

IN THE HIGH COURT OF AUSTRALIA

.....KENNY.....

.....WEBER.....

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered atSYDNEY.....

onTHURSDAY 24 APRIL 1975.....

RM74/30574

BENEDICT MARCUS KENNY

v.

DONALD EDWARD C. WEBER

JUDGMENT
ORAL

MURPHY J.

BENEDICT MARCUS KENNY

v

DONALD EDWARD C. WEBER

This is an action between residents of different states brought under S.75(iv) of the Constitution.

I propose to make findings determining the issues as raised in the statement of claim, the defence and counter claim and the reply.

On the disputed issues, I find for the plaintiff and against the defendant. In particular, I make the following findings:

On or about 20 October, 1970, the plaintiff agreed with the defendant that upon the defendant designing and manufacturing a machine suitable for harvesting ripe tomatoes and delivering the same to the plaintiff, and upon the tomato harvester being reasonably suitable for harvesting ripe tomatoes, the plaintiff would purchase the tomato harvester, the price to be determined in an amount near to \$5000.

The defendant designed and manufactured the machine for that purpose and the machine was delivered in January, 1972, to the plaintiff at the defendant's premises.

The machine was tested on the plaintiff's property at Carroona, New South Wales, in the presence of the defendant in April, 1972. It was not then reasonably suitable for harvesting ripe tomatoes. It was valueless to the plaintiff. On the ground that the machine was not reasonably suitable for harvesting tomatoes, it was rejected by the plaintiff. It remains on the premises of the plaintiff.

The plaintiff, at the request of the defendant and in order to assist in the development of the machine, paid the defendant in several sums a total of \$4500 as advances against the purchase price, should a purchase be made. The plaintiff demanded the repayment of the \$4500 together with \$500 for the transport of the machine from Melbourne to the plaintiff's premises and other expenses. This claim for \$500 has been abandoned.

The plaintiff was entitled to reject the machine on the ground of its unsuitability. In these circumstances, the plaintiff is entitled to the return of the \$4500. No argument was put that he was not so entitled in these circumstances.

As to the counter claim, I find that the elements which go to the counter claim are not established. They are inconsistent with the previous findings which formed the basis of the plaintiff's claim.

It is to be noted that although arrangements were made by one Steptoe, who was the partner of the plaintiff, and although at some stage accounts were sent to the plaintiff by a company called D.E.C. Weber Pty Ltd, it was agreed by counsel for both parties that for the purposes of this case those facts should be ignored and the arrangements treated as if made entirely on behalf of the parties to this action, and that the rights and obligations were those of the plaintiff and the defendant alone.

These findings involve in substance acceptance of the plaintiff's case and rejection of the defendant's. The case has been characterised by inconsistencies, failure of recollection and uncertainties on both sides.

Because some criticism was made of both the plaintiff and the defendant, I wish to make it quite clear that I have accepted both the plaintiff and the defendant as men of integrity, each of whom has endeavoured to give his evidence honestly and to the best of his ability. Although on certain matters, their evidence was admittedly wrong or quite unacceptable, this is in no way to be taken as an indication of untruthfulness. They were speaking about matters which were some time ago and a subject of confusion even at that time. This appears from their various accounts and discrepancies in correspondence and in the pleadings.

Although I find against him, the defendant appears to be a man of talent in the development of agricultural machinery and enjoying a considerable reputation in this field.

The most regrettable feature of this case is that it had to be litigated and that it was not resolved amicably, so that the costs in this case are wholly disproportionate to the amount which was in dispute. There will therefore be judgment for the plaintiff in the sum of \$4500 on the claim, with costs agreed at \$5000. The counter claim is dismissed.

There will be the usual order as to the exhibits.