No. 44 of 1951

IN THE HIGH COURT OF AUSTRALIA

LEW IS AND OTHERS

v.

LEY

*v.*

LEY

v.

LEWIS AND OTHERS

# REASONS FOR JUDGMENT

*Judgment delivered at* SYDNEY,

*on* FRIDAY, 29TH. AUGUST, 1952.

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

C.12280/45

LEY V. LEWIS AND ORS.

LEWIS AND ORS. V. LEY.

Nos. 41 and 44 of 1951.

In each appeal, Order as follows:-

Appeal allowed.

Order of the Full Court of the Supreme Court of Victoria set aside, and in lieu thereof Order that the judgment of Coppel A.J. be varied by deleting paragraphs 1, 2, 3 and 5 thereof and so much of paragraph 6 thereof as relates to costs, and substituting therefor the following:

1. That the defendant Lewis pay to the plaintiff the sum of £525, being the aggregate of the amount tendered by him by cheque on 19th June 1947 (£425) and the amount of £100 in respect of five tanks not accounted for in the documents which accompanied the said cheque.

2. That the plaintiff have liberty to apply for an inquiry as to the difference between, on the one hand, £20 per tank in respect of one-half the total number of tanks which the plaintiff was in a position to deliver to the defendant Lewis under the Agreement of 18th March 1947 and one-half the amount of the servicing charges (if any), incurred by the defendant Lewis in respect of the said tanks, and, on the other hand, one-half the value as at 24th May 1947 of the said total number of the said tanks assessed on the footing that the value of each General Lee tank at that date was £240, the value of each General Stuart tank at that date was £170 and the value of each British Medium

Cruiser tank at that date was £150.

3. That the defendant Lewis pay to the plaintiff the amount of the said difference as ascertained upon such inquiry, by way of damages for breach of the contract constituted by the plaintiff's exercise of the option contained in the said Agreement.

3A. That the defendant Lewis have liberty to apply for an inquiry as to the difference between, on the one hand, £20 in respect of each tank which the plaintiff became bound to deliver to the defendant Lewis under the said Agreement but the said defendant has not received, and, on the other hand, the value of each such tank as at 24th May 1947 assessed on the footing abovementioned.

3B. That the plaintiff pay to the defendant Lewis the amount ascertained upon the lastmentioned inquiry, by way of damages for the plaintiff's non-delivery of the full number of tanks which he was bound by the said Agreement to deliver.

3C. Further consideration and further costs reserved.

No order as to costs in this Court or in the Supreme Court up to the date of this order.

Cause remitted to the Supreme Court to do what is right conformably with this order.

LEY V. LEWIS AND ORS.

LEWIS AND ORS. V. LEY.

JUDGMENT

McTIERNAN J.
WILLIAMS J.
KITTO J.

LEY V. LEWIS AND ORS.

LEWIS AND ORS V. LEY.

JUDGMENT

McTIERNAN J.
WILLIAMS J.
KITTO J.

These appeals are brought from a judgment of the Full Court of the Supreme Court of Victoria, which varied a judgment given by Coppel A.J. on the trial of an action. The appellant in the first appeal and the respondent in the second was the plaintiff in the action. The defendants, the respondentsin the first appeal and the appellants in the second, resisted the plaintiff's claim, and two of them, Lewis and Heywood, each counterclaimed for certain relief against the plaintiff.

The claim and counterclaims all arose out of transactions between the parties with respect to army tanks which the Commonwealth Disposals Commission sold in November 1946 at an auction sale at Bandiana, near Wodonga in Victoria. At that sale the plaintiff bought a number of tanks with a view to reselling them after reconditioning. He had a tenancy of five acres of land nearby, and to this area, which became known as Ley's Park, he took the tanks as they were made available to him by the Army. He made some sales with which we are not concerned, and on 24th May 1947 there were at Ley's Park 97 tanks. These were removed by the defendants on that day without the consent of the plaintiff, and none of them has been restored to him. They comprise, as the trial judge found, 73 which are still in the defendants' possession, 10 which the defendants have sold, 10 which were the property of one of the defendants Heywood, and 4 which were delivered to one Athol Murray by agreement between the

parties in satisfaction of a claim which Athol Murray had against the plaintiff. (The plaintiff sued the defendants in conversion and detinue in respect of 96 tanks only, but the discrepancy may be accounted for by the fact that of the four tanks delivered to Athol Murray one (No. 155422) never belonged to the plaintiff). The first question for decision, then, is whether the plaintiff is entitled to relief against the defendants in respect of the 83 tanks other than the 10 which were Heywood's and the 4 which were delivered to Athol Murray.

The decision of this question must depend largely upon the true construction and effect of a written agreement which had been made on 18th March 1947 between the plaintiff, therein called the vendor, of the one part and the defendant Lewis, therein called the purchaser, of the other part, for the defendants base upon this agreement a contention that their removal of the tanks did not infringe any right of possession to which the plaintiff was entitled. The parties executed what are said to be duplicates of this agreement, but the two documents are not quite in identical terms, and the intention of the parties must be decided by consideration of the language of both. It will be convenient, when quoting from the agreement, to use the text of the document which the trial judge regarded as the original, corrected where necessary by reference to the other. The principal provision appears in the form of a recital:

> "WHEREBY the Vendor agrees to sell and the Purchaser to buy such number of Army Tanks at present parked at Bandiana and such other tanks as shall be obtained by the said Vendor from the Army Disposal Commission not being less than 100 which said tanks shall be shown by their Official number in an inventory signed by both parties and forming part of this Agreement upon the following terms and conditions ....."

No inventory was included in the agreement, nor was one ever agreed upon or signed by the parties.

The meaning of the provision quoted has been much debated. The phrase "at present parked", seems clearly to mean "as are at present parked". Bandiana of course refers to Ley's Park; and "such other tanks as shall be obtained by the Vendor from the Army Disposals Commission" refers to the balance of the tanks still to be delivered by the Army to the plaintiff. The phrase "not being less than 100" is clearly intended as a statement concerning the number of tanks which would prove to be comprised in the two defined classes, and amounts to a warranty by the vendor that the aggregate of the tanks which he has to sell in Ley's Park and the tanks he is to obtain from the Commission shall not be less than 100. The last clause of the provision, beginning "which said tanks", read literally, is not part of the description of the tanks sold, (as it would be if the tanks were described as "such tanks ..... as shall be shown .... in an inventory"), but is a substantive provision by which both parties undertake to co-operate in making up and signing an inventory identifying by their official numbers the tanks which should be found to fall within the two classes. Prima facie, then, the provision records three things: first, that the parties agree to sell and buy, respectively, tanks of the two defined classes; secondly, that the tanks comprised in these two classes number in the aggregate not less than 100; and thirdly, that an inventory shall be made up, showing the tanks of the two classes by their official numbers, and when made up shall be signed and form part of the agreement.

Neither the trial judge nor the members of the Full Court of the Supreme Court construed the agreement in this sense. Coppel A.J. expressed the opinion that the agreement provided for the sale of an uncertain number of unascertained tanks to be identified in an inventory signed

by both parties which was to be an integral part of the agreement itself; and, because no inventory was ever signed, he held that no property in any tank passed to the purchaser and he did not become entitled to the possession of any tank. In the Full Court, O'Bryan and Dean JJ. thought that in the absence of the contemplated inventory there was no final or binding agreement between the parties, and that it was intended that no binding obligation should arise until the inventory was completed and signed, Sholl J. took a similar view, which he summarised by saying that the preparation of the inventory was contemplated as being a step essential at one and the same time to complete the description of the tanks the subject of the sale and to complete the agreement itself, so as to render its obligations complete. In thus construing the agreement, each of the learned judges was influenced in a greater or less degree by the surrounding circumstances and the history of the matter, and gave effect to what he considered the parties would be most likely to have intended. In particular, great weight was allowed to the fact that the plaintiff was already bound by contract to sell some of the tanks at Ley's Park to persons other than the defendants; although as against this it should be remembered that the agreement contained an option of repurchase which would enable the plaintiff to perform his obligations to third persons out of tanks passing to Lewis under the agreement if he should need to do so. Again, some weight was given to the fact that not all the tanks parked in Ley's Park belonged to the plaintiff, because he had made sales of some of them under which the property had already passed to the purchasers; but it appears to us that this is really not a matter which assists the conclusion their Honours reached, for we think the implication is clear enough that the first class of tanks to which the agreement refers is confined to such as shall be obtained by the vendor so as to become his property. It may

be mentioned also that against the construction adopted in the Full Court is the clear intention of the parties that at least clauses 1(b) and 5, which are set out later in this judgment, shall have immediate operation.

On the whole, there appears to be no sufficient reason for departing from the prima facie meaning of the agreement, which allows to it an immediate binding force as an agreement for the sale of all the plaintiff's tanks which were at Ley's Park at the date of the agreement and such other tanks as he should thereafter obtain from the Disposals Commission pursuant to his purchase at the auction sale. The provision for the inventory means, on this construction, simply that the parties are mutually bound to record in an inventory the official numbers of the tanks, those already at Ley's Park at once, and those yet to be obtained when they become identified as tanks answering the second description; and the fact that in the event the parties omitted to carry out this term of the agreement is, on this construction, of no consequence for the purposes of the case.

It is necessary, then, to turn to the remaining provisions of the agreement in order to decide, as between the plaintiff or the defendant Lewis, which of them was entitled on 24th May 1947 to the possession of the tanks then at Ley's Park, all of these tanks (except such as belonged to third parties and may therefore be ignored) being tanks covered by the agreement of 18th March 1947. These provisions are contained in five clauses which read as follows:

"1. THE Purchase price shall be Twenty Pounds per tank and shall be payable as follows:-

(a) One Hundred Pounds already paid by the Purchaser to the Vendor receipt of which has already been acknowledged.

(b) Nine Hundred Pounds (£900) on the signing hereof.

(c) The Balance on possession of the balance of the tanks to be sold and completion of the said Inventory.

2. ALL Tanks shall be delivered to the Tank Park at present leased by the Vendor at Bandiana.

3. POSSESSION of each tank shall pass to the Purchaser on acceptance of delivery of such tank at the said park subject to payment as aforesaid.

4. UNTIL such time as the Purchaser shall have disposed of half of the total number of tanks shown in the inventory the Vendor shall have a first option of repurchase of up to fifty per centum of the average total number of tanks referred to in this Agreement at the sum of Twenty Pounds per tank plus any servicing charges which may have been incurred by the said Purchaser PROVIDED ALWAYS that the Vendors right of repurchase shall apply to only such tanks as will be allocated to him by the Purchaser and PROVIDED FURTHER that such option shall not be an exclusive option as against the Purchaser who after having disposed of fifty per centum of the Total tanks referred to herein may proceed to dispose of such other tanks as shall at that date not have been taken over by the Vendor under his said option, the abovementioned option is a continuing option which must be exercised before Fifteenth day of September, 1947.

5. THE Vendor agrees to permit the Purchaser to fence off an area of approximately two acres on any portion of the said tank park for his own exclusive use on payment to the Vendor of a weekly rental of One Pound ten shillings such arrangement to continue during the currency of the Lease of the said Vendor during the convenience of the Purchaser this arrangement to be binding on the Vendor so long only as the Purchaser shall think fit to exercise such right."

The recital which has already been discussed contemplates that additional tanks will be caught by the agreement as they are obtained from time to time, and clauses 2 and 3 seem clearly enough to mean that it is the vendor's

obligation to get to Ley's Park all the tanks of the class secondly described in the recital, and to deliver possession of each tank when available to the purchaser at Ley's Park "subject to payment as aforesaid". The appellants contend that, in view of the clear recognition in clause 3 of the piecemeal nature of the contemplated delivery of possession, the effect which should be given to the words "subject to payment as aforesaid" is that the right to possession of each tank is conditional upon the payment of such moneys, and of such moneys only, as have become payable by virtue of clause 1 at the time when that tank is available for delivery; and they say that the result of this is that by the 24th May 1947 the purchaser had become entitled to the possession of all the plaintiff's tanks then in Ley's Park, because the payments provided for by paragraphs (a) and (b) of clause 1 had been made - indeed another £100 had also been paid, at the plaintiff's request - and, as the inventory had not been completed, the balance of the purchase money had not yet become payable under paragraph (c). They go further, in fact, and say that possession of the tanks seized had actually been given to the purchaser by the plaintiff, for, although no area in Ley's Park had been fenced off for the purchaser's exclusive use pursuant to clause 5 of the agreement, an undefined area had been devoted by mutual agreement to the same purpose; the tanks had been concentrated in that area in the form of a hollow square, and the defendants had busied themselves in that area with the work of reconditioning such of the tanks as needed to be put into going order. There was a conflict of evidence, however, as to whether the tanks were put into a hollow square, the plaintiff asserting that they remained scattered over the whole of Ley's Park; and the trial judge made no finding that possession had been given. Indeed the tenour of his judgment is to the contrary, notwithstanding a reference he made to the plaintiff never having claimed for

use and occupation. It seems right therefore to take it, in favour of the plaintiff, that he did not surrender possession of any of the tanks to the purchaser, and that the removal of the 97 tanks from Ley's Park on 24th May 1947 was a removal of them from the plaintiff's possession.

But are the defendants right in saying that on 24th May 1947 the purchaser had become entitled to have possession of the tanks because no money had become payable under clause 1(c), and therefore the words "subject to payment as aforesaid" in clause 3 did not make the purchaser's right to possession conditional upon the making of any further payment? The answer depends primarily upon the construction of clause 1(c). Upon that there are several points to be noticed. The first is the verbal point that the purchase price is stated to be, not an aggregate sum calculated at the rate of £20 per tank, but simply £20 per tank. In so badly drawn a document this might be of little significance were it not for the fact that the specification of a separate price for each tank fits in with the scheme of the transaction and its inherent probabilities, as will be seen when the following points are considered. The possession to which clause 1(a) refers is shown by clause 3 to be a possession of each separate tank, to be given as the stipulated situation arises with respect to that tank. It is also important to take account of the evident improbability of an intention that the vendor, having been paid only enough to cover the price of 50 tanks, should be obliged to go on delivering tanks, as they became available, in excess of 50, while not being entitled to any further payment until the deliveries should be completed and the inventory signed. Indeed it seems that at the date of the agreement there were 80 tanks already at Ley's Park, and on the defendant's contention the right to possession of all these passed at once although only 50 were

paid for.

These considerations point to the conclusion that the true meaning of clause 1(c) is that, since each tank has its price of £20 and delivery is to be a piecemeal affair, the payment of the balance over the £1000 provided for by (a) and (b) is to keep pace with deliveries. The reference to "the balance of the tanks" is meaningless unless it is a reference to the tanks in excess of the fifty the price of which was covered by the payment of the £1000. "On possession of the balance of the tanks" seems in the context naturally to mean" contemporaneously with the piecemeal delivery of the tanks in excess of fifty." The method of payment for which paragraph (c) provides is therefore, as we read the agreement, a payment of £20 for each tank after the first fifty as possession is delivered, so that the whole balance is paid off as the final delivery is made. The words "and completion of the said Inventory" are added because the completion of the inventory is envisaged as coinciding with the exchange of the last £20 for possession of the last tank.

This construction of clause 1(c) enables a much more natural meaning to be given to clause 3 than that which the defendants ascribe to it. Possession of each tank (and, by implication, the property in it) is to pass to the purchaser on acceptance of delivery at Ley's Park, subject, in the case of each of the first fifty tanks, to the payments of £100 and £900 having been made as mentioned in paragraphs (a) and (b) of clause 1, and subject, in the case of each tank comprised in the balance of the tanks, to the payment of its purchase price of £20 and subject to the completion of the inventory when the last tank is delivered.

The result of adopting this construction of the agreement is that on the 24th May 1947 the purchaser, having paid the plaintiff only £1100, was not entitled, without further payment, to the possession of more than 55

tanks; and this means that the defendants took from the plaintiff's possession, without any right under the agreement so to do, the 28 tanks which make up the difference between, on the one hand, the total number removed from Ley's Park (97) and, on the other hand, the aggregate of the 55 for which the defendant Lewis had paid, the 10 which belonged to Heywood and the 4 which were later delivered to Athol Murray. But, be it noted, that is not to say that they took 28 tanks in respect of which the plaintiff's right to retain possession was absolute. It was not absolute; it was defeasible upon payment by the purchaser of £560 and the completion of the inventory for which both parties to the sale were equally responsible.

On 19th June 1947, the defendant Lewis sent to the plaintiff what purported to be an inventory showing 95 tanks identified by number, and 2 British medium tanks whose numbers were unknown, making 97 in all. There was a note also about a tank hull "agreed price £5", and 4 other tanks whose numbers were unknown but which were still in the Commonwealth Disposal Park and therefore had not been taken by the defendants on 24th May. At the foot of the inventory was a statement that ten of the listed tanks had been sold by the plaintiff to Heywood and were held on his account, two had been sold to and were held on account of Russell Murray, three had been sold to and were held on account of Athol Murray, and one other had been allocated to Athol Murray. These total 16. With the inventory the defendant Lewis sent the plaintiff a cheque for £425, which is £20 each for 21 tanks, plus £5 agreed price for the one tank hull. As 55 had already been paid for, this cheque, if accepted, would have completed the payment for 76 tanks. There is a difference of 5 between this number and the 81 which remain after deducting the 16 mentioned in the statement at the foot of the inventory from the total of 97 which the

inventory included. This difference of 5 is accounted for by the notice which accompanied the inventory, five tanks identified by number being there excepted as not having passed into the possession of Lewis,(and in fact they are five for which the defendant Heywood counterclaimed as having been sold by the plaintiff to him. Only three of these (38379, 38655 and 38795) were found by the trial judge not to have been received by Heywood).

The plaintiff rejected Lewis' cheque for £425, and never demanded payment of any other sum. His rights resulting from the removal of the tanks are shown by the case of Bishop v. Shillito, 2 B. & Ald. 329(n), 106 E.R. 38(n), in which Bayley J. put the comparable case of a tradesman who has sold goods to be paid for on delivery and whose servant by mistake delivers them without receiving the money. The tradesman, said the learned judge, "may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser". So here, if the plaintiff had demanded payment of £560 or the return of 28 tanks, and if the defendants had rejected or ignored the demand, the plaintiff could have sued in trover or, alternatively, in detinue, and thereby have recovered the value of the tanks or the tanks themselves. But he made no such demand. What he did will be mentioned in a moment; but of immediate importance is the fact that Lewis sent to the plaintiff his cheque for the amount due for 21 tanks. Allowing for the £5 for the tank hull, this tender left the plaintiff in the position that, while he was entitled to be paid the £425 as a debt, he had no cause of action in tort for wrongful deprivation of the possession except in respect of 7 tanks, that number being the difference between 97 tanks and the total of 76 (payment made or tendered), 10 (belonging to Heywood) and 4 (delivered later, by arrangement, to Athol

Murray). This difference is equal to the sum of the two which are stated in the inventory to have been sold to and held on account of Russell Murray, and the five which were stated in the accompanying notice not to have passed into Lewis' possession. The trial judge found that Heywood had agreed with the plaintiff to accept responsibility for the two tanks which were to go to Russell Murray; and as his Honour also found that 83 tanks were wrongfully removed (other than Heywood's ten and Athol Murray's four) and no reason appears for disagreeing with this finding, it must be taken that there was no sufficient justification for Lewis' subtraction of the five tanks in his inventory. Unless the agreement of 18th March 1947 has been validly terminated - a question to which consideration must next be given - the defendant Lewis is liable to pay the £425 which he has already tendered and a further £100 in respect of the extra five tanks. If Lewis pays that sum, the plaintiff will have no right to damages for the interference with possession of which he complains, for it follows from what we have said that his right to retain that possession, being defeasible upon payment of £20 per tank (and completion of an inventory for which both parties were responsible), had no greater value to him than £20 per tank, and that must be the measure of his damages: Belsize Motor Supply Coy. v. Cox, (1914) 1 K.B. 244 at 252.

The plaintiff received Lewis' cheque which accompanied the inventory of 19th June 1947, and held it until 8th August 1947. On 12th June 1947 his solicitor had written to Lewis a letter which complained of the unauthorized removal of tanks from Ley's Park and of a failure "to make available sample stock". The letter proceeded to state that the plaintiff "contends that in

view of your breach of the agreement he is cancelling the same and requires you to forthwith return all tanks taken by you when all moneys paid by you will be refunded, or alternatively he has exercised his option contained in the agreement and is prepared to pay you the purchase price of the tanks referred to in the agreement on their delivery to him." To this Lewis' solicitor replied on 1st July, 1947, stating that his client had complied with the provisions of the agreement, and that the cheque in final payment had been accepted by the plaintiff. The latter's solicitor on 8th April 1947 denied that any cheque in final payment had been accepted by the plaintiff, and returned the cheque for £425 which had been sent on 19th June 1947.

The view was taken by the learned trial judge that the removal of the tanks on 24th March 1947 was a fundamental breach of the agreement of 18th March 1947, and that when the plaintiff returned Lewis' cheque for £425 he accepted that breach as a repudiation of the contract. We are unable to share this view. There was no term of the agreement, express or implied, fundamental or other, which amounted to a promise by Lewis not to take possession of any tanks before becoming entitled to do so by virtue of the agreement. What he did on 24th May, as regards tanks of which the plaintiff was then entitled to retain possession amounted to a tort and nothing more. It gave the plaintiff no right to treat the agreement as at an end. The other allegation of breach of the agreement, which was made in the solicitor's letter of 12th June 1947, was entirely without substance. Even if at the lastmentioned date the plaintiff was entitled to terminate the agreement by reason of some breach by Lewis, it is to be noticed that the plaintiff did not unequivocally do so. The letter represented the plaintiff as adopting or intending to adopt alternative attitudes, and there was never a final election

between them. The plaintiff retained Lewis' cheque for seven weeks, indeed for five weeks after Lewis' solicitor had asserted that it was in final payment and had been accepted by the plaintiff. We can see in the circumstances no justification for regarding the agreement as having been validly terminated.

It is necessary now to refer to a fact which so far there has been no occasion to mention. That is that by a letter dated 8th May 1947 the plaintiff in clear terms exercised the right which he had under clause 4 of the agreement to repurchase one half of the tanks comprised in the agreement at the sum of £20 per tank plus servicing charges incurred by the purchaser. The word "average" in clause 4, all parties agree, was intended to ensure that if the plaintiff should exercise his right of repurchase he would get tanks of a quality equal to the average quality of the tanks he sold to Lewis. The clause provided that the vendor's right of repurchase should apply only to such tanks as should be allocated to him by the purchaser, and the plaintiff's exercise of his option therefore did not entitle him to specific tanks.

The option having been duly exercised, the position between the parties before the removal of the tanks from Ley's Park on 24th May was that the plaintiff had not only a right to reclaim possession of 28 tanks (this right being worth, as against Lewis, £20 per tank), but also a right to have tanks of average quality, equal in number to one-half of those he had sold, allocated and resold to him by Lewis at £20 each plus servicing charges incurred. Lewis' obligation to make an allocation has never been performed. On ordinary principles, specific performance should not be ordered, but there should be an order that the defendant Lewis pay to the plaintiff damages to be assessed, equal to the difference between, on the one hand, £20 per tank in

respect of one-half the total number of tanks which he was in a position to deliver under the agreement and one-half of the amount of the servicing charges, if any, incurred by Lewis in respect of this total number of tanks and, on the other hand, one-half of the value, as at 24th May 1947 of the same total number of tanks.

On Lewis' counterclaim there should be judgment in his favour for damages in respect of such tanks as should have been delivered to Lewis under the agreement but have not been received by him, such damages to be assessed at the difference between £20 for each such tank and the value of each such tank as at 24th May 1947.

In the assessment of damages the values as at 24th May 1947 which the learned trial judge arrived at, namely £240 for each General Lee tank, £170 for each General Stuart tank and £150 for each British Medium Cruiser tank, are to be accepted.

The judgment for £680 for the defendant Heywood on his counterclaim will stand.