IN THE HIGH COURT OF AUSTRALIA

McGAVIN

V.

OLDHAM

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on MONDAY 17th OCTOBER, 1955.

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

McGAVIN v. OLDHAM

ORDER

Appeal dismissed with costs.

McGAVIN v. OLDHAM

JUDGMENT

FULLAGAR J.
KITTO J.
TAYLOR J.

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JUDGMENT.

FULLAGAR J.
KITTO J.
TAYLOR J.

This is an appeal from the Supreme Court of Western Australia (Wolff J.). The plaintiff's case as set forth in his statement of claim was that by a verbal agreement made by telephone between the defendant in Perth and the plaintiff in Melbourne on 16th November 1953 it was agreed that the defendant would employ the plaintiff and the plaintiff would work for the defendant to assist in the management of the defendant's business in Perth. It was said to be a term of the agreement that the defendant would pay to the plaintiff a salary equivalent to half of the net profits of the business and that the plaintiff's salary would not be less than £50 per week. It was said to be an implied term of the agreement that the engagement should be determinable on reasonable notice, and that three months' notice was reasonable notice. The plaintiff alleged that he commenced working for the defendant as from 14th January 1954 and continued working for him until 12th May 1954, when the defendant wrongfully terminated the employment without due notice. The plaintiff claimed an account of profits, or alternatively salary at £50 per week, in respect of the period from 14th January to 12th May, and also claimed salary at the same rate for a further thirteen weeks in lieu of notice. By his statement of claim he gave credit for £100 paid to him by the defendant. Wolff J. gave judgment for the plaintiff for the sum of £1400. From this judgment the defendant appeals.

The plaintiff and the defendant had met and become friendly in the army during the recent war, and had maintained an irregular correspondence after its termination. In November 1953 the plaintiff was employed in the office of an estate agent in Melbourne and was earning about £30 per week. The defendant

was carrying on the business of a contracting stonemason in Perth. Of this business Wolff J. said:- "It had been doing well, and its prospects seemed excellent. While financial statements subsequently prepared would suggest that the income from the actual stonemason business was in the vicinity of £60 a week, that was not the whole story. According to the balance sheet of the 30th June 1954 the balance of assets over liabilities was £1771. This had been reached after a little over 18 months operating, the commencing capital having been as little as £25. But the balance sheet shows that the bulk of the profits were being ploughed back into the business. In this manner the business had acquired some investments. One in particular was a garage on the Canning Road. By reason of having control of labour and access to materials, the business had been able to build this garage which was completed at a cost of something like £4900 and soon after sold for £9000."

The plaintiff gave evidence that the defendant in Perth telephoned him in Melbourne about 10pm. Perth time (midnight, eastern standard time) on 16th November 1953 and that a conversation took place between them. If the plaintiff's account of this conversation be accepted, there can be no doubt that an offer of employment was made in the terms alleged in the statement of claim and that that offer was capable of such acceptance as would create a contract. The plaintiff says that he asked for a little time to consider the matter, that he talked the matter over fully with his wife and that he telephoned back to the defendant about an hour later saying that he accepted the defendant's offer. This evidence was corroborated to a certain extent by the plaintiff's wife.

The defendant's version of the conversation differed radically from that of the plaintiff. He said that the telephone call was merely a casual call on the spur of the moment and that there was no mention of employment. The plaintiff, he said,

mentioned the possibility of coming to Perth for a holiday and enquired about accommodation and he, the defendant, said that he would be welcome. The two different accounts of the conversation are obviously irreconcilable and it would seem clear, as Wolff J. said, that one party or the other was lying.

Wolff J. accepted the evidence of the plaintiff as to the first conversation containing the offer of employment. A certain letter, however, dated 18th November 1953, from the plaintiff to the defendant was produced which, while quite consistent with the offer having been made by the defendant, was not consistent with that offer having been then unequivocally accepted by the plaintiff. His Honour accordingly found that there had been no acceptance of the offer on the 16th or the 17th November. He held, however, that the offer was accepted at a later date, when the plaintiff came from Melbourne to Perth, and proceeded to take part in the conduct of the defendant's business.

It is thus seen that the contract found by the learned judge was not made on the date alleged in the statement of claim. No amendment of the statement of claim was at any time made, nor was there at any time any application for leave to amend. The defendant accordingly says that, when the only contract pleaded was negatived by the finding that acceptance did not take place on the date alleged as the date of the contract, the case was at an end unless and until an amendment was made, and the only possible judgment was a judgment for the defendant.

It appears from his Honour's notes that counsel for both parties adverted to the alleged variance in their final addresses at the trial, counsel for the defendant asserting that the plaintiff had "pinned himself" to a contract made by telephone on 16th November and counsel for the plaintiff asserting that, if the facts established the claim, the plaintiff was entitled to recovery, even though the contract was made later. It would probably have been wise to ask for leave to amend, and we have no

doubt that, if such an application had been made, it would have been granted. No such application was made. But in Leipner v. McLean (1909) 8 C.L.R. 306, at p. 312, Griffith C.J. observed in the course of argument: "There is perhaps a variance between the evidence and the declaration, but this Court never pays much attention to such matters as can be cured by amendment." And according to the headnote "The High Court on appeal will not give effect to objections based on defects in the proceedings which could have been cured by amendment, but will deal with the case before them as if all necessary and proper amendments had been made." It is not suggested that this course should be adopted where it would result, on appeal, in dealing with one issue upon evidence tendered with respect to another and where the opposing party would be prejudiced thereby. This, however, is not such a case; the whole of the facts were put before the learned trial judge by the parties and no question of prejudice arises. But in any case, as counsel for the respondent pointed out, meeting technicality with technicality, the point about the pleading is not raised by the notice of appeal. The argument based on the absence of any amendment to the pleading fails.

The substantial argument for the appellant was to the effect that no contract was proved ever to have been made between the parties. The case is a peculiar one, and the plaintiff may be thought to have come into court labouring under a heavy burden of proof, for there seems to be a strong inherent improbability (of which counsel naturally made the most) that the defendant, who had not seen the plaintiff for some years, should suddenly telephone him across the continent at midnight and offer him a half interest in a business of a kind in which the defendant appears to have had no experience whatever. We are of opinion, however, that the case was essentially one which turned on the credibility of the parties, and that there was ample evidence to

support the finding of the learned judge that the contract alleged had been proved, though not actually concluded until a later date than that originally alleged.

We have already said that the evidence given by the plaintiff and his wife of the initial telephone conversation clearly, in our opinion, established an offer capable of being accepted so as to create a binding contract. And the making of such an offer is perhaps not so improbable as at first sight appears. The defendant seems, as his Honour said, to have been under some emotional stress at the time. He had had some domestic trouble, and it seems likely that he was at the time very anxious to get rid of, and replace, a man named Muscara, who was a skilled stonemason and was either his foreman or his partner. Indeed, it seems quite probable that the subsequent trouble arose because the defendant later either found it impossible to do without Muscara or found it impossible to get rid of him, and, that being so, decided that the plaintiff had to go. If the defendant's original idea was to replace Muscara, and if he regarded this as a matter of urgency, the telephone conversation of 16th November assumes a less improbable aspect than it might otherwise wear.

It is clearly impossible to challenge his Honour's finding that that conversation took place as related by the plaintiff. Nor does it seem to us possible to challenge the other finding, which is that the offer made at that conversation was accepted by conduct. In other words, there was an offer of a promise for an act accepted by the doing of the act. The defendant, to quote his Honour's judgment, "sold his car and furniture and arranged sea transit for his wife, himself and his child. He arrived in Perth on the 14th January. It so happened that the plaintiff was due for a fortnight's leave from his Victorian employment. He took the leave to coincide with his departure but did not give notice of termination until he arrived

in Western Australia, when he immediately took up his employment with the defendant's business." Actually he resigned from his position in Melbourne by telegram sent from Perth on 25th January, eleven days after his arrival.

Although he was paid nothing for some time, there seems to be abundant evidence to justify his Honour in saying that the plaintiff "immediately took up his employment with the defendant's business". On arrival in Perth he and his wife went directly to the defendant's house at Mt. Pleasant, where they were accommodated for the time being. Immediately on arrival the defendant produced certain books, records and job cards relating to the business. These seemed to the plaintiff and his wife (who had had some accountancy experience) to show that the business was prosperous. They stayed at the defendant's house until 22nd January, when they were required by the defendant's wife to leave. They then lived at hotels until 5th February, when they took a house at Como for six weeks, after which they took a six months' lease of a larger house at Melville. The houses at Como and Melville were used as the offices of the firm, and the plaintiff's telephone number at each house was stated in the firm's advertisements as the firm's number.

From the time of his arrival in Perth the plaintiff accompanied the defendant six days a week, Monday to Saturday, on outside work, i.e. the inspection and supervision of jobs in progress. He kept the books and records of the business, in some cases introducing systematic records where none had been kept before. He attended to the collection of over-due accounts. He was working from the time he arrived. He said: "I had a full time job - very much so - that was from the time I arrived until the time I finished on the 12th May." All this evidence was accepted by the trial judge. It seems to establish that the plaintiff was employed in the business, and it is by no means an unreasonable finding to say that that employment was on the

terms of the offer of 16th November. It was in our opinion quite open to his Honour to regard the plaintiff's entering on his activities in the business as done on the faith of the offer and as amounting to an acceptance of the offer, to hold that what he was doing would be so understood by the defendant, and to regard his subsequent activities as work done in performance of the contract which that acceptance brought into being. There is something to be said for the view that acceptance ought not to be regarded as having taken place until 25th January when the plaintiff resigned from his Melbourne employment. But it was open to his Honour, in our opinion, to find, as he did, that on the day of his arrival the plaintiff was satisfied as to the soudness of the business and that from 15th January onwards he was employed on the terms of the offer of 16th November.

We are of opinion that the appeal should be dismissed.