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OVERALL McCRAY Ld v MALLICK.

Judgment. Knox C.J.

The respondent hired a boring plant from the appellant for a period of 6 months from the 15th May 1924, and paid £250 for the hire of the plant during that period. After the 15th November 1924 respondent continued to use the plant without any ~~from~~ express agreement having been made as to payment for its use after that date. The appellant sued for money payable for hire of the plant after the 15th November 1924 relying on an implied agreement to pay for its use. The respondent resisted this claim mainly on the ground that one Millar who was alleged to be the authorized agent of the appellant had promised that if the bore were not finished by the 15th November the respondent should have the use of the plant free of charge after that date until

33/1925

the bore was finished. The jury returned a verdict for the appellant for £64-5-9. On appeal by the present respondent to the Full Court of the Supreme Court the verdict was set aside and judgment enteredm for the respondent on the ground that there was no evidence to support the finding of the jury. From this order this appeal is brought by special leave. In my opinion the appeal should be allowed. It is clear from the verdict that the jury took the view either that the promised alleged to have been given by Millar was not in fact given or that Millar had no authority from the appellant to give such a promise. It was clearly open to the jury on the evidence to take either view and it would not be surprising if they regarded the document put forward in support of this part of the case with some suspicion. This line of

defence failing, the position was that the respondent had paid £250 for the use of the plant from the 15th May 1924 till the 15th November 1924 and that he continued to use the plant after the expiration of that period without any express agreement for the payment of the use of it. During the hiring period a form of agreement in writing embodying the terms of the hiring was submitted by the appellant to the respondent for signature by him. The respondent did not sign this form of agreement but on the 12th August 1924 sent to the appellant an agreement signed by him in terms different from the form which he had been asked to sign.

This agreement, which was never accepted by the appellant, provided that the rental of £250 was to cover the use of the plant from

the 15th May till the 15th of November and that after ~~condition~~ completion of the term the plant was to be properly stacked and remain on the respondents' station until required by the appellant.

On the 13th August 1924 the appellant's solicitors wrote to the respondent's solicitors a letter the relevant portions of which are as follows:- "Yesterday a form of agreement, different substantially from that which was forwarded to your client, was received by post by the Company which bears your client's signature and is dated 15th May. . . . . We observed that the agreement is for 6 months certain and makes no provision, as was done in the agreement prepared by us, for ~~the~~ rent in the event of the hirer requiring the use of the plant after the expiration of the fixed period of hire. It must, therefore, be distinctly understood that on the expiration of the hire period on 15th November next, your client must discontinue the use of the plant and properly stack it and allow it to remain at the site on the station

until the Company requires it. It must also be understood that, on the expiration of the hire period, our clients are at liberty to remove it from the site. . . . . The agreement which was prepared by us set forth the terms and conditions upon which the plant was hired to your client. He has however, instead of signing the agreement which we prepared, had a somewhat different agreement prepared which omits certain of the provisions. This was, we presume, dohe intentionally, and our clients consider that your client is seeking by this means to secure an agreement different to that previously agreed to, and in this way to obtain an unfair advantage. The matter is one which seems to us to be capable of easy solution, but our clients are not inclinnd to assent to any terms which your client may seek to impose. "

On the 5th September 1924 the respondents solicitors wrote to the appellant's solicitors a letter containing the following passage viz:- " Referring to your letter of 13th ultimo Mr Mallick is at present

out of town, but, as soon as he returns we will have the matter attended to. We have seen Mr D. Millar on the matter who informs us that at the expiration of the 6 months the boring will be at his sole disposal as managing director of Martin Boring Co.Ld. and that Overall McCray Ld. will have no further interest in it, but that any further arrangements with regard to the plant must be made by Mr Mallick with Mr Millar. We do not wish to have any misunderstanding on this point and shall be glad to hear from you about it. With regard to the statement in your letter that your clients reserved the right to claim payment for wire rope, &c., required to equip the plant we are instructed by Mr Mallick to say that he was not to pay for any such equipment as the plant hired was to be in going order."

It will be observed that this letter shows, that respondent's solicitors were in communication with Millar and had communicated to respondent the contents of the letter of the 13th of August above mentioned, and, this being so, the omission to mention the document dated

6th March 1924 produced at the trial, which contained the alleged promise by Millar to which I have referred, called for some explanation. In the absence of any explanation and having regard to the contents of the letter of 5th September I think the jury was amply justified in refusing to give effect to the contention based on the alleged promise made by Millar.

On the 7th October respondent's solicitors wrote to appellant's solicitors asking who was entitled to the boring plant "at the expiration of the present lease." This letter does not appear to have been answered and nothing further occurred between the parties until after the 15th of November.

On the 19th November the appellant having gone into

liquidation the liquidator's solicitors made a demand in writing on his behalf for delivery of the boring plant. This document so far as relevant is in the words following viz:-"We are instructed by the Liquidator to now require your client to deliver up possession of the Boring Plant as set forth in the inventory forming part of the Hiring Agreement of 15th May 1924, and to state when it will be convenient for the Liquidator to take possession.

We are further instructed that if your client desires to extend the period of hiring the Liquidator is willing to do so on conditions to be approved by him. In the event of your client using the plant or any portion thereof after the date of this letter the Liquidator must necessarily hold your client liable therefor, & for the rent thereof. "

These being the circumstances I find myself unable to agree with the learned Chief Justice of New South Wales that there was no evidence on which the jury could find an implied promise to pay for the use

of the plant after the 15th of November.

I have already said that in my opinion it was open to the jury to find on the evidence that the respondent had failed to prove the alleged promise by Millar that he should have the use of the plant after the 15th of November without payment. In coming to this conclusion the jury may have been influenced by the opinion they had formed as to the credibility of the respondent and his witnesses, but however this may be I think that without having had the advantage of seeing the witnesses I should on the evidence have arrived at the same conclusion. Once this conclusion was reached the correspondence and the conduct of the parties in my opinion afforded sufficient evidence

of an implied agreement to support the verdict.

In my opinion the appeal should be allowed and the verdict restored.

High Court of Australia
Court Papers
p.p. 1 to 4

OVERALL McCRAY LIMITED.

V

MALLICK.

JUDGMENT. ... MR JUSTICE ISAACS.

OVERALL McCRAY LIMITED.

V

MALLICK.

JUDGMENT. ... ISAACS J.

The appellant company sued the respondent for £105 for the use of a boring plant with the appellants permission. The plant was not the appellants general property, but by arrangement with the owner, the Martin Boring Company Limited - which was indebted to the appellant - the latter was given the right of selling or hiring the plant on a commission of 10%. In the circumstances of the case the authority was a right because it was in the nature of a power, coupled with an interest. That it was so regarded is shewn by the fact that without any objection the appellant company hired the plant to the respondent in its own name for six months, and when the cheque for £250 was handed to Millar, the owner's manager, he handed it over to the appel--lants. After the expiration of that six months -namely 15 November 1924- the respondent went on using the plant, and this action is brought for the value of that use for seven weeks. The question is whether there is any evidence on which the jury could reasonably find a verdict in the appellants favour. It is said there is not, because long before the expiration of the admitted hiring, that is as early as 6 March 1924, Millar, the owner's manager, agreed in writing with the respondent that the latter ---------- at

at the end of six months of hiring,, if the bore on the respond-dents station were not finished, should have the use of the plant free until the bore was finished. That is said, negatives any notion of an implied agreement by the respondent to pay for the use of the plant after the six months. There is in the letter as it now stands a postscript after the signature of Millar, and in these terms:-

> "You can take the second hand casing and we will not charge
> "for same. This casing is at Polly Brewan Boring Site.
> "D.Millar."

The postscript bears evidence ex facie of its having been written later. The letter itself bears date the day the cheque for hiring £250 was given. It was intended between the parties to this action to have their agreement for the six months reduced to writing. As they did not agree on the terms to be inserted no written agreement was signed. But by a document dated 15 May 1924 -that is two months after the date of the Millar letter - the respondent, obviously by his solicitors, sent to the appellant for its execution a proposed agreement already signed by him. There are two important clauses in that document. The 4th says that "any material broken damaged or "not returned to be paid for at the prices mentioned in the Schedule "attached hereto". The Schedule does not mention prices, but the in-tention of the clause is clear. The 5th clause says:- "After com-pletion of the said hiring term the complete plant to be properly "stacked and remain at Bore Site on Polly Brewan Station free of all "charges until required by the said owner".

Those two clauses are on the face of them inconsistent with the terms of the letter of 6th March. The document, bearing date 15 May 1924, was however not forwarded until 12th August, the agreement being intended to operate retrospectively, that is until 15 November 1924. On 13th 13th August, the appellants solicitors wrote with reference to it, agreeing to that retrospection, and adding:- "it must therefore be "distinctly understood that on the expiration of the hire period on "15 November next, your client must discontinue the use of the "plant and properly stack it and allow it to remain at the Site on the Station until the company "requires it". It must also be understood that on the expiration of "the hire period, our clients are at liberty to remove it from the "Site". On 5 September 1924, the respondents solicitors replied saying "that the respondent was absent, and that they had seen Millar "who stated that at the expiration of the six months the boring plant "would be at his disposal as manager of the Martin Company, and that "the appellant company would have no further interest in it, but that "any further arrangement must be made by Mallick with Millar". Receiving no answer to this, the respondents solicitors again wrote asking "who is entitled to the boring plant in question at the ex-"-piration of the present lease". This letter also was silent as to any such arrangement as is now relied on. The Martin Company went into liquidation, and further correspondence took place, none mentioning that arrangement. It was sprung into notice at the trial. Millar was not called as a witness. Apart from any question of law as to the

effect of the letter dated 6th March, not brought to the notice of the appellant, it was in my opinion well within the rights of the jury, as men of the world to refuse to place any reliance on it, or on any arrangement it purported to record. Putting that letter aside the way was open for the jury to conclude that the respondent retained and used the property on the understanding that he was doing so, not as a trespasser, but by permission and on such terms as they thought reasonable, that is on an implied contract to pay a reasonable sum for the use actually enjoyed. ----------

The relevant law as stated by Bowen L.J. in Phillips v Homfray (24 Ch.D.at.pp 461-463) puts the position quite clearly. ----------

On the one hand the respondent was under a well understood and cer-tainly an implied obligation to return the plant to his lessors at the end of the term. Even if he had assumed to treat the Martin Com-pany as the rightful person to whom rent was payable he would have found difficulty in denying the appellants right. See Fisher v Marsh (6 B & S.p.411). Having regard to the proved relations between the two companies I think such an attempt would probably have failed. But he did not adopt that attitude. He denied liability to anyone and rested on a prior arrangement which the jury not unreasonably disre-garded. There is then a holding and user by permission, under circumstances that primarily imply a fair recompense to the appel-lants, without any other circumstances that negative the implication.

In my opinion therefore the appeal should be allowed.

Land Values

OVERALL McCRAY LIMITED V. MALLICK.

Judgment. Higgins J.

I concur in the opinion that this appeal must be allowed. I recognize the force of the reasonsgiven by the Chief Justice of the Supreme Court, against the verdict of the jury. But, as the learned judge himself points out, the question is not what the Court would find, but "whether there is any evidence from which an inference could be drawn by reasonable men that the defendant retained the plant after the 15th November on the implied promise that he would pay the plaintiff company for its use." As usual, the difficulty is with the minor premisses. — is there any such evidence? I think there is evidence on which the jury, as reasonable men, could find such an implied promise. For instance, the company having sent a form of agreement to be signed by the defendant, containing a provision for a rental of £250 for the first six months, and for £15 per week until the plant should be returned, the defendant rejected this form, and sent one of his own which contained (cl.5) this provision:-

"After completion of the said hiring term the complete plant to be properly stacked and remain at Bore site on Polly-brewan station free of all charges until required by the said owner". This, the defendant's form, was expressed as made between the plaintiff company and the defendant; ~~and it implies~~ - not between the Martin boring company and the defendant, - and it implies that the plant was to be free from rent only when properly stacked out of use. ~~in the event of the plant not being used.~~ It is extraordinary that the defendant does not in this form of agreement, or in his solicitor's letter of 5th September 1924, refer in any way to the promise of the Martin Boring Company (6th March 1924) - "should your bore not be finished at the end of six months from beginning of hire from Overall McCray Ltd., we the owners of the said plant will allow you to finish the bore without any extra cost". It was for the jury to believe or disbelieve and to draw legitimate inferences; it is not the function of the Court to set aside the jury's verdict under the circumstances.