OF 1956 No 9

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

154

CURRY & ANOR.

V.

O'BRIEN

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Tuesday, 2nd July 1957

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

C.1978/55

CURRY

v.

O'BRIEN

ORDER

Appeal allowed. Judgment of the Supreme Court of South Australia set aside and in lieu thereof order that judgment be entered for the defendant (appellant). Respondent to pay the appellant's costs of the trial and of this appeal.

CURRY

v.

O'BRIEN.

JUDGMENT

DIXON C.J.
WEBB J.
TAYLOR J.

CURRY

v.

O'BRIEN

This is an appeal from a judgment for the sum of £2,800 entered by the Supreme Court of South Australia (Ligertwood J.) in favour of the respondent who was the plaintiff in an action brought in that court to recover damages from the appellant for breaches of contract. As appears from the reasons of the learned trial judge it was alleged by the respondent that he and the appellant had entered into three separate contracts and that substantial breaches of each contract occurred. In the result the respondent failed in respect of two of the causes of action sued upon but succeeded in recovering damages for the breach of a contract relating to the sale and supply of a quantity of 6" fibrolite pipes known as "Italit" piping.

The three contracts alleged were as follows:-

"(i) a contract for the sale to the respondent of approximately 1750 feet of 6" 400 foot head "Italit" piping;

(ii) a contract made contemporaneously with the first contract pursuant to which the appellant undertook to provide the respondent with such plans and such advice as would enable him to instal and operate satisfactorily a system of spray irrigation suitable for use on his property;" and

"(iii) a contract for the sale by the appellant to the respondent of a quantity of irrigation spray equipment for a total sum of £1,050. In the main this equipment consisted of portable and fixed sprays known respectively as 'Rainbow' and 'Newton' sprays and the breach alleged was of a condition that the subject goods should be suitable for use on the respondent's property for "specified purposes."

The respondent failed in his attempts to prove the second contract and it is unnecessary to refer to it further. The other contracts were found to have been made but as to the third contract alleged the learned trial judge found that no breach had occurred. It is mentioned only because it forms

part of the general picture of the relationship between the parties at the relevant times.

Prior to the events which led to the litigation the respondent was a dairy farmer. But about the month of June 1950 he became interested in purchasing a property with access to the Murray River and, with the aid of a system of spray irrigation, in growing thereon fruit trees, grape vines and certain classes of vegetables. He had not, however, had any previous experience either in installing or working a spray irrigation system and in due course he found his way into the office of the appellant in Adelaide who carried on business as a "Spray Irrigation Specialist". There a discussion took place in the course of which the appellant learnt of the respondent's lack of experience and, after the latter had furnished a rough sketch of the land which he had in mind and with various other necessary particulars concerning the land, including the height to which it would be necessary to raise water from the river by means of a pipe line, the appellant quoted an approximate price for a suitable installation. Shortly thereafter the respondent purchased the land in question but since irrigation equipment of a suitable nature was unprocurable at that time nothing more was done at this stage. Subsequently, in April 1951, a further discussion took place. The appellant said that a product known as "Italit" piping, a 6" fibrolite product, was being imported into Australia from Italy and that this piping would be suitable for use as the main supply line or, as it was frequently described in the evidence, the rising main. This main, the appellant said, would be supplied almost immediately and the respondent placed an order with him. It was, however, found impossible to procure supplies of this product immediately and about two months later the order was cancelled. But in the month of January 1952 the appellant learned that a large quantity of "Italit" piping would shortly become available at Mildura and he, thereupon, called upon the respondent at Murray Bridge and offered to supply an appropriate quantity for use on his land. The agreement sued

upon was then concluded but it is convenient to defer consideration of the evidence concerning it until some mention has been made of the other difficulties which arose in the case.

After the making of the contract, the appellant proceeded to Mildura where, according to the oral evidence, he purchased some 5,000 feet of "Italit" 6" piping and, thereafter, arranged for a parcel of approximately 1750 feet to be transported to the railway station at Mildura and there consigned by rail to the respondent at Murray Bridge. He also notified the respondent of the despatch of the piping and, on or about the 16th February 1952, the goods were, on the instructions of the respondent, lifted from the depot at Murray Bridge by a carrier and delivered by him at the respondent's property some two or three miles away. A few days later, when the appellant came to the respondent's property for the purpose of inspecting the piping, the respondent pointed out that a number of the pipes appeared to be damaged at the ends but this the appellant said could be readily remedied by cutting off the damaged portions with a hack-saw. That it was recognised that this damage had been caused before the piping came to the hands of the respondent is clear for there was some proposal that a claim should be made on the Department of Railways. But this was not done; instead the appellant, who had obtained insurance cover in his own name for the journey from Mildura to Murray Bridge, made what the learned trial judge called an arbitrary settlement with his insurance company and received from it the sum of £5 which he passed on to the respondent. The apparent damage was, however, regarded by the parties as a minor matter and it appears to have little significance in relation to the substantial issues in the case.

During the following months the respondent prepared a plan for the irrigation of the respondent's property which consisted of a rectangular block of land comprising about 21 acres with access to the river along a narrow approach

or lane about 16 feet wide and approximately 700 feet long. For a distance of about 500' from the river the surface of this approach was exposed limestone and there were obvious difficulties in the way of excavating for an underground pipe line. There can be no doubt that this feature of the respondent's land, and the consequent difficulty of excavation, became known to the appellant when he visited the property in February 1952 but the evidence is quite indefinite concerning his knowledge of these matters before the sale of the piping was made.

In the following month, March 1952, the respondent obtained money for the purchase of the necessary sprays and other equipment by the sale of a boarding house which he had been conducting and in the month of April he purchased from the appellant a quantity of fixed and portable sprays. Most of this equipment was delivered during the month of May and the early part of June. But about this time the respondent received expert advice concerning the suitability of his land for the proposed venture and for some time thereafter he endeavoured to resell the property. In this he was unsuccessful and about November he decided, apparently, to devote the land to the growing of vines. This called for modifications in the current irrigation plan which had been prepared by the appellant and, upon the request of the respondent, the appellant prepared a final plan with the necessary modifications. It is unnecessary to set out in detail all that was done in the preparation of plans for the work though it is of importance to notice that considerable delay occurred in the installation of the "Italit" piping after its delivery to the respondent. But after the receipt of the final plan the respondent and one, Jaensch, who had been recommended to the respondent as a man with experience in this work, commenced the laying of the rising main. This was completed in February 1953 and, by the end of April, the reticulation system to the sprays and the installation of the

sprays themselves had been completed. Thereupon the plant was, under the supervision of Jaensch, set in operation. The pumping system was said to have been brought carefully into operation and the water pressure was raised gradually to something less than 80 lbs. Meanwhile care was taken to see that the pipes were flushed for the purpose of bringing the sprays into play. But a sudden reduction of pressure, indicative of a break in the rising main was noticed, and when the pump was shut off it was found that a portion of the main had blown out. A substantial repair with cement was effected and a week later the system was set in operation again. On this occasion the main blew out in two places. After further repairs involving a fortnight's delay another attempt was made to operate the system but there were further similar failures. Then in August, with the aid of a new pump, further attempts were made but, again, there were failures in the main. In September the appellant visited the respondent's property and again further attempts were made to operate the system. Again these were unsuccessful.

There is, upon the evidence, no doubt that the system did not operate satisfactorily and that this state of affairs resulted from repeated failures in the main. But, for the appellant, it is asserted that these failures may well have resulted from causes for which he could not, on any view, be held responsible. In particular, it was said that the failures in the main were due to its faulty installation. The main fault in its installation, it is alleged, was that it was not laid beneath the soil over its entire length and this, if not absolutely necessary, was highly desirable. Indeed, the appellant says that he told the respondent that it was necessary for the pipe to be buried and he points to the omission to do this as a highly probable cause of its failure. As already appears the land traversed by the main consisted for some 500 feet from the river of exposed limestone where excavation was not practicable and on this portion of the land the main was laid

on the surface though, according to the evidence called for the respondent, it was bedded in sand and effectively anchored. There was, however, a great deal of conflicting evidence concerning this factor and the learned trial judge was not prepared to entertain this as a probable cause. Nor if, as the learned trial judge found, the main failed on many occasions when the water pressure was much less than that for which the piping was designed, would this appear to have been the cause. Indeed, even in January 1954, the appellant himself did not ascribe the repeated failures which had occurred in the main to faulty laying for in answer to one of the respondent's many complaints he wrote saying:-

> "It is possible that you have now reached the end of transit damages and the breakages now occurring are due to faulty laying of the pipe. In this case the pipe would generally first crack and then open gradually, thus releasing pressure slowly, which may account for the pump not reacting as previously."

This letter was written four months after the appellant's visit to the respondent's property in September 1953 and after many complaints had been made and it is quite inconsistent with any earlier assertion by him that the damage had resulted from improper laying of the main. Moreover, the respondent's description of the character of the damage which might be expected to result from such a cause is quite inappropriate to describe the damage which actually occurred. On the whole this statement in the appellant's letter of the 10th January 1954 strongly supports the respondent's evidence that the appellant had said, in the preceding September, that the cause of the failures was "transit damage".

Theories that the damage was caused by a phenomenon known as "water hammer" or by the use of an unsuitable pump were also discussed and rejected by the trial judge and after consideration of the evidence these theories appear to have been rightly rejected. Again, the suggestion was made that the pipes had been damaged after their receipt by the respondent in the course of handling and laying them, but this

was also rejected by the learned trial judge and the case may be dealt with on the basis that no reason exists for disturbing this finding. At the same time it should be observed, however, that it was incumbent upon the respondent to establish that the pipes had become defective before the risk of the goods passed to him.

The rejection of these possibilities leaves it open to question whether the repeated failures resulted from defects in manufacture or from defects caused by damage which had occurred at some stage or stages in the course of the transportation of the piping from the place of manufacture to its ultimate destination at Murray Bridge. Clearly enough, on the findings of the learned trial judge, the piping was defective but, since there is no evidence to suggest that it was of faulty manufacture, this possibility must be dismissed. On the other hand there is some evidence capable of supporting a conclusion that the piping had at some stage of its transportation from place to place been subjected to rough or careless handling for, as already appears, a number of the pipes were found to be damaged at the ends. The pipes so found to be damaged were approximately one-third of the total supplied and there seems no doubt that this damage was caused during the process of handling and transportation. Moreover, upon the evidence, the appellant appears to have acknowled for some time after September 1953 that the repeated failures may well have resulted from defects caused by careless handling and transportation and, for the purposes of dealing with the appeal, we are prepared to assume that this was so.

But even if this is taken to be established by the evidence there is a further difficulty in the way of the respondent for, if the cause of the defective condition of the piping was "transit damage", it is necessary to determine at what stage the risk of the goods

passed to the respondent. The evidence shows that the goods had been carried by ship to Melbourne, then unshipped and forwarded to Mildura and, subsequently, consigned by rail from the latter place to the respondent at Murray Bridge and there are no grounds for concluding that any such damage occurred at one stage of their transportation rather than at any other. It is, therefore, of vital importance to ascertain the rights of the parties under the contract of sale and to see whether the respondent assumed the risk of the goods at any time before he received them at Murray Bridge.

There was, as already appears, a conflict of

evidence between the appellant and the respondent concerning the precise terms of the conversation which resulted in the contract of sale. The respondent said that when the appellant came to see him and told him that he was in a position to supply him with "Italit" piping the appellant said it would cost about £700. He further said it would be necessary for the respondent to pay that sum in advance and that he was going to obtain the piping from Mildura. Apparently, it was the appellant's intention to purchase a large quantity of piping for re-sale to a number of customers and he required finance for this purpose. Within a day or two the respondent handed a bank draft to the appellant and received in return a receipt in the following terms:-

"Received from V. O'Brian

SEVEN HUNDRED POUNDS. Duty Stamp cancelled 30/1/52

Payment for 1750 ft. 6" Fibro Asbestos Italit Pipe.

RALPH CURRY

£700. 0. 0 "

Shortly afterwards the appellant went to Mildura and having made his purchase, consigned a parcel of approximately 1750 feet of the piping to the respondent at Murray Bridge. The appellant, on the other hand, said that when he saw the respondent at this time he told him that he was in a position to supply him with "Italit" piping of the required capacity. "The price for the quantity that you require" he said, "will be approximately £700 which includes the wharfage on the docks at Melbourne and the costs which have to be incurred in taking the piping from Melbourne to Mildura." He further alleged that he told the respondent that he (the respondent) would have to meet the freight from Mildura, that he was going to Mildura to inspect the piping and that he would send it to the respondent by road, if possible, and otherwise by rail. He agrees that he told the respondent that he required payment of the sum £700 in advance.

The learned trial judge preferred to accept the

respondent's rather general version of this conversation and we can see no reason why we should entertain any other view; there are, in our opinion, good reasons for thinking that the conversation was not precisely as deposed to by the appellant particularly when regard is had to the curious form which the invoice, subsequently sent by him to the respondent, assumed.

Upon the acceptable evidence there can be little, if any doubt, that, whatever the precise terms of the contract the appellant expressly warranted that the "Italit" piping was suitable for use in the rising main of the irrigation system designed for the respondent's property. Indeed, in his cross-examination the appellant admitted that he had so assured the respondent and in the light of the circumstances in which the arrangement was made there can be little, if any, doubt that a warranty to this effect was given. But, even if it would be wrong to hold that the appellant's assurance formed part of the contract, it would be beyond dispute that a condition to that effect should be implied pursuant to s. 14(i) The Sale of Goods Act 1895-1936 (S.A.). Further, if the repeated failures resulted from some defect existing in the pipes before the risk of the goods passed to the respondent, it is clear that there was a substantial breach of this warranty or condition.

The evidence shows that the contract of sale was made in circumstances of the utmost informality and it is clear that nothing was expressly said concerning the place of delivery. This, in our view, is so notwithstanding the appellant's evidence that he told the respondent that he would have to meet the freight charges from Mildura to Murray Bridge. This evidence was not accepted by the learned trial judge who, preferring the respondent's version of the discussion, proceeded to find as a fact that the contract called for delivery at the respondent's property at Long Island. But it is one thing to say that an oral contract for the sale of goods fixes a particular place as the place of delivery and another to say that delivery under such a contract has, in fact, been made at that

place. The two questions are quite distinct and the considerations which led the learned trial judge to his conclusion appear to be relevant to the latter rather than to the former question. The plain fact is that upon the respondent's version nothing was said about the place of delivery or from which it can be inferred that the appellant's obligations under the contract could be discharged only by delivery to the respondent at Murray Bridge or upon his property. The fact that there was no mention of freight or other charges incidental to the carriage of the goods to his property, or, that the respondent may have believed or contemplated that the piping would be sent, or delivered, to him there, does not constitute sufficient ground for thinking otherwise.

The contract was, of course, one for the purchase of unascertained goods by description and it is apparent that the respondent knew that it would be necessary for them, when ascertained, to be forwarded by rail or road from Mildura. And if the contract of sale did not call for the delivery of the subject goods at Murray Bridge or upon the respondent's property it is clear that it was open to the appellant to effect a transfer to the respondent of the property in the subject goods by unconditionally appropriating to the contract goods of the contract description in a deliverable state (The Sale of Goods Act 1895-1936 s. 18 rule 51 (S.A.)). This, of course, could be done only with the assent of the respondent but if, as it was, the contract was silent concerning the place of delivery and if, as it was, it was necessary and permissible for the goods to be forwarded either by rail or road, the respondent must be taken to have impliedly assented in advance to an appropriation of goods to the contract by their consignment by rail from Mildura. But there is more in the case than this for, contemporaneously with the delivery of the goods at the rail depot at Mildura for carriage to Murray Bridge, the appellant forwarded to the respondent an invoice for the goods showing a nett debit against the latter of £2. 14. 8 after giving credit for the sum

of £700 already paid and this invoice not only noted the despatch of the goods by rail on the 4th February 1952 but also specified "Rail Freight Mildura - Murray Bridge to your A/c." The respondent received this invoice and upon the arrival of the goods at Murray Bridge arranged for the piping to be transported by road to his property. Both the railway freight and road charges were thereafter paid by him so that, even if there was no prior assent by him to their despatch by rail from Mildura, it is beyond doubt that his assent was apparent immediately thereafter.

It was, however, suggested that the appellant did not intend the consignment of the contract goods from Mildura to Murray Bridge to operate as an unconditional appropriation of those goods to the contract; it was, it was said, neither his belief nor intention that the appropriation of the goods and their despatch should operate to transfer the property in them to the respondent. This argument is founded on the fact that the appellant obtained insurance cover on the goods in his own name in respect of loss or damage to them whilst in transit to Murray Bridge. Such a circumstance could be of considerable significance but when it is seen that in his invoice, prepared at the same time, the appellant notified the respondent that "insurance charge on above will follow" and that, subsequently, the insurance charge was met by the respondent, that circumstance loses much, if not all, of its countervailing weight. In the circumstances we are of the opinion that no other conclusion is open upon the evidence than that the contract goods and the attendant risk passed to the respondent at Mildura and, since it is impossible, upon the evidence, to say whether it was as the result of damage which occurred before or after their consignment from that place that the pipes ceased to be reasonably suitable for the respondent's purposes, there is no room for the conclusion that the appellant should be held responsible. Accordingly, the appeal should be upheld and the judgment appealed from set aside.