9/1923

In the High Court of Australia

On appeal from the Supreme Court of South Australia

Spring

-v-

Young & anor

Reasons for judgment

1. Knox, C.J.
2. Isaacs, J
3. Rich, J

South Australian Registry

SPRING V YOUND &ANOTHER

Judgment. Knox C.J.

The appellant sued the respondents in the Supreme Court to recover £657-10-0 in respect of the balance alleged to be due to him under an agreement for the agistment feeding and taking care of certain sheep viz:- 4040 from 25th October 1919 to 31st July 1920 a period of 40 weeks

4000 from 1st November 1919 to 30th April 1920 a period of 26 weeks

and 1200 from 30th April 1920 to 31st July 1920 a period of 13 weeks.

and £114-11-7 in respect of disbursements made on behalf of the respondents and at their request.

The respondents disputed the claim and counterclaimed for damages alleged to have been caused by the negligence and breaches of contract of the appellant.

So far as the appellants claim is concerned the substantial

question in issue between the parties is whether the appellant is entitled under the agreement to payment at the agreed rate (1½d per sheep per week) on the total number of sheep put on the land by the respondents in accordance with the terms of the agreement, or only upon the number of sheep actually depasturing on the land from time to time.

On the counterclaim the issues raised and contested in this Court are (1) Whether the appellant was under a duty to take care of the sheep

and (2) if so, whether he had failed in the performance of his duty.

On these questions Angas Parsons J. decided -

(1) that the appellant was entitled to payment at the agreed rate only on the number of sheep on the land from time to time

(2) that the appellant was under a duty to take care of the sheep

(3) that the appellant did not take due care of the sheep.

and on these findings entered judgment on the claim for the appellant for £424-13-8 and on the counter claim for the respondents for £1117-4-8.

The sum of £424-13-8 was made up as follows viz:- £499-13-10 for the sheep agisted on Naracoorte, £910-8-3 for those agisted on Sheoak Range and £114-11-7 for disbursements ~~and~~ less £1100 paid on account.

The sum of £1117-4-8 was made up of £836-8/- damages for loss of 1394 sheep worth 12/- a head lost through the negligence of the appellant and £280 -16-8 expenses incurred in efforts to recover these sheep.

The first question for consideration is on what footing the amount payable to the appellant for agistment is to be calculated.

The agreement between the parties was partly in writing and partly oral. Before any written communications passed between

the parties the appellant had agreed with the respondents' manager, one Kimberley, to take on agistment 8000 sheep on certain specified areas of land. The respondent Young then telegraphed to appellant accepting his offer and confirmed this telegram by a letter which, so far as is material, is in the following terms viz:-"As wired today reading - will accept 16000 acres, 6000 acres and 2 lots 19000 acres each early November for 6 months and notice 2 months before expiry if extension required. Your men to at once see all boundary fences secure and water supply assured by repairing and erecting two windmills. 1½d. per week per head. writing. please confirm. reply paid.

I have now much pleasure in confirming this arrangement and understand that you require this matter kept quiet, and we will do so; in fact the drovers will be told you own the sheep. I hope to have them forward in first week in November, or as near that as possible, it all depends on the shearing weather. Each lot will be carefully dipped in Cooper's powdered dip, full strength; each lot distinctly branded, and also nosed marked. 4000 merinos will go to the areas West of Penola, and the balance (merino and comebacks) to West of Naracoorte. "

"Terms - 1½d. per head per week. Payments, £120 per month balance to be adjusted on removal. Term for the two 19,000 acre areas to be six months, and a similar term for the 16,000 and 6,000 acre areas, but with the notice to be given two months before expiry of lease if an extension desired."

The appellant replied by letter in the words following:-

"I am in receipt of your letter of the 14th inst., and I confirm the arrangements regarding the leases to your Mr Kimberly in accordance therewith.

The original number of sheep to be grazed on the 16,000 and 6,000 acre blocks West of Penola was 5,000, but as the former tenant requires to retain 2,000 acres for 10 days after the transfer in order that he may dispose of his sheep, I will be quite satisfied with the 4,000 sheep as now arranged.

You understand that the balance of the money £0 due at expiry of your lease will be made up at per head on the 8,000 sheep. I will attend to taking delivery of sheep, and the necessary details as desired, also the fences and troughs, and I have engaged the necessary good boundary riders."

The respondent Young wrote in answer to this letter :-

"4000 merinos will arrive at Penola about end of October or very early in November, and will travel in two lots.

2,400 merino comebacks will arrive at Naracoorte about the same time. 1600 merinos will arrive at Naracoorte probably seven to ten days later."

On the 25th of October 4040 sheep were delivered on Sheoak Range and on 1st of November 4000 sheep were delivered on Naracoorte.

The appellant contends that the true meaning of the agreement ~~xxx~~ was that payment was to be made at the rate of 1½d a head a week for about 8000 sheep, and this contention appears to me to be supported by the stipulation contained in the appellants letter of the 19th August in which he says"you will understand that the balance of the money due at expiry of your lease will be made up at per head on the 8000 sheep." Having regard to the fact that under the agreement the respondents were to have the exclusive use of the land in question for 6 months and that it would be practically impossible to ascertain with any reasonable degree of accuracy the number of sheep on the properties each week, I think it is clear that the agreement was that the number of sheep to be put on should

be fixed at 8000 or thereabouts and that payment should be made on the assumption that sheep to that number were on the land during the period covered by the agreement. It would be unreasonable to expect that the appellant would give an exclusive right to graze on the properties for 6 months without making provision for an adequate return, or that he would accept a payment the amount of which depended wholly on the number of sheep the respondents chose to put on the property and the length of time they chose to keep them there. In fact 8040 sheep were put on by the respondents - a number approximating as nearly as practicable to the 8000 agreed upon. Of these 4040 were put on the Sheoak Range property on the 25th October 1919 and were not removed till the 31st July 1920 a period of 40 weeks, 4000 were put on Naracoorte on 1st November 1919 and were not removed till 30th April 1920 a period of 26 weeks, and of these 1200 were then put on Sheoak Range and remained there till 31st July 1920 a period of 13 weeks. The appellant is in my opinion entitled

to payment calculated on the basis of 4040 sheep for 40 weeks at 1½d per week - £1010 - 4000 sheep for 26 weeks at the same rate - £650 and 1200 sheep for 13 weeks at the same rate - £97-10/-, making in all £1757-10/-. He is also entitled to £114-11-7 the amount found to have been ~~disbursed~~ disbursed by him making a total of £1872-1-7. Credit must be given for £1100 paid on account leaving a balance due to the appellant of £772-1-7. The next question is whether the appellant was under an obligation to take care of the sheep while on this land. In his evidence the appellant said that he told Kimberley that he would treat the respondent's sheep as his own, that he would look after them like he would his own and that he would inspect the sheep frequently. The correspondence shows that the appellant was to provide a man and horses necessary to boundary ride each paddock to pay half of the man's wages, and to find horse feed, to cart salt and specific to each section of the land free

of cost to the respondents to see all boundary fences secure and water supply assured by repairing and erecting windmills and troughs, to attend to taking delivery of the sheep, and to advise the respondent Young from time to time of anything which the appellant should consider required attention.

In my opinion these terms of the agreement imposed on the appellant the duty of taking such care of the sheep as a reasonable man would of his own sheep in the circumstances, and it is unnecessary to consider what would have been the extent of his duty if he had not expressly undertaken these obligations.

The next question is whether the appellant performed the duty which he had so undertaken.

It appears from the evidence that when the sheep were removed from Sheoak Range only 2438 could be found out of the 4040 originally put on that property leaving a balance of 1602 unaccounted for.

The learned trial Judge who had the advantage of seeing the witnesses called to give evidence respecting this shortage came to the conclusion that 15% of the number originally delivered was a fair allowance for mortality in the circumstances. He was in a better position to estimate the value of the evidence than this Court and I think his conclusion on this point should be accepted as correct. Deducting from the 1602 sheep unaccounted for 15% of 4040 - viz 606 - it appears that 994 sheep were not accounted for. As to these the trial Judge arrived at the conclusion that they had been removed from the property some months before the expiration of the period covered by the agreement. He was guided to this conclusion by the evidence of certain witnesses whom he accepted as reliable and I do not feel myself in a position to reject his finding. Assuming the facts to be as he found them I think there is sufficient evidence of negligence on the part of the appellant to make him responsible in damages to the extent of

the value of these 996 sheep. Accepting his estimate of 12/- per head as the value which was not challenged before us these sheep were worth £599-12/-. No argument was addressed to us with reference to the sum of £280-16-8 allowed to respondents as damages in respect of expense incurred in endeavouring to recover the missing sheep. The result is in my opinion that the appellant is entitled to judgment on his claim for £772-1-7 and the respondents to judgment on their counterclaim for £279-8-8.

There remains the question of costs. Both in the Supreme Court and in this Court each party succeeded in part and failed in part. Having regard to all the circumstances I think substantial justice will be done by leaving each party to bear his own costs of the proceedings both in the Supreme Court and in this Court.

Order. Appeal allowed - Judgment set aside and judgement entered on the claim for appellant for £772-1-7 and on the counterclaim for respondents for £878-8-6.

No order as to costs of action, counterclaim, or appeal.

SPRING V YOUNG.

JUDGMENT. .... MR. JUSTICE ISAACS.

As to the appellants action the only question is as to the terms of remuneration agreed upon. The circumstances narrated in the oral evidence coupled with the terms of the letters of the parties leave no doubt in my mind that the contractual intention was to pay for "the 8000 sheep" as the flock was termed at the rate of 1½d. per head per week. The express and definite stipulation to pay £120 per month during the period commencing in early November and lasting six months certain with possible extension, and to pay "the balance" on removal "on the 8000 sheep" is quite inconsistent with the respondents reading of the bargain in this respect. That was that he was to be free to put as many or as few as he pleased on the land for the whole of the stated period, with the right of extension provided only he paid for as many as were there 1½d. per head per week. There are other provisions in the letters opposed to that reading, which has the further disadvantage of being unbusinesslike and improbable. The appellant is entitled to judgment for the flock called "the 8000 sheep" during the originally agreed period of six months and for that flock and a further number of 1200 sheep for an extended period of about three months. // As to the counterclaim the main contest was as to the dominant nature of the bargain. The learned Judge treated it as an agistment contract, casting the burden on the appellant of accounting forthe disappearance

of the missing sheep and holding that not only had the appellant failed in this, but that the evidence had positively satisfied him the learned Judge, that the appellant was negligent and thereby caused loss.

The respondent maintained the correctness of this decision. The appellant during the argument raised a contention that the true character of the bargain was that of a mere letting of the grass with the right of placing the sheep on the land, leaving their supervision and care to their owner - the respondent, except for some special undertakings expressly set out in the correspondence.

It was strenuously argued for the appellant that no primary duty of care rested on him, that in fact all necessary care had been observed, and that if any of the special undertakings had been broken the onus lay on the respondent to establish the fact and to prove affirmatively that the breach was the cause of the loss. The letters partly constituting the contract do not say expressly which is the correct view. The word "lease" and the word "agistment" are both used. But no single word will determine thematter. The Court must look to the substance of the transaction in order to judge of its real nature. And where the parties leave their language ambiguous their conduct in relation to it is a legitimate guide to their common intention. For this Watcham v East Africa Protectorate (1919 A.C. 533) is the most recent and for us the most authoritative decision.

There are several reasons for concluding that the learned Judge was right in attributing to the bargain the dominant character of an agistment bargain, that is one which the appellant agreed to receive and take delivery of the respondent's sheep, place them in his paddocks re-deliver them to their owner on demand. One very good reason is that the appellant himself sued on that basis. The statement of claim is copiously eloquent as to the contract being one of agistment, he conducted the case and obtained his judgment on the basis of the claim being for agistment his notice of appeal confirms the view, and the affidavit in support of the notice of appeal continues it. The agreement is admitted on both sides to be partly oral, and partly written it is obvious that some possible difficulty of the Statute of Frauds which might have been pleaded was entirely avoided if the agreement were one for agistment instead of a letting giving exclusive rights to occupy land and use the grass. See for instance Masters v Green (20 Q.B.D. 807) and Jones v Flint (10 A.& E. 753). A Court would not be eager in those circumstances to permit a party during the argument on appeal to entirely change front and assume an inconsistent attitude on a doubtful question of intention in order to avoid liability on a cross-claim based on the fundamental accuracy of his own. That is quite different from reliance on some special qualifications if any contained in the contract solong as a consistent position is maintained. But apart from the question of inconsistency

the agreement is in fact and truth of an agistment character. In view of the evidence it is quite unnecessary to determine whether it is ~~an~~ primarily a simple agistment bargain with all its common law liabilities, plus somesuper-added obligations expressly undertaken, or whether the appellants obligation of care arises by reason of the express promise made by him to treat and look after the respondent's sheep as his own. In either case, as the evidence shews he agreed to receive and take delivery of the sheep, he did receive and take delivery of them, he bestowed by himself and his men some considerable amount of care outside the special undertakings and his express averments in his statement of ~~claim~~ claim are that he "agisted" the sheep, and claimed "for the agistment, feeding and taking care of sheep" for the respondent at his request.

He was in either aspect a bailee of the sheep, and as such his obligation at the end of the bailment was to have there the sheep he received for the bailor to take or else to account for their absence (Coldman v Hill 1919 1 K.B. 443). He accounted satisfactorily to the learned primary Judge for a considerable number of the sheep undelivered by establishing a certain probable mortality. But as to a large number he has failed. By reason of the onus of proof, and of the affirmative oral evidence to which the learned Judge gave substantial credence, and also taking into consideration the appellant's own declared opinion of the estimated probable shortage, the appellant has failed to redeliver or satisfactorily account for 996 sheep. The value of 12/- per head which the learned Judge placed on the missing sheep has not been challenged, and therefore the appellant is responsible on this head for £597.12.

Other items are not challenged.

SPRIGG V. YOUNG.

Judgment Rich.J.

The appellant obtained a judgment on his claim and the respondents obtained a judgment on their counter-claim. Each of the parties contends that the learned judge Angas Parsons was not warranted him sufficient. The appellant's complaint with respect to his own claim is that the contract was not properly interpreted with respect to the terms of payment. In the telegram of August the 4th. are these words "I½d per week per head", they are not accompanied by any reference to the number of sheep. The learned judge considered that they meant only I½d per week per head for every sheep actually on the land and of course only for the time it was there. The appellant's argument was that when the whole of the circumstances were looked at and the conversation between the appellant and the representative of the respondents and particularly when the correspondence was read the fair and reasonable meaning to be gathered was that the terms were that the respondents were entitled to graze the

whole of his flock of 6000 or thereabouts and the appellant was to be entitled to payment at the rate mentioned for the whole flock, whether so grazed or not. In my opinion the appellants' argument is correct and the judgment must be varied accordingly.

A more difficult question was raised on behalf of the appellant and then for the first time in the history of the case. The learned judge at the trial had ruled that the onus of accounting for missing sheep lay upon the appellant and that he had failed to discharge the onus. Before contesting this ruling learned Counsel raised an argument which if sound would certainly avoid that difficulty because it would alter the inherent nature of the relations between the parties. Instead of being a contract for agistment involving responsibilities of a bailee as it is in the nature of a lease - a letting of the grass. This was a reversal of form and would be difficult to uphold at that stage under any circumstances but I am convinced it is not sound. Looking at the whole material we have to the conclusion in the appellant's favour as to the terms of payment I am satisfied

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