Supreme Court Notes

by Anita Del Medico

TAXATION - STATUTORY INTERPRETATION - S.4(1) Taxation (Administration) Act 1978 - whether "wet hires" fall within the definition of "hiring arrangements" - liability to pay stamp duty.

Brambles Australia Ltd -v- Commr. of Taxes

20.10.93 COA: Angle, Mildren & Morling JJ.

The appellant company, as part of its business in the NT, offered cranes it owned for hire, either with or without the services of a crane operator, being an employee of the appellant. An arrangement known as a "wet hire" was one where a crane was offered for hire on the basis that it be accompanied by an employee of the appellant, who operated the crane when used by the hirer/customer. On site, although the customer directed the work to be done, the crane operator was at all times responsible for his machine. If the work could not be performed in one day, the crane would remain on the customer's site overnight. The customer determined what work the crane and its operator were to perform, where they were to work and the periods when the crane was to be operated.

The principal question for determination on appeal was whether "wet hires" were hiring arrangements within the meaning of that term as defined in S.4 of the Taxation (Administration) Act 1978 (the "Act"). If so, then instruments of the appellant company evidencing the hiring arrangements were liable to stamp duty by virtue of S.4 of the Stamp Duty Act 1978 (and Schedule 1 thereto). The gist of the definition of "hiring arrangement" in S.4(1) of the Act is that it "...includes an arrangement under which goods are or may be used at or during any time by a person other than the owner of those goods..."

HELD, per curiam, dismissing the appeal with costs (but reserving formal orders to this effect until the appellant had considered whether a further ground of appeal should be pressed),

1. The question whether the definition of "hiring arrangement" in S.4(1) of the Act is exhaustive must be determined by ascertaining what was the intention of the legislature. The draftsman of S.4(1) was careful to use both "means" and "includes" when defining the various terms referred to in the subsection. In these circumstances, it may be readily inferred that when he used the word "includes" he did not intend the definition to be exhaustive. It seems reasonably clear, in the context of the Act, that the draftsman deliberately used "means" when he intended a definition to be exhaustive. The definition of "hiring arrangement" is therefore not exhaustive and accordingly the next question to be considered is whether the contractual arrangements for "wet hires" or cranes falls within the ordinary meaning of the words "hiring arrangement".

Y. Z. Finance Co. Pty. Ltd. -v- Cummings (1964) 109 CLR 395 @ 401-2, followed.

2. Considering all of the circumstances under which the appellant hired its cranes, the arrangements it made with its customers fall within the ordinary meaning of "hiring arrangement". The appellant and its customers correctly used the terms "hire" and "hirer" when describing their contractual relationship. The expression "hiring arrangement" is of wide import and is apt to refer to contracts of the kind entered into by the appellant and its customers. The ordinary meaning of "hire" in the Oxford English Dictionary is "To procure the temporary use of (any thing) for stipulated payment". Although misuse of the language of the parties to a transaction when describing it cannot alter the nature of it, it should not be assumed that the appellant and its customers were unaware of the legal significance of the terminology they used to describe their contractual relationship.

[It was submitted by the appellant that a hiring arrangement cannot come into existence in the absence of a bailment by the owner of a chattel to the person who hires it; that a bailment cannot occur in the absence of the passing of possession of the chattel and that since possession of a crane does not pass under a wet hire arrangement, such an arrangement is not, in law, a hiring arrangement.]

3. This argument by the appellant attributes to the words "hiring arrangement" a more technical meaning than they have in ordinary English usage. But even if the more technical meaning be adopted, arrangements made by the appellant for wet hires of its cranes still fall within the meaning of S.4 of the Act. A review of the Canadian cases referred to by the appellant and examination of Palmer on Bailment's analysis of the legal nature of such hiring arrangements, indicate that contracts for hire such as the appellant's "...will generally produce a bailment." (Paton @ 470, 483, & 488)

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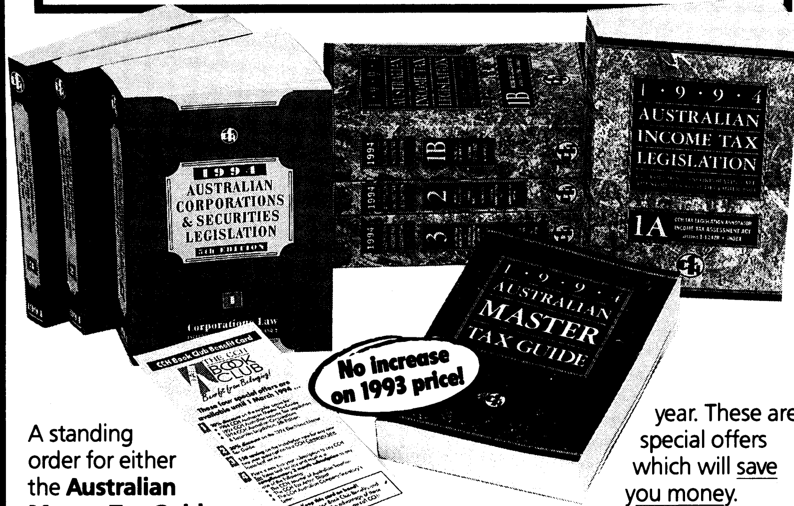

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Each case however, must depend on its own facts. Here, what the operator of the crane does when it is on wet hire to a customer is done at the direction of the customer and not the appellant. During the period of hire by the customer, no other person can lawfully take possession of the crane against his will, nor take it out of his control. Certainly neither the crane operator nor the appellant has that authority. The fact that the operator remains the employee of the appellant does not mean he is not acting under the direction of and on behalf of the customer, <u>nor does it alter the essential nature of the arrangement made between the appellant and the customer, which is an arrangement of the hire of a crane</u> - the requirement that a customer accept an employee of the appellant as operator of the crane on wet hire is but one of the conditions of hire. It is not necessarily inconsistent with the bailment of a chattel that the bailor's employee should operate it whilst it is bailed.

Furthermore, it is relevant to consider the terms and conditions of hire applicable to wet hires since 1987 - these oblige the hirer to indemnify the appellant for loss of or damage to a crane when hired. It is difficult to understand why such an obligation was on hire to a customer it would be regarded as being in his possession. Clause 4 of the terms of hire also provide that the appellant has the right to determine "the type of operation in which the PLANT may reasonably be employed". This clause implies that the customer will be the user of the plant (the crane) in operations approved by the appellant - he arranges for the crane to be operated by the appellant's employee and instructs him on the work to be carried out.

<u>Acadia Road Contractors Ltd -v- Canadian Surety Co.</u> (1977) 81 DLR (3d) 169; (1978) 27 NSR (2d) 605;
<u>Great Lakes Steel Products Ltd -v- M.E. Doyle Ltd et al.</u> (1968) 1 DLR (3d) 349;
<u>Allison Concrete Ltd -v- Canadian Pacific Ltd</u> (1973) 40 DLR (3d) 237, considered.

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Coast Crane Co. Ltd -v- Dominion Bridge Co. Ltd et. al. 28 DLR (2d) 295, considered, but doubted. [Other Canadian cases mentioned]

4. Although of the view that the definition of S.4(1) is not exclusive, consideration was given to the appellant's argument that the meaning of "hiring arrangement" is to be determined by reference only to the words "an arrangement under which goods are or may be used at or during any time by a person other than the owner of those goods...". The central feature of this argument is that although cranes which are wet hired are used for the purposes of the hirers, they cannot be said to be used by them. For reason already outlined, the fact that a crane is supplied with an operator does not have the consequence that the customer fails to gain possession of the crane. Thus, if the appellant's argument that the definition of "hiring arrangement" is exhaustive were to be accepted, its wet hiring arrangements would still be caught by the definition. The appellant's customers who hire cranes with an operator use the cranes for their own purposes, ie., to carry out the building operations upon which they are engaged. Accordingly, they are "goods..used..by..a person other than the owner".

Commr of Taxation -v- Brambles Holding Ltd (1991) 28 FCR 451;
Otto Aust. Pty Ltd -v- Commr of Taxation (1991) 28FCR 477, considered.

[It was further held that the appellant had not shown that the respondent had wrongly exercised its discretion under S.96(6) of the Act, or that the Court should itself fix penalty duty at amounts lower than those fixed in the assessments.]

Appeal against decision of a single judge that a particular "hiring arrangement" fell within the definition of Section 4(1) of the Taxation (Administration) Act 1978.

I. Gzell QC and S. Southwood, instructed by Waters James McCormack, for the appellant.

C.E.K. Hampson QC and M. Spargo, instructed by the Solicitor for the N.T., for the respondent.

LOCAL COURT APPEAL - painting contract - implied warranty of result

Zorba Structural Steel Co. Pty Ltd -v- Watco Pty Ltd

5.11.93Angel J

The respondent was the contractor to build five houses in Arnhem Land for the N.T. Government - three at Oenpelli and two at Maningrida. The respondent had subcontracted for the appellant to fabricate the steel work for the houses and to prime paint the steel work. The appellant agreed to paint the steel for $2,000.00. Painting commenced on the 31 March 1992. On 3 April 1992 an employee of the Dept of Transport and Works as agent for the respondent directed the appellant to strip back Duragal coating on the steel and to repaint it with a certain type of Taubmans primer paint. The respondent agreed to the pay the appellant $2,000.00 plus the extra cost of the replacement paint. The Dept of Transport and Works inspected the steel upon completion and transported to Maningrida and Oenpelli where the primer paint peeled and powdered and was useless to the respondent. The cost of repainting was $3,750.00. No expert evidence was called before the Magistrate to say what caused the failure of the paint. The Magistrate held that even though there was no expert evidence he could infer "that the task of priming beams bearers and columns was a failure". He dismissed the appellant's claim for work done, allowed the appellant's claim for the paint ($937.00) because it had not been proven to be defective, deducted that sum from the cost of repainting ($3,705.00) and awarded the respondent $2,812.00 on the counterclaim for breach of contract. The appellant argued that in the absence of expert evidence as to the cause of failure, the respondent had failed to discharge its burden of proof in proving a breach of contract which remained a mere matter of conjecture, citing Luxton -v- Vines (1952) 85 CLR 353 @ 358. It was submitted that the respondent had failed to prove either defective workmanship or defective materials and that the magistrate ought to have dismissed the counterclaim.

HELD, appeal allowed; judgment on the counterclaim reduced from $2,812.00 to $813.00. Each party having partly succeeded and partly failed, no costs were awarded on the appeal.

1. The failure of the paint, whatever its cause, constituted a breach of implied warranty of result. Whether the failure was caused by bad workmanship or an improper method of painting or bad materials is irrelevant. The end result was not as was impliedly warranted, that is, a workman-like prime painting job suitable for over painting on site at Oenpelli and Maningrida. In a claim for work done and materials supplied a plaintiff must prove, first the contract, secondly its performance, and thirdly its value. Here the performance was useless. The appellant had contracted to paint the steel with an undercoat. It was implicit in that undertaking that the undercoat would be suitable to paint over with a coat of decorative paint and be such as to support that overcoat for its natural lifetime.

Cooper and Ors -v- Austn. Electrical Co. (1922) Ltd (1922) 25 WALR 66, followed.

2. The appellant's claim for $2,937.00 was properly dismissed by the Magistrate. The Magistrate wrongly deducted the claim for the paint ($937.00) from the cost of repainting. The respondent's measure of damages as the excess cost over the contract price of having the contract performed viz. $813.00 being $3,750.00 less $2937.00.

Appeal pursuant to Section 19 of the Local Court Act.

A. Wyvill, instructed by Elston & Gilchrist for the appellant.

J. Terry, for the respondent.