IN THE HIGH COURT OF AUSTRALIA

FORREST

V.

SCOTT

REASONS FOR JUDGMENT

28/10/48

Judgment delivered at Hobart

on Wednesday, 3rd. November, 1948.

H. E. Daw, Gov. Print., Melb.

C.12280/45

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Appeal from the Full Court, which allowed an appeal from a judgment of Clark J. for £320 in favour of the plaintiff (the appellant in this court) in an action for deceit and breach of warranty. The appellant, Mrs. Forrest, bought a carrying business from the defendant. She answered an advertisement and the defendant then wrote her a letter in which he described the business which he had for sale. The letter was in the following terms:-

> "I received your letter to-day in answer to my advertisement in Saturday's Mercury. I will give you details of the business. One Ford V.8. 1942 Lease Lend Model truck 4 ton with 11 tyres of which 4 nearly new. One 1934 Model Ford V.8 truck 2 ton recently fitted with reconditioned engine and has been fitted with several new parts. This also has 11 tyres of which 4 are new. The carting consists of produce of all kinds to and from railway the distance ranging from 4 to 15 miles. The charge being 1/- per mile per ton. I have customers in Tunnack, Baden, Whiteford, Woodsdale, Levendale, Eldon, Mt. Seymour and Colebrook. My price is £780 the lot and the earnings are about £1,000 a year.
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> Perhaps you could come and see for yourself and I would be able to tell you more then."

The plaintiff and her husband saw the defendant and had several conversations with him and she ultimately bought the business for £780.

The learned trial judge found that several statements contained in the letter were untrue to the knowledge of the defendant. The Ford V.8 truck did not contain a 1942 engine, but an engine of earlier date which had been reconditioned. The charge which the defendant had made for carting was not 1/- per mile per ton to and from the railway station, but was 1/- per ton from the railway station and only 6d. per ton to the railway station. The earnings of the business, if earnings meant receipts, had been near enough to £1000 a year to make the statement about earnings substantially true, but if "earnings" were interpreted as meaning profits, then the statement was false to the knowledge of the defendant.

The learned judge found that several of the statements contained in the letter were fraudulent, but that the plaintiff got value for the money which he paid and, no damage being established, no remedy was given upon the claims in deceit. He held that the statement as to earnings was a warranty, that the word "earnings" should be construed as equivalent to profits, that the warranty had therefore been broken, and awarded £320 damages. Upon appeal to the Full Court the court was of opinion that the word "earnings" in the letter should be interpreted as meaning gross receipts. Therefore there was no breach of warranty and the judgment in favour of the plaintiff was accordingly set aside.

The statement contained in the letter as to the earnings of the business is part of the description of what was sold and, the defendant having entered into possession of that which was sold, the statement is enforceable as a warranty. The important question which has to be determined is whether earnings means gross receipts(that is, takings)or profits. The word appears in a written document. The construction of a written document is a matter for the court. The word "earnings" is plainly ambiguous. It may be used to mean the gross receipts, or, on the other hand, it is capable of being used so as to mean profits. The meaning of the word must depend upon the context in which it is used and the circumstances to which it is evident the parties intended it to be applied. If a workman were asked what his earnings were he would respond by stating the amount of wages which he received. That amount would represent what he earned. In the case of a business the nature of which consists substantially in the provision of services, prima facie the meaning of "earnings" used in connection with such a business will approximate more closely to the meaning in the case of a workman than to the meaning which would be more natural and apt in the case of, say, selling goods. In the latter case it would not be a natural user of the words to regard all the receipts for the sale of goods as

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being money earned in or by the business. It would be more natural to regard earnings in such a case as representing the net result of trading. In the present case, however, the business consists substantially of the provision of services and is closer to the case of a wage-earner.

The words of the written contract must speak for themselves, and evidence is not admissible as to the intention which the parties had in their mind when they used the words. But where the words in a written contract are ambiguous, evidence is admissible of the conduct of the parties and the manner in which they acted in relation to the transaction in question in order to resolve the ambiguity. In the present case the plaintiff gave evidence that when she and her husband met the defendant the defendant said that they "took £1000 a year". The amount of £1000 a year was the amount which had already been stated in the letter as representing the annual earnings of the business. As soon as they met the defendant he said that the takings of the business were £1000 a year. It is almost impossible to reach the conclusion that both parties understood that the £1000 referred to in the letter was a statement of the profits, and not of the gross receipts, of the business.

It is argued as against this interpretation of the meaning of "earnings," first that the evidence shows that no enquiry was made as to the expenses of the business, and that if the sum of £1000 represented the gross receipts, the plaintiff and her husband would certainly have gone on to make enquiries as to the expenditure of the business. On the other hand, as against this argument it is not unimportant to remember that any statement as to profits is an estimate which depends upon the items of expenditure which are charged against the receipts. A statement as to profits therefore is a statement which means very little

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until there is an examination of accounts. The statement, however, of the amount of the takings of a business is a clearly ascertainable fact, and if the person who makes the statement is trusted by the persons to whom he makes it, then there is a basis upon which the value of a business can be estimated by an intending purchaser. In the present case the purchaser knew that it required two trucks in order to carry on the business. If he knew anything about it at all he would be able to form some estimate of the necessary expenditure in maintenance of trucks, labour, petrol and oil, and on the basis of the takings would be able to form an idea of the true value of the business.

In the Full Court the learned judges took the view that it was so improbable that a business earning a profit of £1 000 a year could be bought with two trucks for £780 that the statement as to the earnings of the business should, for this reason, be regarded as a statement with respect to the gross takings of the business. It was pointed out that if the trucks were, as was determined by the learned trial judge, worth £500, the result would be that a business showing a profit of £1000 a year would be purchased for £380 or thereabouts. It was argued on the other side that the existence of the business depended upon the maintenance of a carting licence for the relevant area, and that other licences might be granted, and that the vendor did not enter into a covenant not to carry on business in the district, so that the bargain was not as good a bargain as was suggested in the reasons for judgment of the Full Court. All these matters, however, are matters affecting probabilities only and cannot be regarded as decisive. It was pointed out, on the other hand, that in order to earn a profit of £1000 a year it would be necessary for the trucks to be driven quite an incredible distance, so that nobody could really have believed that the defendant was intending to represent that the trucks earned a profit of £1000 a year.

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On a consideration of the words of the letter and applying those words to the known circumstances of the case, the more reasonable conclusion is that the defendant intended by the use of the word "earnings" to refer to the gross receipts of the business, and that the plaintiff and her husband understood the word in this sense. Upon this view the judgment of the Full Court should be affirmed.

A further contention was submitted for the appellant. The letter contained a statement that the charge which the defendant had been making for carting was 1/- per ton per mile both to and from the railway station. As already stated, the charge which he made for carting from the railway station was 1/- per mile, but the charge for carting to the railway station was only 6d. per mile. The learned trial judge did not find whether or not this statement amounted to a warranty. If the statement as to £1000 was, as has already been said, a warranty, it is difficult to deny the same description to the statement with respect to the charges, because the receipts amounting to £1000 were made up by the charges made for freight. Accordingly, the statement as to the rate of charges should be regarded as part of the description of the business and should be held to amount to a warranty. The charges which the plaintiff had made were 6d. per mile, and not 1/- per mile. Accordingly there was a breach of warranty. But the plaintiff, though having full opportunity to do so, did not show that any damage had in fact been incurred by her by reason of this breach of warranty. Doubtless there was some loss and she gave evidence that she lost some customers by reason of the fact that they regarded themselves as being over-charged when she sought to charge them 1/- per mile for carriage to the railway station. But although the plaintiff had a full opportunity to establish, if she could, what damage flowed from the breach of this particular warranty, she failed to give any evidence upon which any estimate of damage could be made. There appears to be no reason why she should be allowed a second opportunity for

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establishing a case which she endeavoured to make at the trial, but which was presented on behalf of the plaintiff in such a way that it would have been impossible for any tribunal to assess an amount of damages. The plaintiff is entitled to nominal damages for breach of warranty, but this is no reason for ordering a new trial on this issue. The result in all the circumstances, therefore, is that the appeal should be dismissed with costs.

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JUDGMENT. RICH, J.

I agree that the appeal should be dismissed. I would add that counsel in this case applied themselves to presenting a very useful argument to the Court.

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JUDGMENT MCTIERNAN J.

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I agree that the representations made by the respondent that the earnings of the carrying business or of the trucks used in it, which he sold to the appellant, meant the gross receipts. I agree with the other members of the Court on that question. I have a doubt whether either the statement as to earnings or the other statement about the charges for carting is a warranty collateral to the contract to buy the business rather than a mere representation, but it is not necessary for me to attempt to resolve this doubt.

I agree that the appeal should be dismissed.