69/50. 12.

IN THE HIGH COURT OF AUSTRALIA

Fairee

V.

Fanning & anor

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on 27th April 1953

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

C.12280/45

FAIRLIE

v.

FANNING & ANOR.

JUDGMENT (ORAL) DIXON C.J.

- FAIRLIE

v.

FANNING & ANOR.

JUDGMENT (ORAL) DIXON C.J.

This is an appeal by the plaintiff from a judgment given by his Honour Judge Wells in the Supreme Court of the Northern Territory. The action was one in which the plaintiff by his statement of claim claimed damages under five heads which are enumerated in the claims appended to the statement of claim under paragraphs (a), (b), (c), (d) and (e). The defendants filed a counter claim for £205:14:4 for storage charges. The action arises out of the storage of certain goods which were obtained by the plaintiff as a purchaser from Commonwealth Disposals. The events go back to the month of January 1947 and possibly earlier. The defendants have not been represented upon the appeal and that is a circumstance which perhaps does not make it any easier to decide the matter. We have a further embarrassing fact and that is that we have no account of the reasons for the learned judge's decision, except a fragmentary statement which appears in the affidavit upon which leave to appeal was granted.

The plaintiff's complaint in the action is, in effect, that he was deprived of certain goods which were stored for him by the defendants and were not re-delivered to him. There were, however, some demands included in the statement of claim on another basis to which it is not necessary to refer with great particularity. It is enough to say, first, that under paragraphs (a) and (c) of the claims judgment was given for the plaintiff for an amount of £16:8:3, and, secondly, that the item in paragraph (b) which is there stated at £110:19:0, took its place as a deduction from the storage charges to which the

counterclaim related, being there quoted at £118:15:8, and is therefore covered by the judgment given on the counterclaim for the amount of £205:14:4. There is no doubt about the judgment standing in this respect. The judgment on paragraphs (a) and (c) of the claim for £16:8:3 must also stand.

But paragraphs (d) and (e) of the claim remain in controversy; those paragraphs are the subject of the appeal. Paragraph (d) claims £619:1:0 as damages for loss of certain goods which are enumerated in a set of particulars delivered on 4th July 1950. Paragraph (e) of the claim relates to certain paragraphs of the statement of claim, namely paragraphs 9 and 13, in which it is alleged that two electric grinding machines were taken from the defendants' premises to the premises of the Darwin Meat and Cold Storage Co. Limited and were returned with certain breakages and missing parts, the damages claimed being £25. The plaintiff by his evidence made a case, as to most of the items which he claimed, of having put the goods into the custody of the defendants for the purposes of storage and of not having received them back. The defendants by their evidence suggested that they themselves were not prepared to undertake any responsibility except for goods which they had checked into the store and which were shown to be missing by a check made when the plaintiff received goods out of the store. The defendants relied too on the fact shown that the plaintiffs had not in fact claimed damages for the loss of goods which they had stored before they received the account for storage charges. Apparently they did not set up the claim until they had been sued in the Local Court in an action which afterwards was discontinued.

We are not at all clear on what ground the learned judge dismissed the claims in paragraphs (d) and (e) of the claim appended to the statement of claim. It is conceivable that, as to many of the items concerned, he simply was not satisfied with the plaintiff's evidence; but in the affidavit on which leave was obtained, this

excerpt from his reasons appears: "There will be a verdict for the plaintiff for £16:8:3 on the claim and for the defendants on the counter claim of £324:10:0". I pause to state that the sum of £324:10:0 was a mistake, and was based upon the figure which is given as a preliminary figure in the particulars under the counterclaim but which the counterclaim itself shows is subject to the deduction of £118:15:8 leaving a sum of £205:14:4. His Honour corrected the mistake at a sitting of the Court later in the day. The excerpt from the reasons goes on: "The defendant Grosvenor Fanning disclaimed liability and the plaintiff admitted that there had been a change in the storage rate. I am satisfied that the defendants accepted liability only for goods which they checked into the store, no objection was made to Grosvenor Fanning's evidence disclaiming responsibility". Again, I pause to say that that appears to mean that no objection was made on the ground that Grosvenor Fanning's evidence did not prove any special terms limiting responsibility communicated to the plaintiff and agreed upon between the defendants and the plaintiff. The reasons go on: "When Gerald Fanning sought to give evidence to the same effect Mr. Newell objected. It was then too late. The plaintiff did not make any claim for shortages until he was sued in the Local Court for storage charges". That does not purport to be an accurate verbatim report of his Honour's words but the effect, and of course it is not complete.

It seems possible that the explanation of his Honour's judgment is that his Honour placed on the evidence the construction that the defendants had, by a special provision or by special terms, accepted liability only for goods which they checked in and out of the store. That would be an error on the evidence if it were so, and it would be contrary to the admissions on the pleadings. But of two things there seems to be no doubt. One is in relation to the claim for £25 damages under paragraph (e) of the claim, the cause of action being stated in paragraph 13 of the statement of claim. There can be no doubt that the cause of action alleged under paragraph 13 of the

statement of claim was made out. There is no traverse of those allegations contained in that paragraph which entitle the plaintiff to judgment for £25. In the second place, there is an item which is comprised in the particulars delivered on 4th July 1950 in respect of paragraph (d) of the claim. That item is: "Machine woodsanding horizontal". Opposite to it under the heading "Number not redelivered to plaintiff" there appears: "electric motor table stand and runners missing". When the evidence is looked at, and it appears on page 29, line 4 and on page 41 line 43 of the transcript, it would seem that the plaintiff gave evidence that a complete belt sanding machine was delivered at the defendants' store complete with electric motor, table and stand, and that the electric motor was stolen one night, and the table and stand were not delivered back to the plaintiff. It further appears that the defendant, Grosvenor Fanning, when asked about this item, had nothing to say in answer to this evidence, except this: "I remember a sanding machine being delivered to our store and returned minus a motor. I can vaguely remember that machine being picked up by Mr. Fairlie as a machine". On that evidence it is again claimed that his Honour was mistaken, and we think that there can be no doubt that he should have entered judgment for the plaintiff for damages in respect of that particular loss. The amount of damages claimed was the sum of £42:1:0.

The case made by the plaintiff was not a weak one, and the evidence for the defendants cannot be regarded, on a perusal of the record, as by any means conclusive. Having regard to the mistakes which we have mentioned, to the complete uncertainty as to why his Honour dismissed the plaintiff's claim under paragraph (d), and to the possibility that he did so for reasons which could not be entirely supported in law, we think there ought to be a new trial in respect of the items contained in the

particulars under paragraph (d). The judgment for the plaintiff ought to be increased by the amount of £25 which, as I have mentioned, was made out under paragraph (e) on the pleadings as well as on the evidence. There might be something to be said for also entering judgment for the plaintiff for the item of £42:1:0, but, as that forms part of the claim under paragraph (d), we think it is much better to allow it to be dealt with on the new trial which we shall order.

The order will be that the judgment for the plaintiff under paragraphs (a), (c) and (e) of the claim be increased to £41:8:3, and that a new trial be had between the parties on the causes of action stated in paragraphs 9 to 12 of the statement of claim, being the subject of the particulars given under paragraph (d) of the claim. The costs of the first trial are to be dealt with by the judge before whom the new trial takes place. The respondents will pay the costs of the appeal to this Court. Until final judgment in the action, there will be a stay of the judgment on the counterclaim, and a stay also of the judgment on paragraphs (a), (c) and (e) of the claim. It will be for the learned judge who hears the new trial to make the provision which is usual in a judgment on a claim and counterclaim, namely that there be a set-off of the amounts for which judgment is ultimately given on the claim and the counterclaim respectively.