ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

MARIAN

V.

FREMANTLE FISHERMEN'S CO-OPERATIV
SOCIETY LIMITED

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Thursday, 4th November 1958

(13)

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

C.1978/55

MARIAN

v.

FREMANTLE FISHERMEN'S CO-OPERATIVE SOCIETY LTD.

ORDER

Appeal dismissed with costs.

MARIAN

v.

FREMANTLE FISHERMEN'S CO-OPERATIVE SOCIETY LIMITED

JUDGMENT

DIXON C.J.
KITTO J.
MENZIES J.

MARIAN

v.

FREMANTLE FISHERMEN'S CO-OPERATIVE SOCIETY LIMITED

This is an appeal from Wolff S.P.J. dismissing an action brought by Marian against the Fremantle Fishermen's Co-operative Society Limited whereby he sought to recover from the Society under an oral agreement which he alleged to have been made on the 11th June 1955 (i) a sum to be quantified by calculating one-third of one per centum of the total business of the Society for the year ended 30th June 1955, as the balance of his remuneration as secretary and general manager of the Society; and (ii) £3500 as a retiring allowance.

Marian had been employed as the Society's secretary and general manager for five years from 1st July 1954 under a contract in writing dated 30th July 1954. Clause 9 of this agreement made the following provision for his remuneration: "The Secretary shall be paid by the Society a yearly salary of ONE THOUSAND EIGHT HUNDRED AND THIRTY EIGHT POUNDS (£1,838) and also one third per centum on the total turnover of all the business of the Society payable on the 30th day of June in each and every year or as may be agreed between the parties hereto." On 11th June 1955 Marian's employment came to an end in circumstances that will have to be considered more fully later, but before this occurred he had, in May, received the sum of £1838, being the fixed part of his remuneration for the year up to 30th June 1955, but there is no suggestion that any date was substituted for 30th June for the purposes of clause 9 of the agreement and it is common ground that the payment of £1838 was made simply in anticipation of 30th June.

Marian's case was that when his employment came to an end on 11th June 1955 a verbal agreement was made by conversations between himself and the members of the Committee

of Management whereby in consideration of his resignation the Society bound itself to pay him his full remuneration for the year up to 30th June 1955 and in addition a retiring allowance of an amount to be fixed by the Society. It is upon this special contract that Marian sued and claimed that £3500 (roughly one year's remuneration) was the appropriate retiring allowance; alternatively he claimed £3500 as damages for failing to fix and pay an appropriate retiring allowance. At the trial the statement of claim was amended to claim, in addition, damages for wrongful dismissal but this, if it ever appeared as a real issue, disappeared in the course of the trial. At the end of his reasons for judgment the learned trial judge made the following statement: "The whole of the claim is based on the alleged agreement and the special terms to make payments to the plaintiff, and the plaintiff must stand or fall by that claim. I cannot accept the plaintiff's evidence in relation to this claim." It seems that the earlier part of this statement was not directed to the claim for damages for wrongful dismissal introduced by amendment but was directed rather to an argument thrown in in the course of Mr. Seaton's reply, without any issue being raised as to it and without any argument for the Society being addressed to it, that independently of the special contract Marian was entitled under the original agreement to his salary including commission up to 11th June when his employment terminated. The notice of appeal by which this appeal was instituted did not refer to this matter but upon the hearing of the appeal it was in the course of the argument raised as a matter of last resort, and whether it should be regarded as open to the appellant is a matter to which consideration must be given. It is convenient, however, to defer this and to proceed straight away to the issues that arise from the pleadings and from the notice of appeal.

Wolff S.P.J. found that the special contract alleged by Marian had not been proved. Proof of such a contract depended entirely upon the acceptance of Marian's oral evidence and this the learned trial judge could not accept. The party upon whom the burden of proof rests who fails at a trial because he is not believed, undertakes a task of great difficulty in attempting to convince an appellate court either that he should have been believed and should have judgment in his favour, or that the grounds for the rejection of his evidence were sufficiently unsatisfactory to warrant affording him another chance by ordering a new trial. In 1953 in Paterson v. Paterson 89 C.L.R. 212 Dixon C.J. and Kitto J. gathered together the authorities dealing with the position of a court of appeal in relation to the reviewing of findings of fact by a primary judge and emphasised that notwithstanding it is the duty of an appellate court to decide questions of fact as well as of law, it should not upset a finding of fact by a trial judge into which questions of credibility have entered unless, having taken fully into account the trial judge's advantage of seeing and hearing the witnesses, it is convinced that his finding is wrong. Since then the House of Lords in Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370 has referred to the distinction that there is between the finding of a specific fact depending upon the evaluation of evidence after taking into account the credibility of witnesses and a finding of fact which is really an inference drawn from facts specifically found, and has pointed out that in the case of the latter an appellate court will more readily form an independant view than in the case of the former.

The finding which Marian attacks in this appeal clearly belongs to the category of a specific fact depending upon the evaluation of the evidence of Marian, on the one hand,

and that of Del Rosso, the Chairman of the committee, and one Sidoti who acted as secretary of the committee, on the other hand. The criticism that was made of the finding was more that Del Rosso and Sidoti should not have been believed than that Marian should have been believed. It is true that the conduct of Del Rosso and Sidoti in being party to the faking of minutes and the antedating of letters both was reprehensible and went seriously to their credit, but the learned judge was nevertheless not prepared to accept Marian's evidence. In this he was no doubt influenced by his conclusion upon a matter which was not primarily in issue but to which a good deal of attention was paid not only at the trial but upon the appeal, that is, whether Marian had been guilty of malpractice with regard to the purchase of a boat called, without regard to the lineage, singularity and masculinity of the mythical Arabian bird, "Miss Phoenix". What had happened was that Marian, in his own name, had bought "Miss Phoenix" from Australian Petroleum Refinery Ltd. for £3500. This transaction had certainly been completed by 10th June but Marian had known earlier that his offer made on 2nd June 1955 had been accepted. Marian's story was that he had purchased the boat on behalf of a company called "Australian Lobster Co. Pty. Ltd." in which he and his wife were at the time the only shareholders but in which it was intended that the Society should have a controlling interest. His explanation of not disclosing to the Society anything about his negotiations and their successful outcome was that he wanted to have everything hard and fast before he did so to forestall any of the members getting in first and purchasing "Miss Phoenix" for themselves. This story Wolff S.P.J. disbelieved and made the following findings which he based in part upon the oral evidence of Del Rosso, Sidoti and one Miragliotta who had been present as an adviser at a committee meeting: "I find that the plaintiff was given

instructions to purchase the vessel 'Miss Phoenix' on behalf of the defendant Society; that he was told he might use his discretion and tender up to £7,000 for the vessel; that he had previously told the committee that he thought the vessel could be obtained for about £11,000 which would be, according to the plaintiff, in accordance with the rule insisted on by the disposing authority, viz. two-thirds of original cost. The plaintiff tendered for and was successful in obtaining the vessel for £3,500, but he did not inform the committee, or any member of it, although he knew previously to getting the written acceptance that his tender was successful; that it was his intention to negotiate the sale of this vessel to the Australian Lobster Co., of which he intended to become the managing director on a permanent basis. In reality, whilst telling the Australian Petroleum Refinery Ltd. that he was purchasing for the Society, although he was purchasing in his own name, by his conduct at the meeting of the 10th June he indicated that he was buying the boat for himself." These findings have been criticised, particularly the finding that the plaintiff had been instructed to purchase "Miss Phoenix" for the Society, and attention was drawn to the fact that nothing of the sort appears from the minutes, the correspondence, or the amended statement of defence. If it were necessary to come to a definite conclusion upon the question whether Marian was instructed to buy "Miss Phoenix" for the Society, this Court would not readily upset the findings quoted, based as they are upon the primary judge's estimate of the credibility and accuracy of the witnesses, but it is not necessary to come to any concluded opinion on this matter. The whole issue about "Miss Phoenix" is a side issue since its only importance is its bearing upon the probability of the special agreement alleged by Marian having been made. What is important for

this purpose is not whether Marian had been guilty of malpractice by disregarding his instructions and taking advantage of his position to buy the boat for himself, but whether the members of the committee who he alleged made the agreement on 11th June then believed that he had been guilty of some malpractice in connexion with the "Miss Phoenix", and it is abundantly clear that by 10th June members of the committee had got wind of Marian's purchase of "Miss Phoenix" and had at an informal meeting on that day questioned Marian about his purchase and hot words had been exchanged; no explanation, satisfactory to the members of the committee, had been given by Marian. The evidence for the Society was that Marian had asserted that he, like others, was entitled to have a boat of his own, to which the answer was: "Yes, so far as we are concerned you can own any number of boats as long as it is not the 'Miss Phoenix' because you know we were interested in that boat." Marian's evidence was that he asserted that he had not bought "Miss Phoenix" for himself, that in any case the matter was not finalised, and when it was he would have an interest in "Miss Phoenix" his idea being that both "Miss Phoenix" and a barge should be owned by another company in which the Society would have a controlling interest. It was after this altercation and before the meeting on 11th June that Marian decided to resign and communicated that decision to Del Rosso. At the meeting of the committee on 11th June he tendered his resignation by a letter in the following terms: "Owing to pressure of business in my other activities and owing to ill health I wish to inform you that I have reluctantly decided to tender my resignation as the secretary and the general manager of the Society. You may rest assured that in future I will do my utmost to further the interest of the Co-operative in every possible way. Thanking you once more for the confidence you have shown me in

the past." In so far, then, as what happened over the "Miss Phoenix" is relevant to the case it tells against Marian even upon his own account of the matter in that it makes it less probable rather than more probable that the committee would on 11th June have entered into a retiring agreement with Marian to give him the benefits that he now claims.

Taking into account the various matters that have been discussed this Court should not upset the findings of the trial judge that the agreement upon which Marian sued had not been proved.

This leaves the point not raised in the pleadings or by the notice of appeal and not dealt with in the judgment, that Marian was at any rate entitled to one-third per centum of the total turnover of all business of the Society from 1st July 1954 to 11th June 1955. It is fair to infer that the plaintiff's action was framed as it was deliberately and there was good reason for not raising this point by the pleadings; it is possible too that had the point been raised the trial would not have followed the same course as it did. Furthermore any reference that was made to it at the trial by counsel for the plaintiff seems to have been equivocal and was made, without any application for an amendment of the pleadings, after counsel for the defendant had concluded his address. It was raised upon this appeal, as has already been said, as a matter of last resort and like many matters of last resort it is not something that commands ready acceptance. In those circumstances we think it would not be in accordance with the practice which courts of appeal observe to entertain the point and to embark upon an examination of its merits.

For these reasons the appeal should be dismissed.