

1/1922

Judgment.

Knox C.J.

The plaintiff sues to recover damages for breach of a contract in writing dated 25th April 1921 for sale and delivery to him thereof of about 4000 wethers (and alternatively for conversion of the said wethers).

The defendant counterclaims for damages for breach of the said agreement by the plaintiff.

The facts proved are as follows :-

By contract in writing dated 25th April 1921 the defendant agreed to sell to the plaintiff about 4000 wether weaners therein described at 9/6 per head. The relevant terms of the contract are as follows:-

"Terms cash on advice of purchaser of number delivered free of exchange at St George. Pro forma delivery to be given and taken at Cashmere West on or about the 25th day of May 1921 or within 24 hours from noon on the said date unless bona fide delayed by rain, flood or bush fires, but so that delivery shall in no case be delayed beyond the day of 19. Such delivery shall be considered actual delivery (without another count being made) when payment is completed, but not before, and further until such payment is made. Purchaser to hold the above-mentioned stock as Agent only ^{and} in trust for the Vendor, as continuing owner of the said stock. Should any dispute arise in regard to ~~the~~ ^{this} ~~said~~ contract such dispute shall not vitiate the sale, but the matter in dispute shall be settled by Arbitration in the usual way."

The sale was made by the firm of Camerons (which carried on business at St George as stock & station agents) as agents for the defendant. During the whole of the relevant period Miss Withers was in charge of the office and business of the firm, and she ~~actually~~

negotiated the contract. At all material times both the defendant & the firm of Camerons knew that the plaintiff resided at Tamworth in the State of New South Wales. On or about 11th May Miss Withers, at the request of the plaintiff~~xxxxxx~~ engaged a drover, one Gallagher, to take the sheep when delivered to Mungindi, his remuneration being fixed at £35 per week from the time of delivery of the sheep to him. On the 16th May the plaintiff telegraphed from Tamworth to Camerons asking that firm to "wire date Kirby expects deliver g hoggets."

J.S. Kirby the managing director of the ^{dist.} ~~defendant~~ and on the following day after communicating with ~~defendant~~ Camerons replied by telegram "Kirby shearing will deliver weaners twenty-fifth to twenty eighth weather permitting." On the 20th May Miss Withers for Camerons telegraphed to the plaintiff asking whether he would be at St George to take delivery of the weaners. Cashmere West where delivery was to be given is about 20 miles from St George. The plaintiff did not receive this telegram till later as he had left Tamworth for Mungindi on the 19th May. He arrived in Mungindi on the 20th May and communicated by telephone with Miss Withers who was in charge of Camerons office. His account of the conversation is as follows:- "When I rang up the office a clerk was there and I asked how much rain had fallen. I wanted to know on account of the state of the roads for the car. I also asked if the weaners were ready for delivery & the clerk told me she would ring Mr Kirby and let me know later on at Mungindi; that I was not to leave until she let me know as she did not think the weaners were ready for delivery."

" She rang up again ? - Yes, and she said the sheep were not ready for delivery, and she would advise me later on when they were ready. I told her I could not be there for delivery within a fortnight and I would accept the drover's count. I asked them to wire me before the 26th May as I was leaving for Brisbane for a few days.

By His Honour: Wire you where ? Wire me to Tamworth.

By Mr Macrossan: What did they say to that? - They promised to wire me."

Miss Withers who was called on behalf of the defendant denies that she had more than one conversation with the plaintiff on that day and denies that the plaintiff asked her to wire before the 26th ^{of May} ~~or at~~ all or told her that he was ~~going~~ going to Brisbane for a few days on the 26th May or at all. She said she rang up the Hotel in Mungindi after the first conversation but was told that the plaintiff had left.

I think that Without making any reflection on her credibility, her memory of details she herself admitted it was "misty" was not accurate and I do not think it can be relied on on this point.

On the whole the plaintiff gave his evidence fairly and I see no reason to doubt that his version of the conversation, which I accept, is substantially correct. It is corroborated ^{by} by the telegram of 24th May which was sent by Miss Withers to the plaintiff at Tamworth -

" Kirby expects have weaners ready about Sunday or Monday thirtieth " and by the fact that no communication passed between the plaintiff & her between the 20th & 24th May. The plaintiff did not take exception to the postponement or to the uncertainty of the date of delivery & no point is made against the defendant in this respect. On the 26th

May the plaintiff left Tamworth for Brisbane - he left Brisbane for Tamworth on the 31st May and in the ordinary course should have reached Tamworth by train early in the morning of the 1st June, but owing to an accident on the railway did not arrive there till about 3.30 on the afternoon of that day. On the morning of Saturday the 28th May Gallagher took pro forma delivery of 3795 sheep and on that day Camerons sent a telegram addressed to the plaintiff at Tamworth in the following words "Gallagher took delivery 3795 Cashmere weaners today wire what route travel also date trucking Mungindi wire money Kirby's credit Q.N.Bank." The information as to the number of sheep delivered was supplied^{lied} to Camerons by J.S.Kirby, and later on the same day confirmed by Gallagher. On the same day J.S.Kirby telegraphed to the plaintiff at Tamworth to the same effect. Both telegrams reached Tamworth after noon on the 28th and were received by the plaintiff about 5 o'clock on the afternoon of the 1st June. On the 31st May Kirby not having heard from the plaintiff telegraphed to him at Tamworth "Will take sheep from drover unless payment lodged four o'clock to-morrow Wednesday," and on the same day Camerons telegraphed to plaintiff "Kirby taking sheep from drover Gallagher failing payment by four o'clock Wednesday first June." These telegrams were sent at 4 o'clock and 5.20 respectively on the afternoon of the 31st and were received by the plaintiff with the telegrams of the 28th above referred to. On receipt of these telegrams

plaintiff at 5.20 p.m. on the 1st June telegraphed to Camerons

"Kirby unreasonable only just arrived home if sheep interfered with

"you hold him responsible will pay according my contract waiting reply "

This telegram was received by Camerons on the morning of 2nd June but

the telephone line to Kirby was out of order and when Miss Withers com-

municated the message to him some hours later ^{on} the same day he informed

that ^{her} he had retaken possession of the sheep from the drover. On receipt

of this information Miss Withers on the 2nd June telegraphed to plaintiff

"Kirby took sheep from drover yesterday". In fact the sheep were taken

from the drover early in the morning of the 2nd June. On receipt of

this telegram plaintiff on 2nd June telegraphed to defendant "Holding

you responsible taking sheep from Gallagher" and on 3rd of June after

consulting his Solicitor and his banker plaintiff telegraphed to defen-

dant "Owing accident railway line was detained north until Wednesday

your wires Saturday & Tuesday not received until after sheep ^{re}taken

in view of circumstances will wire purchase money if Gallagher allowed

of these telegrams take sheep wire reply". The defendant did not reply to either ^{but}

^{the telegram of the 2nd} on the 4th June after ~~the~~ had reached the defendant the sheep were

sold to one Fitzgerald for delivery on the 22nd June at 9/6 per head

On the 7th June plaintiff telegraphed to Camerons "Would you accept

money to tender to Kirby for payment sheep". On the 8th June Mr Mar-

gette a member of the firm of Camerons replied by telegram "Kirby

"declines accept money as sheep now sold."

The defendant in support of its defence that the plaintiff was not ready and willing to perform the contract attempted to prove that the plaintiff was not in a position financially to pay for the sheep in question, but in my opinion failed to establish this. The plaintiff was no doubt relying on ^{obtaining} an advance from his bankers or financial agents to pay for these sheep, but I can find nothing in the evidence to justify me in holding that he was not in a position to obtain the necessary accommodation *is not ready & willing to perform the contract* ~~amount~~, especially in view of the fact that there was at the time a rising market for sheep, and that the value of these sheep was substantially more than the contract price. The evidence on ^{the question of value} ~~these points~~ will be dealt with more fully ^{in connection with} ~~on~~ considering the question of damages. I see no reason to doubt that when the plaintiff sent the telegram of 3rd June offering to wire purchase money if the sheep were re-delivered to Callaher he was ready and willing to remit the necessary sum ~~an~~ by telegram on this condition being ^{agreed to.} ~~complied with~~.

The first question to be determined is whether on the facts above stated the plaintiff has established his cause of action, and in order to determine this question it is necessary to ascertain ~~at~~ what was his obligation ^{was} under the condition of the contract with respect to payment - "Cash on advice of purchaser of number delivered free of exchange at St George". Mr Macrossan for the plaintiff argued that his obligation to pay only arose on his receipt of advice of the number of sheep delivered, & that this obligation would be discharged by

sending by post a cheque for the proper amount. He argued also that even if the plaintiff was to be treated as having received advice as to the number on the afternoon of Saturday the 28th May a remittance by post of the amount could not in the ordinary course have reached St George before the following Friday the 3rd June, and that consequently the defendant was not entitled to treat the contract as at an end ^{and} retake the sheep on the 2nd June.

Mr Graham for the defendant contended that the vendor's obligation was fulfilled by sending notice of the number delivered to the place where the buyer might reasonably be expected to receive it and that on this being done the purchaser's duty was to make the money available at St. George within a reasonable time after such notice would in the ordinary course of transmission have reached the place to which it was addressed.

Mr Graham also relied on secs. 42(c) & 49(3) of the Sale of Goods Act, but in the view which I take of ~~the facts of~~ the case neither section is applicable.

In my opinion this condition imposes on the vendor, when the purchaser is not present at the pro forma delivery, the duty of informing him of the number of sheep delivered either by communicating it to him personally or by putting it in course of transmission to him by some method agreed on by the parties or recognised as proper and usual in transactions of this kind. In the present case there is no evidence of any agreement or of any recognised

practice as to the method of advising the purchaser of the number delivered. Nor is there anything to show whether the notice should have been accompanied by a driver's receipt though J.S.Kirby admitted that it was usual to obtain such a receipt. On receipt of the notice the purchaser's duty was to make payment as agreed within the time stipulated, or, if no time were fixed then within a reasonable time, but until the obligation of the vendor was discharged the obligation of the purchaser to pay did not arise. In this case it must be taken that the defendant or its agent knew that the plaintiff intended leaving Tamworth for Brisbane on the 26th May and would be away from Tamworth for a few days and accepted this position. Leaving Tamworth on Thursday the 26th the plaintiff would arrive in Brisbane in the evening of Friday the 27th and could not reasonably be expected to reach Tamworth on his return before the early morning of Wednesday the 1st June. From Thursday night to Wednesday morning would afford five full days, two of which would be occupied in travelling while of the remaining three one was a Saturday and one a Sunday. On the 24th May plaintiff had been informed that the defendant expected to have the sheep ready about Sunday the 29th or Monday the 30th May but no definite date was fixed for pro forma delivery, the plaintiff being willing to accept delivery at a time convenient to the defendant. Without any further notice to the plaintiff pro forma delivery was given in the morning of Saturday 28th May, and information of the number delivered was des-

patched to him by two telegrams on that day. These telegrams did not in fact reach the plaintiff until late in the afternoon of Wednesday the 1st June, the plaintiff's arrival in Tamworth having been delayed by an accident on the Railway. In these circumstances I am of opinion that the obligation of the plaintiff to pay the purchase money did not arise until he received the telegrams advising him of the number of sheep delivered. He was then entitled to a reasonable time after receipt of this information to make the proper amount of purchase money available to the defendant at St George, and even assuming that the money had been sent by telegraphic remittance from Tamworth on Thursday morning the 2nd June it would not have reached St George before the defendant had retaken possession of the sheep, and by doing so had shown its intention of repudiating the contract and treating it as at an end. It was in fact admitted by J.S.Kirby that he treated the contract as determined by the omission of the plaintiff to pay the purchase money on the 1st June.

In my opinion the plaintiff had not at that time^{or} at the time when the defendant took possession of the sheep committed any breach of the contract and it follows that the defendant was not entitled to treat the contract as determined and that the plaintiff is entitled to recover. It follows also that the counterclaim of the defendant fails.

There remains the question what amount the plaintiff is entitled to recover by way of damages. The measure of damages in respect of the sheep is the difference between the contract price - 9/6 per head - and the value of the sheep on the 2nd June. The evidence as to their value is conflicting. The sheep in question were offered by the plaintiff shortly before the date of delivery to one Hayes at 12/6 per head. Hayes inspected on the 26th or 27th of May and refused the offer. The natural inference from this is that they were not considered to be worth 12/6 per head at that time. The same sheep were sold on the 4th June at 9/6 per head to Fitzgerald but I am not satisfied that this sale affords a true indication of their value and it appears that Fitzgerald sold about 3000 of them shortly afterwards at a much higher price. Another lot of sheep bred in the same way as these was bought by the plaintiff from the defendant on April 25th at 8/6 per head off shears for delivery late in July or early in August and the plaintiff resold them on the 5th May at 11/- per head. Mr Baynes estimated the value of sheep of this class in the St George district at the relevant time, in the wool and in good condition at 13/- to 13/6. He had not seen these sheep and based his estimate on the off shears value of average station bred sheep of that description and on the value of wool at that time. J.S. Kirby said these sheep were infested with grass seed and some were struck with the fly, that they were cutting up a good deal and not

walking well. I think this evidence as to their condition was exaggerated, for Fitzgerald drove these sheep to Mungindi later in June and subsequently sold 3000 of them at 14/- and Moore who was in charge of the sheep went over them for the purpose of dressing them for fly during the first week in June and only found it necessary to dress 15 out of the 3795. Mr Margetta of Camerons had not seen these sheep but from his knowledge of values estimated the value of these sheep at the relevant time at from 9/- to 10/- per head. The offer made by Landers carries no weight as evidence of value.

During May there had been rain in Southern Queensland and New South Wales - a circumstance which would tend to enhance the value - and I am satisfied that between April 25th and June the 2nd the market was rising. On the whole of the evidence I think it is fair to conclude that the value of these sheep on the 2nd of June was not less than 11/6 per head. The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract. (Sale of Goods Act sec. 52(2)). On this footing the plaintiff is entitled to 2/- per head on 3795 sheep equal to £379-10-0. He is also entitled to £35 the amount paid to Gallagher the drover, making in all £414-10-0.

At the request of the defendant I assess the amount to which it would be entitled by way of damages in the event of establishing its claim counterclaim.

Assuming the plaintiff to have committed a breach of the contract by failing to pay the purchase money or or before the 1st or 2nd of June the defendant sustained no loss by reason of the breach, the increased value of the sheep being more than sufficient to cover the amount of loss which it is alleged resulted from the assumed failure of the plaintiff to perform the contract.

The defendant claimed £494-9-3 damages but in my opinion the evidence established no more ~~than~~ than £150 and the value of the sheep at the time of the assumed breach exceeded the contract price by £379-10-0.

In these circumstances the defendant is entitled to recover nominal damages only, which I assess at 1/-.

Judgment for plaintiff for £414 -10-0 with costs of action -
Counterclaim dismissed with costs.