No. 49 of 1947

IN THE HIGH COURT OF AUSTRALIA

GULLETT

v.

GARDNER

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on Thursday, 17th. June, 1948.

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

C.12-280/45

GULLETT V GARDNER.

O R D E R.

Appeal dismissed with costs

SIDNEY WOLTON GULLETT

v.

GEORGE GARDNER

JUDGMENT. RICH J.

SIDNEY WOLTON GULLETT

v.

GEORGE GARDNER

JUDGMENT. RICH J.

This is an appeal from the judgment of the Full Court of Victoria reversing the decision of O'Bryan J. The facts which gave rise to the controversy between the parties may be briefly stated. Prior to the agreements presently to be mentioned, the plaintiff and the defendant had been joint managing directors of the Union Can Company - a company of which the plaintiff, the defendant's father-in-law, was one of the founders. In 1936, the plaintiff being desirous of retiring, three indentures of even date were executed. Exhibit "A" is an agreement between the company and the plaintiff. It provides for the plaintiff's resignation as director and managing director of the company and for his "appointment" as technical expert and consultant of the company for the period of his life at a salary of five thousand pounds per annum. The plaintiff accepted the "appointment", but in this agreement there is no covenant, agreement or undertaking on the part of the plaintiff to perform the services mentioned for any period or at all. After the execution of this agreement the plaintiff sold his shares in the company to the defendant. This transaction is evidenced by a deed executed by the plaintiff and the defendant and marked Exhibit 2. The crucial document in this case - an agreement between the plaintiff and the defendant - is Exhibit "B". From clause 2 of this agreement emerges the question of law the subject of this appeal. The clause reads as follows:-

"That /

> "That if for any reason whatever the said Company should fail to continue the 'appointment' herein referred to of the said George Gardner or if for any reason whatever the said George Gardner should retire from or lose such 'appointment' the said Sidney Wolton Gullett for himself his heirs executors and administrators covenants with the said George Gardner that he will pay to him the sum of Three thousand pounds per annum during the life of the said George Gardner by equal half-yearly instalments commencing from the date from which the aforesaid 'appointment' with the said Company may cease."

In construing this document the trial Judge stated that "Though this agreement is silent as to any obligation on the Plaintiff to serve the Company in that capacity, it is, in my opinion, a necessary implication that he is for the like period obliged to serve the Company in that capacity." And His Honour held that the plaintiff had "broken his contract with the company to serve it for life as its technical expert and consultant" and that it was not a usual use of language to say of an employee who is under an obligation to serve but who in breach of that obligation refuses to serve, that he has retired from his appointment". On appeal ---------- the Full Court, refused to accept this reasoning, holding that there was no such implication. I agree with this view. I respectfully agree with Mackinnon L.J. in his statement that a Court is too often invited to find the existence of an implied term upon vague and uncertain grounds: Shirlaw v. Southern Foundries Ltd., 1939 2 K.B. 206, at p. 227. "The principle laid down by Cockburn C.J. in Stirling v. Maitland, 5 B. & S., 840, 852, is not a rigid rule; it is capable of qualification in any given case; and it is a rule the application of which depends on the true construction of the agreement", S.C. 1940 A.C. 701, at p. 712. It is necessary, therefore, to examine the relevant document - Exhibit "B" - and to gather from it the intention of the parties. It is also necessary to consider the circumstances in which the plaintiff's retirement took place. It was a friendly arrangement between the plaintiff and

the defendant, his son-in-law. The plaintiff was a man of about 66 years of age desirous of retiring. He sold his shares to the defendant and accepted what the latter considered was a "nominal appointment". In his evidence the defendant stated "I was equally if not more skilled than the plaintiff who at that time was not doing much work for the company. His at that stage was a nominal "appointment". I was doing most of the technical work". It was, I think, another way of providing a founder of the business and its former "technical man" with a retiring allowance. In interpreting Exhibit "B" one finds no obligation on the part of the plaintiff to serve for life, and although the company was willing that he should be entitled to serve the company there was no corresponding stipulation that he must in fact do so. The most important provision in Exhibit "B" is clause 2. This provides, inter alia, that if for any reason / whatever the plaintiff retires he shall then be entitled to receive from / the defendant £3000 per annum. Thus it is obvious that the parties contemplated that he might not continue as the company's "appointee" and provision was made for this contingency. It is impossible, in my opinion, to place any qualifications on the words "for any reason". There is nothing to suggest that "any reason" must be confined to some particular reasons and not any reason. The clause in question has the clear effect that if the plaintiff for any reason whatever did not wish to continue his service with the company he should then receive the payments mentioned in the clause. This conclusion expresses the inevitable result of a fair and reasonable construction of the document. There is therefore no necessity to call in aid any implication to give what has been called business efficacy to the agreement or any such implication as that referred to in Stirling v. Maitland. ubi sup.. If by the language of their agreement one party has expressed an eleemosynary intention in favour of the other, the effect of their language ought not to be varied by implications based upon what should have been intended if the parties had arrived at their agreement by hard bargaining. For these reasons I am of opinion that the appeal should be dismissed.

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The respondent and others had founded the business carried on by the Union Can Company Proprietary Limited.

In 1936 the respondent resigned his position as a Diredtor and Managing Director of the company.

And in June 1936 agreements were entered into between the company and the respondent and between the respondent and the appellant whereby -

(1) the company appointed the respondent as the technical expert and consultant of the company for the period of his life at a salary of £5,000 per annum payable quarterly:

(2) the respondent agreed to transfer to the appellant 42,500 shares in the company for £28,000:

(3) the appellant covenanted with the respondent that if for any reason whatever the company should fail to continue the appointment of the respondent or if for any reason whatever the respondent should retire from or lose such appointment then the appellant, his executors or administrators would pay to the respondent the sum of £3,000 per annum during the life of the respondent by equal half yearly instalments (clear of income tax) commencing from the date from which the appointment with the company ceased.

And an agreement was also made in June 1936 between the appellant and Spry and Meares whereby the appellant

deposited the shares already mentioned with Spry and Meares under a lien as security for the performance of the agreement between the respondent and the appellant already mentioned.

The respondent, in an action in the Supreme Court of Victoria in which he was the plaintiff, alleged that he retired from his appointment with the company which ceased on the 31st December 1944 when he tendered his resignation as technical expert and consultant to the company to take effect as from 31st December 1944. The company refused to accept the respondent's resignation. Nevertheless the respondent sued the appellant upon his agreement for three half yearly instalments of the sum of £3,000 per annum which the appellant had covenanted to pay him under the agreement already mentioned.

The primary judge gave judgement for the defendant in the action - the appellant here - but his decision was reversed upon appeal to the Supreme Court of Victoria in Full Court and the plaintiff in the action - the respondent here - had judgement: hence this appeal.

The question is whether the resignation of the respondent constituted a retirement from his appointment as a technical expert and consultant of the company which brought about the termination of his appointment.

The respondent at the time of his appointment was about 65 years of age when he arranged to retire from his position as a Director and Managing Director of the company. The agreement between the respondent and the appellant did not expressly provide that the respondent should act as a technical expert and consultant to the company during his life: it was the company that appointed him during his life. The agreement is rather a provision for the respondent upon his retirement from the company than

an agreement on his part to act as a technical adviser and consultant to the company though it no doubt desired the benefit of his experience and advice as and when required, but was only bound to pay him his salary if he rendered those services. The agreement between the respondent and the appellant envisages the possibility of the company failing to continue the respondent's appointment or its loss and also the retirement of the respondent. In any of these cases the appellant took upon himself, his executors or administrators the obligation of providing the respondent with what was in reality an allowance upon retirement from the business of which he was one of the founders.

Retirement is merely a withdrawal from office or position and does not necessarily nor ordinarily require the mutual assent of the parties concerned. And whether in the present case the assent of the company was necessary to make the respondent's resignation or retirement from his appointment effective depends upon the construction of the documents and the surrounding circumstances already mentioned.

In my judgement, terms of the agreement coupled with the surrounding circumstances do not require the assent of the company to render the respondent's resignation effective. His appointment ceased upon his resignation and brought into operation the covenant of the appellant.

The decision of the Supreme Court of Victoria in Full Court was therefore right and this appeal should be dismissed.

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This appeal depends upon the interpretation that should be placed upon a transaction of a somewhat curious nature between the two parties, the plaintiff and the defendant. It depends upon its interpretation in the wide sense; not the mere construction of the language in which it is expressed, but the extraction from the documents and the circumstances to which they refer and in which they were made of the full intention which the parties had or are to be considered as having with reference to the question now arising from the events that have occurred.

The parties stand in the relation of father-in-law and son-in-law. The transaction took place on 11th June 1936. Up to that date they had been joint directors of a manufacturing company called the Union Can Company Proprietary Limited in which substantially they held all the ordinary shares.

It had been decided that the father-in-law, a man then of 65 years of age, should retire from the directorate and from any active concern in the company and should sell his shares to the younger man. The purchase price, which amounted to £28,000, was to be paid in instalments spread over ten years. But it was also agreed that the retiring director should be appointed as technical expert and consultant of the company at a salary of £5000 a year for the period of his life.

It can hardly be doubted that the purpose of this appointment was to provide him with an income commensurate with that which, but for his retirement from the company, he might have derived from the business. At all events, he was never in

fact /

fact called upon to perform any duties on behalf of the company.

A further part of the arrangement between the two men was that the younger man, in whom all the ordinary shares would be vested, as well as the full responsibility of management, should give his covenant that the company would retain the elder man in the appointment and that if for any reason there was a cesser of the appointment he would pay the latter an annual sum. The sum fixed was £3000 a year clear of income tax. To secure this sum the scrip for the shares with transfers signed in blank were to be deposited with the company's auditor and its solicitor. To carry out these arrangements four indentures were prepared and executed. By one, to which the retiring director and the company were parties, his resignation from his positions of managing director and of director was testified and his appointment at £5000 a year as technical expert and consultant was made. By another, the parties thereto being the son-in-law and father-in-law, the latter sold his shares to the former, who in his turn covenanted to pay the purchase money. A third indenture was devoted to securing over the shares the liability of the purchaser to the vendor, not for the purchase money, curiously enough, but for the £3000 per annum from the cesser of the appointment. The fourth indenture contained the covenant for the payment of that sum, if such a cesser took place.

By the end of 1944 it had become only too plain that £3000 per annum clear of income tax was likely to remain a much more satisfactory income than £5000 per annum less income tax. On 14th December 1944 the father-in-law, who is the plaintiff respondent in these proceedings, wrote to the company resigning as consultant as from the end of the year. The company refused to accept his resignation on the ground that as he was appointed for life it constituted a breach of the agreement. Tender was made of the periodical payments on account of the £5000 a year less tax but these were rejected. The action was then brought

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by the plaintiff against his son-in-law, who is the defendant-appellant, to recover the periodical amounts which would have fallen due on account of the £3000 a year, if he were right in his claim that his resignation brought into operation the covenant under which that annuity is payable. The action was tried by O'Bryan J., who decided that the plaintiff was not right in this claim; but, upon appeal, the Full Court, consisting of Macfarlan, Gavan Duffy and Barry JJ., reversed the judgment of O'Bryan J. The Full Court held that the voluntary retirement or resignation of the plaintiff from his appointment as technical expert and consultant fell within the conditions which the defendant's covenant to pay him £3000 a year clear of tax contemplated as giving rise to that liability. We are now called upon to express in our turn our opinion upon the question.

The covenant itself is expressed in terms which, at all events at first sight, appear to favour the conclusion of the Full Court. For it provides expressly that if for any reason whatever the company should fail to continue the appointment of the plaintiff or if <u>for any reason</u> whatever the plaintiff <u>should retire</u> or lose such appointment the defendant for himself his executors and administrators covenants with the plaintiff that he will pay him the sum of £3000 per annum during the life of the plaintiff by equal half-yearly instalments commencing from the date from which the aforesaid appointment with the company may cease.

The word "retire" prima facie refers to resignation or voluntary withdrawal from an appointment or employment. The contrast with the alternative stated of "losing such appointment" seems to emphasize the voluntary character of the retirement. This is again reinforced by the words "for any reason". They refer to cause not motive, as is plainly shown by their use in connexion with the word "lose". Though the plaintiff might "retire" either for a motive or for a cause, it would be quite

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incongruous to use the word "motive" with reference to his losing the appointment. There will be a cause of his loss but he could not have a motive in "losing" the appointment: loss is a thing he suffers.

But while it might appear that the use of the word "retire" in this context, necessarily connoting, as it does, voluntary resignation, is enough to settle the matter, a difficulty in this simple solution arises from the evident fact that the plaintiff's right to £3000 per annum clear of tax was never intended to arise unless and until his right to receive £5000 a year from the company had terminated.

It was not in the contemplation of the parties that he should enjoy, whether cumulatively or alternatively, the right at the same time to both annual sums. That is expressed in the last words of the covenant, if any expression of so obvious a thing be needed, namely the words "commencing from the date from which the aforesaid appointment with the company may cease". It is therefore contended on behalf of the defendant, with reason, that the retirement must be effective to terminate the appointment. The appointment did not establish the relation of master and servant. The remuneration does not grow out of that relation so that the unilateral destruction of the relationship might end the right to the remuneration. It is a contract for services, but not of service. The annual salary is made payable, even though no services are called for.

In these circumstances the defendant maintains that unless the company is discharged definitely from the obligation arising from the appointment to pay the plaintiff £5000 per annum, the defendant's obligation has not arisen. Such a discharge might arise from the plaintiff's resignation if, by his agreement with the company, he is not bound to retain the appointment for life but is at liberty to retire. It might arise even if he were bound to retain the appointment for life, if his retirement were consented to by the company. It might arise also if the company treated his resignation as a renunciation of the appointment, which renunciation the company

accepted. But the company has been careful to refuse either to consent or to treat the resignation as a renunciation on the part of the plaintiff of his appointment as technical expert and consultant of the company.

There remains, however, the question whether the plaintiff was bound to retain his appointment for life or, on the contrary, was at liberty to resign it at any time, as he purported to do. If he was at liberty to resign from it at any time his retirement was lawful and his right to salary at £5000 per annum from the company terminated once for all.

The agreement between the company and the plaintiff, upon the true effect of which this question depends, begins by reciting the fact that the plaintiff and the defendant are joint managing directors of the company under a prior agreement of 1934, and that by mutual agreement between the company and the plaintiff and defendant, and for various good reasons, the plaintiff has arranged to retire from his position as director and managing director. The first operative provision states that the plaintiff, with the consent of the company, thereby resigns from his position of director and also from his position as managing director. The second provision cancels the agreement of 1934 so far as the plaintiff was interested therein. The third operative provision states that the company thereby appoints the plaintiff as technical expert and consultant of the company for the period of his life at a salary of £5000 per annum payable quarterly on certain dates. The agreement contains nothing further.

The defendant's contention is that, in as much as the respondent was appointed for life, it must be taken that he was bound to serve for life. In ordinary circumstances the agreement by which one party agrees to employ another for a specific term naturally imports that the party employed agrees to serve for a like term. It is upon this implication that the

defendant's contention must depend. But, after all, it is an implication and not an express term.

It is readily made when the relationship is that of master and servant, which this is not. The circumstances make it only too evident that the chief purpose of the appointment was to provide the plaintiff with an annual sum and that the services expected of him were, if not unreal, at least of a nominal character. Implications are made because they appear almost inevitably to spring from the situation the parties have expressly created. They are the logical inference from the stipulations contained in an agreement or from the terms in which it is expressed. The inference that the parties must have intended to bind themselves in the manner sought to be implied should arise from the circumstances and from the contract as a rational deduction of such cogency that another intention can hardly be supposed. The intention is to be gathered from what they have said and done, and concerns what each party to the contract had the right to expect, but it does not necessarily mean an enquiry into their actual mental state. The question is one of interpretation in the sense of ascertaining the full scope and bearing of their contractual intent. In such a question it is not only permissible, it is requisite, to consider the circumstances in which the parties contracted.

In the present case the agreement between the plaintiff and the defendant made upon the same date is one of the circumstances. That agreement cannot itself be construed without an examination of the agreement to which it relates, although of course as a matter of construction the latter might be dealt with independently of the former. The main purpose of both agreements was to give security to the plaintiff and to ensure that whatever happened he should receive an annual sum of money of a considerable amount notwithstanding his retirement from the managing directorship of the company. It is evident that a contract saddling the

company /

company with an annual payment of £5000 would involve a burden upon it. Such a burden might make it difficult to dispose of the shares or of the assets in case the defendant should ever decide to relinquish the business himself. That may have been one reason why the alternative sum of £3000 was stipulated for as a payment to be made by him. For it might well be that if he desired to sell the shares he might be tempted to take steps, and that the purchasers would take steps, to attempt to terminate the agreement. It might be that the defendant would desire to terminate the agreement himself and take over the liability personally. Considerable flexibility was therefore left in the agreement between the defendant and the plaintiff in describing the conditions upon which the liability to £3000 should arise. They could not foresee what circumstances might occur. It was therefore drawn to cover every possible contingency in which payment of the £5000 might cease.

There is no reason to suppose that any of the parties contemplated the possibility of the plaintiff's providing real and continuous services to the company. Yet if the defendant ceased to control the company the plaintiff might be called upon to do so as, for instance, by successors in title to the defendant's shares. If he were called upon to perform services and were unable to retire he might quite well find himself in an extremely awkward position. The circumstances are such as to make it unlikely that he was committing himself to a contract to serve as technical expert and consultant to the end of his life. The language in which the agreements are expressed suggests that "retire" was intentionally used in its prima facie sense of voluntary action on his part. The inference is that it was so used because it was left open to him so to retire from his appointment and that it was not intended that he should bind himself to serve throughout his life. The words "retire from his position" in the agreement between him and the company occur in the recitals and "resign from his position" in the first operative

clause /

clause, although in both cases the position referred to is that of managing director. There it is clear that they are convertible terms. His appointment is expressed as the designation of a person to an office or function, and not as a contract to serve or a contract to employ. The designation of a person to an office or function, even although he is designated to it for a term, is usually understood as leaving it open to him to resign. On the whole transaction I am of opinion that the Full Court was right in refusing to import into the agreement a stipulation on the part of the respondent precluding him from resigning his position voluntarily and without the consent of the company.

For these reasons I think that the appeal should be dismissed.

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JUDGMENT MCTIERNAN J.

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JUDGMENT MCTIERNAN J

I agree that the appeal should be dismissed. The second clause of the indenture between the respondent and the company bound it to retain him for the period of his life as its technical expert and consultant if he carried out the duties of that position. But the agreement contains no express covenant on his part that he would serve the company for the period of his life or any shorter period. I agree that in the circumstances of this case there is no warrant for holding that the indenture implies a covenant on the respondent's part to serve it for the period of his life or for any longer period than he should think fit to do so. The action was brought on the second clause of the indenture between the respondent and the appellant whereby the appellant agreed that "if for any reason whatever" the company "failed to continue the appointment" or "if for any reason whatever" the respondent "should retire from or lose such appointment" the appellant would pay him £3,000 per annum during his life from the date from which the appointment should cease. I think that the conditions stipulated in this covenant upon the fulfilment of which the respondent was entitled to payment were fulfilled when the respondent's letter whereby he resigned his appointment as expert and consultant took effect. The terms of the covenant apply if for any reason whatever the respondent should retire. It is necessary to entitle him to payment that he should not only retire but that the result of action taken on his part to that end should cause his appointment with the company to cease. The covenant leaves him free to retire that is withdraw from the appointment for any reason which seems good to him; there is no limitation to grounds for which he would need to find justification. I think that the respondent not having assumed an obligation to remain in the position for any period after the date upon which his letter of resignation

was expressed to take effect his appointment ceased upon that date. The respondent accordingly was entitled to succeed in the action.

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By clauses 2 and 3 of the agreement sued on, being the agreement made between the plaintiff and the defendant on 11th June 1936, the defendant became liable to pay to the plaintiff the sum of £3,000 per annum clear of income tax from the date upon which the plaintiff's appointment as technical expert and consultant of the Company ceased. The plaintiff was so appointed by an agreement of even date made between the plaintiff and the Company. Clause 3 of this agreement provided that the appointment should be for life at a salary of £5,000 per annum. On 14th December 1944 the plaintiff wrote to the Company resigning the appointment from 31st December 1944.

The plaintiff claims that his appointment then ceased and that he then became entitled to the payments provided for by the agreement sued on. Clause 2 of this agreement provides inter alia that these payments should commence if for any reason whatever the plaintiff should retire from the appointment. The right of the plaintiff to retire from the appointment depends upon the agreement between him and the Company. Unless he had a right to retire at will, the Company would be entitled to refuse to accept his resignation and to treat the agreement, as it has done, as still subsisting. The plaintiff's appointment as technical expert and consultant would not then have ceased and he would not have retired within the meaning of clause 2.

The agreement between the Company and the plaintiff does not, like the agreement in Wallis v. Day 2 M. & W. 273, contain an express promise by the plaintiff to give his services to the Company as technical expert and consultant for his life.

There is therefore nothing in the express terms of the agreement to prevent the plaintiff retiring at will, and the case for the defendant depends upon the implication of a promise to that effect. Such a promise should only be implied if, having regard to the language of the agreement and the circumstances under which it was entered into, it is necessary to imply the term to give to the transaction such business efficacy as the parties must have intended. The implication must be of a term that the Court presumes represents the intention of both parties.

There is nothing that I can discover in the language of the agreement to give rise to such an implication, and the circumstances surrounding the execution of the agreement referred to by Rich J. all point to the conclusion that the plaintiff could not have intended to bind himself to continue to give his services to the Company for any longer period than he found convenient.

In my opinion the appeal should be dismissed.