

SUPREME COURT
BURNS PHILP (SOUTH SEA) COMPANY LIMITED

63

v.

A

M.K.S. PISCES TRADERS LIMITED

[SUPREME COURT (Kermode, J.) 29 March 1979]

B

Civil Jurisdiction

Contract—Work on chattel—entitlement to lien on chattel until amount due paid.

K. Chauhan for the Plaintiff.
G. P. Shankar for the Defendant.

C

Plaintiff sought a declaration it was entitled to retain the possession of a launch owned by the defendant until the latter paid of its debt for the balance of purchase price of the engine installed in the launch and the cost of certain repairs it effected to the engine: alternatively the plaintiff sought to dispose of the launch by public auction, apply proceeds to its total debt.

(The learned trial Judge noted that the matter of repairs was covered by Disposal of Uncollected Goods Ordinance (Cap. 209); the Order sought in these proceedings may not have been necessary. The Ordinance provided that a bailee to repair may sell under its provisions).

D

Plaintiff filed a statement of claim, claiming \$8,590.96.

E

Defendant, in a counterclaim, claimed a set off and damages for wrongful seizure and detention of the launch; it claimed plaintiff was in breach of its contract *inter alia* to insure the hull.

It was admitted the plaintiff delivered the engine to the defendant and installed it in the launch, that the balance of purchase money for the engine was \$5,220. Other admitted facts were:

F

1. In April, 1975 the plaintiff had sole the Kubota engine to the plaintiff for \$2,258 deposit, the balance being the \$5,220 above. It was installed by a Mr Michael, defendant's employee.
2. The balance was to be secured by a Bill of Sale. The defendant refused to sign this because of the alleged failure by plaintiff to insure the hull.

G

The trial Judge found as a fact that the launch was delivered to the defendant by a Mr Michael for certain repairs. He found Michael had authority to do this but that the defendant anyway ratified the contract for repairs. In May 1976 the launch was delivered by Mr Michael and remained in the possession of the plaintiff thereafter.

H

A The Court found that the plaintiff had a lien on the yacht to the extent of the cost of repairs to the pump, which entitled it to retain possession thereof until the account was paid. Further, the costs had not been paid nor the relevant sum tendered.

B The Court considered on the authorities, the lien did not extend to cover the amounts owing to plaintiff other than the cost of repairs to the launch. Tender of the relevant amount would have been excused if the plaintiff claimed a lien for the wrong amount; or made it clear it would not release the yacht unless the full claim (i.e. for the balance of the cost of the engine plus the repairs) was paid.

Meanwhile until payment of these repair costs, the plaintiff was entitled to retain possession.

C *Held:* The launch was lawfully delivered to the plaintiff which had carried out repairs to it. To the extent of the cost of the repairs, plaintiff had a valid lien on the launch, which to date of judgment had not been paid.

Judgment for plaintiff for \$7,377.52. Defendant's claim for wrongful seizure and damages for detention dismissed.

Cases referred to:

D *Associated Motors Ltd. v. Hawke & Co. Ltd.* (1924) 24 S.R. (NSW) 592.
Keene v. Thomas (1905) 1 K.B. 136.
Albemarle Supply Co. Ltd. v. Hind & Co. (1928) 1 K.B. 307.

KERMODE J:

Judgment

E This action was commenced by Originating Summons in which the plaintiff company sought a declaration that it was entitled to retain possession of a launch owned by the defendant company until the defendant company paid for the balance purchase price of the engine installed in the launch, and the cost of certain repairs the plaintiff claimed to have effected to the engine. In the alternative the plaintiff sought a declaration that it was at liberty to dispose of the launch by public auction or as directed by the Court and to apply the proceeds from the sale in satisfaction of the plaintiff's expenses and the balance debt owing by the defendant to the plaintiff.

F In so far as the plaintiff's claim to have effected repairs to the launch is concerned, the assistance of the Court is not necessary as the plaintiff's rights are quite adequately covered by the Disposal of Uncollected Goods Ordinance. That Ordinance provides that the bailee of the property accepted by him for repair may sell the goods if he first complies with the provisions of the Ordinance.

G Realising that the relief sought would not solve the problems faced by the plaintiff with regard to the plaintiff's claim against the defendant for the balance purchase price of the engine, Mr Chauhan for the plaintiff agreed to file a statement of claim and the Court duly made an order that a statement of claim be filed.

H In the statement of claim which was filed the plaintiff claimed from the defendant the sum of \$8,590.96. The defendant in its Defence and Counterclaim claimed a set off and damages for wrongful seizure and detention of the launch.

In its defence the defendant contended that the plaintiff was in breach of its contractual obligation to arrange insurance on both the launch hull and the engine. It is not in dispute that the plaintiff did arrange for insurance on the engine but not on

the hull. Nor is it disputed that the engine was delivered by the plaintiff to the defendant and was installed in the launch.

At the hearing the Court pointed out to counsel for the parties that the question of insurance on the hull of the launch was an issue which the Court did not have to consider. If provision of hull insurance was a condition of sale, on the admitted facts the defendant had clearly not cancelled the contract of sale and purchase and the defendant had suffered no loss as a result of such alleged failure to arrange insurance.

The Defence could have been better framed. In the main it was a general denial of the facts alleged in the statement of claim followed by admissions of certain facts. At the hearing the defendant admitted a number of facts which should have been admitted in the Defence. In particular the defendant did not dispute owing the plaintiff the sum of \$5,220 being the balance purchase price of the engine. This sum makes up the major part of the plaintiff's claim. This failure to admit facts in the Defence which the defendant admitted at the hearing resulted in a more lengthy hearing than was necessary.

Certain facts are not in dispute and I find the following facts to be established:

In April 1975 the plaintiff sold to the defendant a Kubota engine for the sum of \$7,800. The defendant paid a deposit of \$2,580 and the balance purchase of \$5,220 was to be secured by a Bill of Sale the full terms of which were not disclosed to the Court. The engine was installed in the launch by a Mr Francis Michael employed by the defendant. The installation was supervised by Mr Alan Jessop employed by the plaintiff company.

The defendant company refused to execute the Bill of Sale. One reason given for refusing to execute the Bill of Sale was the alleged failure by the plaintiff to arrange insurance on the hull of the launch. It did however advise the plaintiff that it would execute the Bill of Sale if such insurance was arranged.

Notwithstanding that hull insurance was not arranged the defendant used the launch for about a year on its fishing venture. In December 1975 and January 1976 the defendant delivered fish to the plaintiff totalling in value the sum of \$595.25 which sum the plaintiff with the concurrence of the defendant credited to the defendant's account against the amount the plaintiff claimed was owing by the defendant. No other sums of money were paid by the defendant in reduction of the alleged debt.

In May 1976 the launch was delivered to the plaintiff by Mr Michael and has been in the possession of the plaintiff ever since.

Before considering the facts which are in dispute, I would refer to one matter on which counsel agreed at the hearing. It was agreed that the question of what loss, if any, was suffered by the defendant as a result of the plaintiff's alleged seizure and retention of the launch should be deferred. If the defendant succeeds on its counter-claim damages will either be assessed by the Court or the Chief Registrar at a subsequent hearing when evidence will then be led to establish the defendant's damages.

The main dispute between the parties is in connection with the delivery of the launch to the plaintiff by Mr Michael in May 1976. The plaintiff contends the launch was delivered to it to effect repair to the water pump by fitting a water intake-non-return valve. The defendant on the other hand, contends that Mr Jessop

A "corruptly lured the master of the vessel into delivery of the same (i.e. the launch) into the hands of the plaintiff on the pretext of fitting a water intake-non-return valve."

B Mr Jessop gave evidence and said that Mr Michael had come to see him and had told him the water intake pump was not functioning properly necessitating the priming of the pump every time the engine was started. Mr Jessop advised Mr Michael that a non-return valve should be fitted. Mr Michael asked whether the plaintiff would carry out the work when the launch returned from that finish trip. He was advised by Mr Jessop that the work would be carried out but the owner would have to pay for the work. Mr Michael then said that was in order. Mr Jessop instructed Mr Michael to bring the launch to the plaintiff's workshop at Walu Bay and Mr Jessop would arrange for Whippy's Boatyard to slip the launch. Mr Jessop also said that Mr Michael asked for some work to be done on the hull where there were signs of deterioration while it was on the slip.

C The launch was in due course delivered to the plaintiff and Mr Jessop stated the valve was fitted and other work done on the launch.

D Mr Michael told a different story. He said he went to the plaintiff company to purchase a gasket for the engine of the launch which Mr Jessop refused to sell him because the defendant owed the plaintiff a lot of money. He said Mr Jessop asked him to give a good engineering reason to take the boat. By this Mr Michael meant that the plaintiff was seeking a reason to get possession of the launch. Mr Michael said he walked out of the office indicating his displeasure. On his return home he learnt from his wife that while he was away on the launch she had gone to the defendant company to seek a small advance of money and was refused an advance. Mr Michael said he got very wild at this news and he thereupon returned to the plaintiff company and saw Mr Jessop and told him that if he was serious about paying Mr Michael money he, Mr Michael, would deliver the boat to him. Mr Michael said Mr Jessop offered him \$100 which Mr Michael agreed to accept. He said that he gave Mr Jessop an excuse for delivery of the boat to him and that was to fit a non-return valve above the sea cock in the launch. He stressed this was only an excuse so as to obtain the \$100. He delivered the launch to the plaintiff and obtained from Mr Jessop a voucher for \$100 for "services rendered" which he took to the Fijian lady cashier and obtained payment of the \$100. That day he ceased working for the defendant and has not been employed by the company since.

G Mr Jessop denied making out a voucher for payment of \$100 to Michael and denied any bribe. As a result of a subpoena served on him calling on him to produce the alleged voucher, he said that he had caused a search of the company's records to be made and there was no record of any such voucher. He said that if Mr Michael had received a voucher for payment for services rendered there would have been a record of such payment. There was no such record. Mr Jessop freely admitted he did seek to recover payment of all moneys owing by the defendant to his company and the defendant company was advised that the launch would be sold if the debt was not paid.

H Determination of this issue depends on whether I believe Mr Jessop or Mr Michael. On the question of the credibility of these two witnesses I am in no doubt whatsoever that Mr Michael is entitled to no credence where his story varies from the story told by Mr Jessop. Mr Michael told an incredible story of spite and patent dishonesty and was quite obviously not telling the truth when giving his evidence.

Mr Michael repeatedly stressed that the fitting of a non-return valve was merely an excuse. In evidence-in-chief he categorically denied that he had told Mr Jessop the pump was not functioning properly although he did admit there was in fact a minor fault in the pump. Each time the engine stopped he had to prime the pump. In answer to questions from the Court, however, he stated he did tell Mr Jessop that everytime they started the engine they had to prime the pump and it was his suggestion to Mr Jessop and not Mr Jessop's that a non-return valve should be fitted.

Mr Michael claimed only to be an engineer and not master of the launch. He had no master's certificate. He said the master was a Fijian and he, Mr Michael, had no authority to have repairs carried out on the launch. It transpired however from the evidence of Mr Motilal, a director of the defendant company, that the so called Fijian master worked under Mr Michael and was paid by Mr Michael out of the commission the defendant company paid Mr Michael.

In its defence the defendant pleaded that Mr Jessop had corrupted the "master of the vessel". There can be no doubt this is a reference to Mr Michael. Mr Michael also stated that from the time he handed over the launch until the day he gave evidence he had not seen or spoken to Mr Motilal.

Mr Motilal in his letter of 27th May, 1976 addressed to the plaintiff was certainly aware of the then whereabouts of the launch and that the water pump was faulty although he denied such knowledge when he gave evidence despite the clear terms of the letter which he had signed.

At the hearing the defendant contended that Mr Michael had no authority to have any repairs carried out on the launch. Mr Shankar for the defendant company, quoted the case of *Associated Motors Ltd. v. Hawke & Co. Ltd.* (1924) 24 SR (NSW) 592 reported in Vol. 24 The Australian Digest Second Edition at page 670. In that case it was held that the company doing repairs for a hirer under a hire purchase agreement did not have a lien against the owner. It was held that the claim to a lien must be derived from legitimate authority and the hirer had no such authority. The decision in that case turned on the particular facts of the case.

It was held in *Keene v. Thomas* (1905) 1 K.B. 136 that where a person hiring a chattel and undertaking to keep it in repair sends it to be repaired the repairer has a particular lien on the chattel for his charges against the owner. In *Hawke's* case it was a specific provision in the contract that the owner-alone should have any repairs executed. The hirer had no authority to incur the expense. In *Keene's* case because of the undertaking by the hirer to repair, the owner's authority to have repairs effected was implied.

The defendant in its defence did not set up this defence. The defendant company's letter of 27th May, 1976 did not mention any lack of authority by Mr Michael to have repairs to the pump effected. On the contrary the company contended that modification to the pump should be done by the plaintiff free of charge.

On the 14th July 1976 the defendant company again wrote to the plaintiff company referring to the repairs to the water pump and stating the company would immediately pay on receipt of the bill. There is not in this letter any reference to any lack of authority for Mr Michael to have the repairs done. The facts appear to indicate that Mr Michael, the person in charge of the boat since the alleged master was his servant, had authority to order the repairs to be done, but if this is not so, the evidence is clear that the company later ratified the contract for the repairs.

A I believe Mr Jessop to be a truthful witness and do not believe Mr Michael. I hold that the defendant has failed to establish that there was any impropriety in connection with the delivery of the launch to effect repairs to the pump. There was no unlawful seizure of the launch as alleged by the defendant.

B I find as a fact that the launch was in May, 1976 delivered to the defendant company by Mr Michael for repairs to the pump and that, if Mr Michael had no authority to order the repairs which on the facts I consider he did have, the defendant ratified the contract for repairs. The defendant's conduct after becoming aware of the repairs in any event amounts in my view to a representation that Mr Michael had the company's authority to have the repairs done.

C I am satisfied that repairs to the pump were effected by the plaintiff and to the extent of the costs of those repairs I hold that the plaintiff had a lien on the launch and was entitled to retain possession of the launch until those costs were paid. To date the cost of repairs had not been paid by the defendant.

While Mr Jessop's letters to the defendant company did not clearly indicate what moneys the defendant had to pay to obtain possession of the launch it is clear from his evidence that the plaintiff was seeking settlement of all outstanding accounts.

D The defendant at all relevant times had legal advice particularly that of Mr Parmanandam who, Mr Motilal said, wrote some of the letters in reply to Mr Jessop's letters. It is clear from the correspondence that the defendant was seeking an account for the repairs to the pump and experienced some difficulty in prevailing on Mr Jessop to furnish particulars of that account. A docket showing particulars of the repair account for \$773.15 was eventually sent to the defendant under cover of Mr Jessop's letter of the 3rd August, 1976.

E On payment of this account or tender of the sum of \$773.15 by the defendant to the plaintiff, the plaintiff would have been legally bound to deliver the launch to the defendant since the lien did not extend to cover the other amounts claimed by the plaintiff.

F The defendant did not allege in its Defence that the sum of \$773.15 had been paid or tendered but merely alleged that it had offered to pay the cost of repairs but the plaintiff had demanded payment of all outstanding accounts. The defendant sought to establish this allegation by calling the daughter of Mr Motilal as a witness. What she related was not put to Mr Jessop when he was cross-examined as it should have been.

In her evidence-in-chief she said she saw Mr Jessop who told her he would only release the boat on payment of the whole account—that is for repairs and balance cost of engine.

G When cross-examined however, she said she had taken a blank cheque with her signed by Mr Parmanandam and Mr Motilal who had told her to pay the cost of repairs. She did not know the costs of repairs. She did not inform Mr Jessop she had the cheque and did not enquire how much the repairs were or the amount of the debt. She said she merely said she was ready to pay and have the boat released.

H This witness did not impress me at all and I do not consider any of her evidence can be believed. It was apparent that she was not telling the truth. Her father, the witness Motilal, in evidence-in-chief merely stated he had sent his daughter to the plaintiff company about the boat. Under cross-examination he said he had told his daughter to pay the account, which account he did not know, and she took a company cheque with her.

In answer to questions by the Court Mr Motilal stated he had not previously at any time attempted to pay the plaintiff's account for repairs to the pump and he had no knowledge of giving instructions to anyone to pay that account. Both Mr Motilal and his daughter were most unsatisfactory witnesses and I cannot accept their evidence.

Having ascertained the amount which the plaintiff claimed for carrying out the repairs the defendant should then have paid or tendered the amount of the repair account. Tender would be excused if the plaintiff claiming a lien for the wrong amount made it clear that it would not release the launch unless its full claim was satisfied and that claim was wrongful.

While Mr Jessop was clearly seeking to obtain payment of all moneys owing to his company, in his correspondence he was careful not to be too explicit about the plaintiff's claim to a lien and what bill had to be paid. In Court Mr Jessop refused to commit himself when asked if he had intended to retain possession of the launch until all accounts were paid. The defendant had legal advice and sought and obtained particulars of the repair account and stated it would pay the account. On the facts before me I do not consider the defendant has established that the plaintiff would not release the launch if the repair bill was paid of if there had been a tender of the amount of the bill.

In *Albemarle Supply Co. Ltd v. Hind & Co.* (1928) 1 K.B. 307 Scrutton L.J. at p. 318 stated:

"It was next said that the lien for repairs was lost inasmuch as it was originally claimed for a larger amount and a different cause than the right one. I have considered the numerous authorities cited, and in my view the law stands as follows: A person claiming a lien must either claim it for a definite amount, or give the owner particulars from which he himself can calculate the amount for which a lien is due. The owner must then in the absence of express agreement tender an amount covering the lien really existing. If he does not, unless excused, he has no answer to a claim of lien. He may be excused from tendering (1) if he has no knowledge or means of knowledge of the right amount; (2) if the person claiming the lien for a wrong cause or amount makes it clear that he will not release the goods unless his full claim is satisfied, and that claim is wrongful. The fact that the claim is made for more than the right amount does not matter unless the claimant gives no particulars from which the right amount can be calculated, or makes it clear that he insists on the full amount of the right claimed."

The plaintiff was seeking to recover payment of all moneys owing to it. It had a valid lien for the cost of the repairs it carried out on the launch. Even if it wrongly claimed a lien for all moneys owing to it that did not destroy the lien it had on the launch. It did furnish particulars of the repair account to the defendant. There was not in my view any excuse for the defendant not tendering the costs of the repairs.

I hold as a fact that the launch was lawfully delivered to the plaintiff which carried out repairs to the launch and to the extent of the costs of the repairs it had a valid lien on the launch which costs to date have not been paid. Until those costs were paid the plaintiff was entitled to retain possession of the launch.

It follows from this finding that there is no merit in the defendant's counterclaim which is dismissed with costs to the plaintiff.

A While I do not have the full terms of the sale there is no dispute that it was on terms and one of those terms was the execution by the defendant of a Bill of Sale which it refused to execute. This refusal constituted a breach of the contract and under section 50(1) of the Sale of Goods Ordinance the plaintiff is entitled to claim for the balance purchase price of the engine.

B Mr Varea's affidavit dated 2nd December, 1977 filed in this action indicates the balance purchase bore interest at the rate of \$10 per centum per annum. The plaintiff claimed interest from 1.6.75 to 31.12.75 amounting to \$494.82. Mr Chauhan at the hearing in his final address asked for interest down to the date of judgment. It was open to Mr Chauhan to amend the plaintiff's claim by seeking to claim interest to the date of judgment but the statement of claim limited the claim to 7 months' interest and this is all I allow. Since the debt carried interest by agreement the Court can not in any event invoke Section 3 of the Law Reform (Death and Interest) Ordinance and accede to Mr Chauhan's request.

C Details of the items which make up the sum of \$8,590.96 claimed appear in paragraphs 8 and 11 of the Statement of Claim. Some of these items are expenses paid by the plaintiff and receipts for payment should have been produced. Mr Jessop gave evidence about the following items—

	\$
D Balance of purchase price	5,220.00
Insurance premia paid	1,567.80
Costs of Bill of Sale	25.00
Toilet supplied	240.00
Cost of repairs	773.00

E He was not cross-examined on any of these items. The Defence as I have already stated was a general denial and the defendant did not condescend to particulars as regards paragraphs 8 and 11. While an attempt was made through Mr Michael, whose evidence I have rejected to establish it was not necessary to slip the vessel to effect the repairs I am satisfied from Mr Jessop's and Mr Ah Kee's evidence that slipping was necessary.

F Mr Jessop mentioned there was an attempt by someone, he did not know who it was, to take possession of the launch. This caused the plaintiff to arrange to slip the vessel and store it in the government ship yard. The sum of \$320 was paid to Titan Crane Services for the use of its crane. He admitted this sum was not part of the cost of repairs. The defendant can not on the evidence before me be held responsible for this expenditure.

G On the evidence before me the plaintiff did not establish its claim to the following items:—

	\$
Paragraph 8 Statement of Claim Crane Hire charges	280.00
Paragraph 11 Statement of Claim Charges for removal of the boat from the Slipway yard	613.44
Titan Crane Service charges referred to above	320.00
H	1,213.44
	1,213.44

I disallow the claim for the items totalling the sum of \$1,213.44 which sum must be deducted from the claim of \$8,590.96 leaving the sum of \$7,377.52 for which sum there will be judgment for the plaintiff. A

Judgment for the plaintiff for the sum of \$7,377.52 and costs.

Judgment for the plaintiff; Defendants counterclaim dismissed.

B