the plaintiffs.

The letters are consistent with the conclusion to which everything else irresistibly leads that Hassan & Kensell Pty. Ltd. sold the machine as principals in the agreement to sell and had no authority from the defendant company to contract otherwise. The correspondence opens with a letter of 5th August 1954 addressed to Mr. S. Chapman at the postal address at Lidcombe of the defendant company. It complains of the unsuccessful operation of the baler, which the letter says the plaintiffs " bought through your agents Hassan and Kensell of Gunnedah " a description which the writer again applies to that concern in a passage in which he asks for recompense from the defendant company. " Your agent says the baler cannot be made to work successfully ". The letter concludes " I have approached Hassan and Kensells and have informed them that I want a return of the purchase price or a satisfactory machine and they informed me that it was a matter for the International Harvester Co., as it has cost them much more than they got out of the sale of the baler ". This letter produced two letters from Mr. Chapman who signed himself " District Manager: General Sales ". One of them was addressed to Hassan & Kensell Pty. Ltd. and consisted of a complaint and remonstrance. What perhaps may be material is a passage saying that no complaint about the machine had been received from Boggabri or their zone service supervisor. According to the evidence one of the men named, the zone service supervisor, had visited the plaintiffs and had addressed himself to the working of the machine. Mr. Chapman's letter, after saying in effect that Hassan & Kensell Pty. Ltd. should have exchanged another machine for that in question and not sought a refund from the defendant company, requests all the relevant information " so that we may in some way endeavour to satisfy this client ". The second letter was a reply to the plaintiffs' letter. Mr. Chapman wrote that they were at a loss to understand why the plaintiffs had had the recurring troubles and why the defendant company had not been informed. The letter said that they were calling for a report from the zone manager and zone service supervisor. After which, the letter continued, " we will be in a better position to advise you of our thoughts in this regard ".

It does not appear what was the tenor of the reports nor what thoughts they inspired in Mr. Chapman or his company. The

H. C. OF A. 1958.

INTERNATIONAL HARVESTER CO. OF AUSTRALIA PTY. LTD. v. CARRIGAN'S HAZELDENE PASTORAL CO.

Dixon C.J., McTiernan J. Williams J. Fullagar J. Taylor J.

language in which Mr. Chapman's two letters are expressed, the complaints he makes and the course of action he recommends or contemplates are all in character with the course of business which the documents suggest. The organised distribution of proprietary articles particularly of machines is commonly done by a course of dealing with which modern business has long been familiar. All that Mr. Chapman wrote falls into place with the system. For almost a century cases have appeared from time to time in the law reports illustrating the fact that the word " agent " is often used in business as meaning one who has no principal but who on his own account offers for sale some particular article having a special name : see for example *Wheeler and Wilson* v. *Shakespear* (1).

Agency is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties. But in the business world its significance is by no means thus restricted. In *W. T. Lamb and Sons* v. *Goring Brick Co. Ltd.* (2) the agreement under the consideration of the Court of Appeal was described by *Scrutton* L.J. thus " By this particular agreement the respondents, therein called the ' manufacturers ', the makers of the bricks, appoint the ' merchants ', the buyers of the bricks from them and sellers of the bricks to builders and contractors, ' sole selling agents of all bricks and other materials manufactured at their works ' (3)." *Greer* L.J. was led by this language to say " It is somewhat remarkable that, notwithstanding the numerous cases in which the difference between a buyer and an agent has been pointed out, there are still innumerable persons engaged in business who do not understand the simple and logical distinction between a buyer and an agent for sale, but are content to treat the two words as synonymous. However, I can only read this contract as meaning that the manufacturers undertake, as they say in par. 3, to supply goods to the persons whom they call ' selling agents ' in return for the price mentioned in par. 2 " (4). But as Lord *Herschell* said in a much quoted observation " No word is more commonly and constantly abused than the word ' agent '. A person may be spoken of as an ' agent ', and no doubt in the popular sense of the word may properly be said to be an ' agent ', although when it is attempted to suggest that he is an ' agent ' under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading " : *Kennedy* v. *De Trafford* (5).

(1) (1869) 39 L.J. Ch. 36.
(2) (1932) 1 K.B. 710.
(3) (1932) 1 K.B., at p. 717.
(4) (1932) 1 K.B., at p. 720.
(5) (1897) A.C. 180, at p. 188.

No one supposes that the " distributing agent " or " exclusive agent " in a particular " territory " for a proprietary commodity or specific kind of article or machine is there to put a " consumer " into contractual relations with the manufacturer. In the case of any wide geographical distribution there is a general understanding of the practices of allotting territories, of zoning, of providing some regional superintendence of dealers or distributing " agents " as well as of the maintenance, and sometimes of the proper use, of the machine or article. None of this implies that the manufacturer or the head supplier contracts with the ultimate buyer or " consumer " as vendor. In the present case it appears clear enough that the transaction was carried through on the basis that Hassan & Kensell Pty. Ltd. sold the baler to the plaintiff company and that the defendant company was not the contracting party. There is nothing in the letters which in face of the facts could possibly authorise the contrary conclusion.

In this view of the case it is superfluous to discuss the terms of the contract, but it is proper to add that the attempt on behalf of the plaintiffs during the argument to treat the formal document as of no importance because much of its contents appeared inappropriate to the cash transaction intended cannot meet the difficulty which it creates for the plaintiffs. It was signed as and for an order, and when the price is ascertained and the order accepted by Hassan & Kensell Pty. Ltd. procuring delivery there is not much difficulty in treating the terms appropriate for a cash transaction as forming part of this sale. However this is a matter that does not arise on the view we take of the case and need not be pursued.

The appeal should be allowed and the cross-appeal dismissed.

For the order for a new trial there should be substituted a verdict and judgment for the defendant.

Appeal allowed with costs. Cross-appeal dismissed with costs.

Discharge so much of the order of the Full Court of the Supreme Court as orders that a new trial be had and as deals with the costs of the former trial and of the new trial. In lieu thereof order that a verdict and judgment be entered for the defendant with costs.

Solicitors for the appellant in the appeal and the respondent in the cross-appeal, *Minter, Simpson & Co.*

Solicitor for the respondent in the appeal and the appellant in the cross-appeal, *J. D. Mahony.*

R. A. H.