ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

MANN

V.

DUMERGUE

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Thursday, 22nd August, 1963.

A. C. Brooks, Government Printer, Melbourne
C.7639/60

MANN

v.

DUMERGUE

ORDER

Appeal allowed with costs. Order of the Full Court of the Supreme Court discharged. In lieu thereof order that the appeal to the Full Court of the Supreme Court be dismissed with costs.

MANN

v.

DUMERGUE

JUDGMENT

McTIERNAN J.
TAYLOR J.
MENZIES J.
WINDEYER J.
OWEN J.

MANN

v.

DUMERGUE

The appellant in March 1957 sold the respondent a milk bar and delicatessen business at Coogee for £6,500 and from that transaction there arose legal proceedings in which the appellant claimed damages from the respondent for failing to give a bill of sale to secure the balance of the purchase price outstanding after the payment of £4,500 upon possession, and the respondent counterclaimed for damages for fraud and breach of warranty, alleging that it had been represented and promised that the weekly takings in the business averaged £500 and the weekly profits £100.

The only matter in issue upon the appellant's claim was the amount of damages recoverable for an undisputed breach of the written contract of sale and upon this claim the jury returned a verdict for £2,739 being £2,000 principal and £739 interest. Upon the respondent's pleas of cross-action the jury returned a verdict for the appellant. The respondent appealed to the Full Court of the Supreme Court against the verdict upon his pleas asserting twenty-five grounds of appeal and succeeded on the seventeenth ground - that is "that his Honour was in error in refusing to allow the Defendant to give evidence of conversations with Henry Karpin". The verdicts in favour of the plaintiff were set aside and a new trial ordered. From that order special leave to appeal to this Court was given as it appeared that a decision of this Court may have been misunderstood. Several points were argued but it is convenient to deal first with the ground upon which the present respondent succeeded in the Full Court.

Karpin was an agent who had inserted in The Sydney Morning Herald of 30th January 1957 an advertisement relating to the appellant's business which stated the turnover at £500 weekly and the profit at £100 weekly. While the appellant, who was the first witness, was giving evidence, a copy of this advertisement was produced and marked for identification. As will appear later she was cross-examined upon its contents. Upon the conclusion of her evidence the appellant's case was closed and, after his case had been opened, the respondent was called as a witness. It appeared that he had arrived in Sydney from abroad on 24th February 1957, and a day or two later went to Karpin's office. The course of his evidence at this point was as follows:-

"A. . . . I moved into the Oriental Hotel on the Sunday and I read the newspapers and advertisements on the Monday.

Q. And then on the Tuesday did you go somewhere? Had you been looking at some newspapers, by the way?
A. I was looking at some newspapers on the Monday and on the Tuesday morning, the day before that -

Q. You looked up these newspapers and then on the Tuesday did you go somewhere?
A. Yes.

Q. Where did you go?
A. I went to Henry Karpin's office in 3 Castlereagh Street.

Q. What happened when you got there?
A. Well, he asked me was I looking for a business and I stated I was.

Q. When you say 'he', who was that?
A. Mr. Henry Karpin.

Q. Just tell us the conversation. (Objected to: pressed: rejected. Question pressed on the basis that Mr. Karpin was the agent on the sale)".

The respondent then gave evidence that he had been taken from Karpin's office to the appellant's shop where he said he had some conversation with the appellant herself, in the course of which he told her that he came from Karpin and asked whether it was correct that the weekly takings were £500 and the weekly profit £100. He said that she had confirmed those figures. The transcript record then proceeds:-

"Q. I now go back to the conversation in Mr. Karpin's office. What did Mr. Karpin say to you? (Objected to; rejected)".

As to this and the earlier rejection of the evidence of the respondent's conversation with Karpin, the Full Court said:- "Without analysing the matter in detail, the Court is of the opinion that in these circumstances evidence of the conversation between the defendant and Karpin was admissible. This being so, and in accordance with the principles enunciated in Ballanzuela v. de Gail (sic) (101 C.L.R. 226) and Thatcher v. Charles (104 C.L.R. 57), the Court is of the opinion that there must be a new trial for the action".

The ground upon which the learned trial judge rejected the questions does not appear from the transcript. It may simply have been that the questions were too wide for they were not in terms restricted to what Karpin said to the respondent about the appellant's business. We are prepared, however, to assume, as the Full Court no doubt did, that the second question at any rate might in the circumstances have been understood in such a restricted sense. If so, it was an admissible question and its rejection would require the setting aside of the verdict unless it could be said, adopting the language of Kitto J. in Balenzuela v. De Gail 101 C.L.R. 226

(at p. 237) that the jury, proceeding according to law and within the bounds of reason, could not have been led by the rejected evidence, if it had been before them, to find a verdict for the defendant. In this case - as was the Court in McLellan v. Bowyer 106 C.L.R. 95 - we are ready to go so far, and that for a number of reasons which we shall set out shortly.

First, the respondent's wife gave, without objection, evidence to the effect that Karpin had told her husband and herself that the average weekly turnover was £500 and the average weekly profit was £100. In this way, the very evidence which would no doubt have been given had the questions been allowed was actually given later. Secondly, the advertisement containing representations that the turnover was £500 weekly and the profit £100 weekly was admitted in evidence and it was not in dispute that the appellant was in law responsible for those representations. Thirdly, Karpin was called on behalf of the respondent but was not asked about any conversation with the respondent about the appellant's business. The evidence he gave was to the effect that he had obtained the information which was contained in the advertisement from a Mr. Marchant who was the appellant's brother-in-law and had managed the business for her. Fourthly, it was apparent that, whatever the skirmishing that took place while the respondent was giving evidence - and the trial was hampered by a lot of skirmishing - the issue between the parties was not what Karpin told the respondent about the business; it was what the appellant herself and Marchant told him. The respondent's case was that they had told him that the takings were £500 weekly and the profit £100 weekly and had supported their statements with figures contained in a black-covered exercise book which had not been produced in Court. The appellant's case was that neither she nor Marchant had made such a representation or promise; she denied the respondent's evidence that, after a final

discussion with him about the price, a promise was asked for and given as follows:- "I asked Mrs. Mann about the arrangement and the price and I said, 'Now, if I pay you this amount of money can you give me your personal guarantee that the business is averaging £500 a week with a net profit of £100 a week?' and she said, 'Yes, I give you my word on that. That is correct'". Books and day-to-day records of the business were produced in Court and were admitted by the respondent's counsel to be a true record of the transactions that took place in the shop while the appellant was there. These records showed that the average weekly takings were £445. It was the appellant's case, supported by Marchant's evidence, that these records were actually produced to the respondent and that he bought the business after examining them with an accountant whom he brought to the shop for that purpose. With respect to this aspect of the case the respondent's evidence in chief was as follows:-

"Q. Did you examine the books with an accountant?

A. I do not remember any accountant examining the books. I can say that with sincerity".

His evidence in cross-examination was as follows:-

"Q. You did not say that no accountant did examine the books; you did not say that, did you?

A. There was no accountant with me examining the books.

Q. Did you not bring a man who saw the books of this business?

A. What man?

Q. Just a minute; in the lounge room upstairs, in the presence of Mr. Marchant?

A. What man?

Q. What was your question?

A. Who are you referring to? Was it a relation of mine or a professional accountant?

Q. Could you answer my question, whether you did not bring a man to examine the books, whether he was a relation of yours or a Chinaman or an accountant? Did you not bring a man to examine the books?

A. I cannot remember.

Q. Look, sir, you cannot remember?

A. No, I cannot remember - truly I cannot.

Q. I am putting to you that you saw the same books and the same details which are here, and then told this woman, having seen them, that you would pay her £1,000 less than the price she was asking? Is not that the situation?

A. The only book I saw was the one I mentioned yesterday - the day book.

Q. You brought someone else to see them?

A. I have no recollection of bringing anybody.

Q. Would you deny you did?

A. I am afraid I cannot help you".

It is clear, therefore, that the real issue was whether the respondent had, before he bought the business, been given the correct figures showing weekly takings of £445 or a false set of figures in a faked book to support a misrepresented figure of £500. The jury's verdict in favour of the appellant must have been on the footing that the figures produced in Court were the figures shown to the respondent before the sale and left it of no possible importance whether the two questions put to the respondent about his conversation with Karpin were wrongly rejected. For the foregoing reasons we have reached the

conclusion that the rejection of this evidence, if the questions in the form in which they were asked were admissible, did not warrant setting aside the verdict and ordering a new trial.

Two other grounds taken by counsel for the respondent in seeking to uphold the order of the Full Court should, we think, be mentioned.

While the appellant was giving evidence, counsel for the respondent asked her a number of questions, which were no doubt based upon the advertisement published by Karpin and were probably directed to establishing that the information in the advertisement came from the appellant. Objection was taken, seemingly on the ground that what counsel for the respondent was attempting to do was to prove the contents of the advertisement by this questioning although the appellant had denied any knowledge of its publication. The transcript record of what occurred is as follows:-

"Q. Let us have a look at this advertisement that you say you knew nothing about. Just listen to this - had you just had a - pardon me asking this - but at some time prior to the 30th January 1957 had you had a serious operation?
A. I had.

Q. You would be properly described as a lady vendor who has just had a serious operation?
A. I had.

Q. And the business a milk bar-delicatessen - would that be correct?
A. That is correct.

Q. 'This wonderful business' - just listen to this advertisement and I will ask you some more questions about it in a moment. (Objected to).

Q. I want you to listen to this - (Objected to).

Q. The question is did you not authorise this advertisement?

HIS HONOR: There is a proper way of doing it. The way you were going to do it was not a proper way.

MR. GRUZMAN: I submit that it is, with respect. I desire to take it in parts.

HIS HONOR: You cannot do it that way.

MR. GRUZMAN: Q. I will ask you this: Did you have a price on this business of £6,500, stock at valuation?
A. I did.

Q. Were you prepared to accept £3,000 deposit?
A. No.

Q. With the balance at £25 a week?
A. No, I did not know anything about that.

Q. Nothing about it. You see, what was in fact done in this case was a deposit of £4,500 was paid, wasn't it?
A. That is correct.

Q. And in the ad., you see, were you prepared to accept the balance over four years? (Objected to: rejected)".

Counsel for the respondent complained of his Honour the trial judge's rulings given in the course of this episode. We are, however, far from clear about exactly what took place and cannot regard what his Honour said as a ruling that the respondent's counsel could not ascertain whether the appellant had authorized the advertisement. The advertisement was subsequently put in evidence without objection and the appellant's responsibility in law for its contents was not contested although Marchant did deny that he did anything more than give Karpin the correct figures.

It also appears that the appellant was in fact cross-examined about the various matters appearing in the advertisement. Although certain questions asked in the course of this cross-examination were rejected, they could have been rejected because of their form. In these circumstances the rejection of evidence which did occur affords, we think, no ground for supporting the order setting aside the verdict.

The respondent also sought to hold the order in her favour for a new trial on the ground that the learned trial judge had wrongly allowed the appellant's counsel to begin. This objection was rejected by the Full Court and we agree that in accordance with O. 17 r. 5 the appellant, having the onus of proving damages at least, was entitled to begin.

The appellant having satisfied us that the order appealed from should not have been made upon the ground on which it was made and the respondent having failed to satisfy us of the existence of any other ground upon which it ought to be supported, our conclusion is that the appeal should be allowed and the jury's verdict restored.