HELICOPTER SALES (AUSTRALIA) PTY. LTD. v. ROTOR WORK PTY. LTD. AND ANOTHER[1]

Contract for work and materials — Implied warranties — Nominated manufacturer supplier's known inability to check quality — Latent defect

While the plaintiff's helicopter was flying over Circular Quay, Sydney, a bolt retaining in position the tail rotor blade failed; the helicopter was lost and its occupants killed. The failure was due to a machining defect in the bolt which had occurred in its manufacture.

The defendant, under contract with the plaintiff, had undertaken the servicing of the helicopter and in the course of regular servicing had fitted the defective bolt. The defendant was a wholly owned subsidiary of the plaintiff. The plaintiff thus knew of the lack of technical equipment in the defendant's possession and of its inability to check helicopter parts for latent defects. The whole business of aeronautical engineering is supervised, rigorously, by the Department of Civil Aviation. Under its orders, all materials used in the maintenance of aircraft have to be procured under the cover of a release note or certification document. In this case, the bolt was accompanied by a release note when it was supplied to the defendant by the Australian distributor of Bell Products, the bolt having been manufactured in America. The release note stated that the part had been 'inspected and tested' and complied with the design number quoted.

The case for the defendant was that under these arrangements the suppliers of the bolt, the Bell agents, had complete responsibility for the quality of the bolt. There was no express term in the contract between the plaintiff and the defendant as to quality. The whole case centred on whether a warranty of quality ought to have been implied. The court held that it was inappropriate to discuss a similar implied warranty providing for fitness for purpose in this case as, in substance, a warranty for fitness for purpose and a waranty of quality amount to much the same thing unless some special purpose is made known to the supplier.[2] Jacobs J. put it in the following way:

> I would prefer to say that the materials supplied must answer the specified description in their fitness for purpose and therefore in their quality, or without change of meaning in their quality and therefore in their fitness for purpose.[3]

The High Court concerned itself solely with a consideration of the implication of a warranty of quality.

At first instance, the plaintiff had succeeded in its action against the defendant, the judge finding a breach of both an implied warranty as to quality of the bolt and of a warranty as to compliance with the manufacturer's drawings. The defendant, in turn, obtained judgment against the third party, the Australian distributor of the bolt. It was this original third party who appealed to the High Court against the

[1] (1974) 4 A.L.R. 77: High Court of Australia: Barwick C.J., Menzies, Stephen, Mason and Jacobs JJ.

[2] It is submitted that this is the true reason why there was no need to discuss a separate warranty of fitness for purpose. The actual reason given by the majority of the High Court seems to depend on the use of the trade name for the part supplied and the supplier's inability to test such part. By analogy with the implied term under s. 19(a) of the Goods Act 1958 (Vic.) these reasons ought not to be taken as excluding a term which would otherwise be implied: see fn 28 *infra*.

[3] (1974) 4 A.L.R. 77, 88.

decision for the plaintiff, upon which its liability was founded, along with the defendant's.[4]

The High Court, by a majority, allowed the appeal.[5] It excluded the notion that a warranty as to the quality of materials could be implied into the contract for work and materials as it existed between the plaintiff and the defendant. In reaching this decision, the High Court maintained that it in no way qualified the decision of the House of Lords in *Young & Marten v. McManus Childs Ltd.*,[6] in which it was affirmed that such implied warranties were able to be implied into contracts for work and materials. This result was in accord with an earlier case of *G. H. Myers & Co. v. Brent Cross Service Co.* where Lord du Parq held:

> that a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them unless the circumstances of the contract are such as to exclude any such warranty.[8]

The High Court took comfort in the latter part of this quotation, and indeed, in the House of Lords' decision in *Gloucestershire County Council v. Richardson*,[9] decided immediately after the *Young & Marten* case, where no warranty was implied into a contract for work and materials. The majority viewed the parties' contract in this case as one in which the 'circumstances' were such as not to permit any implication of a warranty.

The contract between the plaintiff and the defendant was one for work and materials. It was not for the sale of goods. The supply of goods was incidental to the essence of the contract — the labour to be provided in servicing the plaintiff's helicopters. It has been pointed out that often the distinction between these types of contracts is a fine one.[10] It has been observed also that it remains somewhat of a curiosity that in the nineteenth century there was sufficient common law authority on the sale of goods to result in the Sale of Goods Act 1893 as a codification of it, but that there was no equal body of decision to support the same outcome for contracts for work and materials.[11] Yet this is the case. The warranties to be implied, if at all, are those which the common law developed prior to the 1893 codification in respect of sales of goods. The common law appears to have made no distinction for the purpose of implying terms providing for merchantability and fitness for purpose, between contracts for the sale of goods and contracts for work and materials. This was expressly stated by Lord Pearce in *Young & Marten:*

> The cases which preceded and crystallized in the Sale of Goods Act 1893 do not, as far as conditions and warranties are concerned, seem to show any clear consciousness of a difference in principle between a sale of goods and a contract for labour and materials.[12]

Some examples of this are to be found in cases such as *Francis v. Cockerell*[13] and *Randall v. Newson*,[14] where the principles applicable are discussed without regard to differentiation between types of contracts. For example, the old principle

[4] Rules of the Supreme Court (Qld.) 0. 17 v. 4(4).
[5] Barwick C.J., Menzies, Stephen and Mason JJ., Jacobs J. dissenting.
[6] [1969] 1 A.C. 454.
[7] [1934] 1 K.B.46.
[8] *Ibid.* 55.
[9] [1969] 1 A.C. 480.
[10] Per Lord Upjohn in *Young & Marten, supra,* at p.472.
[11] *Ibid.*
[12] [1969] 1 A.C. 454, 470.
[13] (1860) L.R. 5 Q.B. 501.
[14] (1877) 2 Q.B. 102 (C.A.).

of *caveat emptor* was displaced where there was no opportunity to inspect the goods[15] and in *Jones v. Bright*[16] in 1829 Best C.J. stated categorically that if a man sells an article, he thereby warrants that it is merchantable. Since sales and similar contracts were not distinguished in the pre-1893 cases, it was possible after the codification of the law of sale of goods to imply analogous terms in contracts for work and materials.

Furthermore, the accident that contracts for work and materials escaped codification gives a court the opportunity to apply more flexible standards, since the common law is capable of development in a way that a code is not.[17] For example, when the contract was one of simple hire, the common law did not trouble itself with a prerequisite to the implication of a warranty, such as reliance on the seller's skill and judgment, as required in sale of goods by s. 19(a) of the *Goods Act* 1958 (Vic.).[18]

Speaking for the majority of the High Court, Stephen J. evidenced an appreciation of the reasons for the rule implying warranties of quality and fitness for purpose into contracts for work and materials. He noted that the rule accorded with good sense and was for the 'general commercial benefit' of the community, that it permitted recourse by third party procedure to the manufacturer, who was responsible for, and best able to bear, the loss and that there was no logical necessity to distinguish for this purpose contracts for work and materials from contracts for the sale of goods.[19]

However Stephen J. was of the opinion that the 'real issue' raised by the appeal was whether it was in all circumstances *reasonable* to imply warranties in this case. This was not in conflict with the rule, for it was recognized as a qualification to it, that warranties might be excluded by the particular circumstances of the contract between the parties. For example, in the *Gloucestershire County Council* case referred to above, the choice of materials was taken out of the hands of the contractor and his employer, the plaintiff, had done all the negotiations and made all the enquiries about design, specifications and so on. Also, by virtue of their contract, the employer had placed restrictions on the contractor being able to secure a remedy from the supplier in the event of any breach due to a latent defect in the materials. In those circumstances their Lordships thought that to imply warranties and grant the employer a remedy against the contractor, when the contractor was not able to obtain relief as against the supplier would not be reasonable.

Stephen J. said that here too, the contract had 'quite special features'[20] which prevented any implication of warranties. In actual fact the approach of the majority in the High Court was to view the contract between the plaintiff and the defendant as having adequately provided as to the quality of helicopter parts. Stephen J. equated the release note under which the parts were supplied to the defendant and which stated they had been inspected and tested and complied with the design number quoted with an express provision as to the quality of the bolt. DCA requirements were seen to adequately provide for the quality of the parts used in servicing the helicopters when they stipulated that all parts were to be supplied in

[15] *Gardiner v. Gray* (1815) 4 Camp. 144.
[16] (1829) 5 Bing. 533, 548.
[17] Per Dixon C.J. *Dependable Motors v. Council of Ashford* (1959) 101 C.L.R. 265, 268.
[18] Turner (1972) 42 A.L.J. 560 'Common Law implied Terms of Fitness in Contracts of simple hire'.
[19] (1974) 4 A.L.R. 77, 82.
[20] (1974) 4 A.L.R. 77, 83.

this way with an accompanying certification that they had been inspected and tested by the original supplier.

Also the fact that the defendant was a subsidiary of the plaintiff's and had the same managing director carried considerable weight with the majority. That is, they were influenced by the fact that the plaintiff knew of the defendant's inability to check, by means of technical equipment, the defects in the parts used. In these circumstances the High Court treated the third party's certification as to quality as being the only relevant provision for consideration.

Stephen J. went on to say that warranties implied into parties' agreements are put there to give better effect to the bargain reached between them and not to 'do violence to their contractual intentions'.[21] The basis for the implication of warranties was according to the High Court, the 'presumed intention of the parties' and what was reasonable in the circumstances.[22]

The result was that the term that the defendant should furnish a release note showing that the part supplied was of Bell manufacture and conformed to that design, plus the plaintiff's first-hand knowledge of the contractor's inability to check the parts for defects, left 'no room' for a warranty of quality to be implied.[23]

One consequence of this result was that the plaintiff was without a remedy for latent defects in the part fitted to its helicopter, and which caused its loss. Stephen J., with whom the majority concurred, arrived at his decision:

> despite the consequences that the theoretical possibility of liability in contract being passed down the chain of supply to the guilty manufacturer is thus frustrated.[24]

In acting pursuant to the qualification of the general rule was the High Court justified in finding that the 'special circumstances' in this case did not permit any implication of a warranty of quality and that the general rule would therefore not be followed?

One member of the High Court who held that the Court was not so justified was Jacobs J., and it is submitted that his dissenting judgment accords with a correct interpretation of the authorities and with general principle.

Jacobs J. began by stating the general rule that warranties are usually to be implied in contracts for work and materials. There is for this purpose no difference between such contracts and contracts for the sale of goods.[25]

It was recognized that in some circumstances the Court would not be inclined to imply warranties. The implication of warranties was said to be based on what is held to be a 'fair and reasonable interpretation of what the parties themselves would have stated if they had turned their minds to the question',[26] *viz.* the presumed intention of the parties. Whether or not warranties are to be implied is a question of law.

Up until this point there would seem to be no quarrel with the majority in the statement of principle. It is the same principle as enunciated by Lord du Parcq in

[21] (1974) 4 A.L.R. 77, 85.
[22] See *Redhead v. Midland Rwy. Co.* (1869) L.R. 4 Q.B. 379, 392.
[23] (1974) 4 A.L.R. 77, 85.
[24] *Ibid.* p.86.
[25] Although it may be suggested that the introduction to s. 19 Goods Act. (1958) (Vic.), that, subject to the provisions of the Act that there is no implied warranty or condition, indicates that a common law *caveat emptor* is the general rule.
[26] (1974) 4 A.L.R. 77, 89.

G. H. Myers v. Brent Cross, supra. However Jacobs J. did add that if a party wishes to exclude the ordinary consequences which would flow in law from a contract which he is making, he must do so in clear terms, and by way of illustration, his Honour quoted Fullagar J. in *Duncombe v. Porter*[27] whose words are worth noting:

> Rights which exist at common law or by statute are not to be regarded as denied by words of dubious import. Before any such denial is accepted, it must appear with reasonable clarity from the language used that denial is intended.

The significance of this cannot be disregarded if one is to give full scope to the general rule and limit the qualification of it to such 'special cases' as the *Gloucester County Council* case.

Jacobs J. then approached the circumstances of this case and considered those which he said would perhaps support the exclusion of a warranty, *viz.* the DCA requirements, the release note and the lack of expectation on the part of the plaintiff that the defendant would in any way check the parts for latent defects. These circumstances, his Honour said, were 'quite neutral'[28] if it was borne in mind that the contractor is responsible for latent defects once a warranty has been implied, by the operation of law, into the contract for work and materials and is not displaced by evidence contrary to its implication. The lack of technical equipment in the defendant's possession was accordingly quite immaterial once it had been established that the normal warranties attracted by a contract for work and materials had not been excluded by the terms of the contract in this case. Liability attaches notwithstanding that the defects are undiscoverable.

The position is the same concerning liability of a seller for latent defects in connection with a sale of goods. S. 19(a) of the Goods Act 1958 (Vic.) introduces prerequisites for the establishing of such liability, such as the buyer's reliance on the seller's skill and judgment. The comment was made by Lord Reid in *Kendall v. Lillico*[29] that logically the obligation placed on the seller by the operation of this section should be just that due skill and judgment will be exercised. But, as Lord Reid pointed out, the law *extends* the seller's liability in a sale of goods under the section, to cover latent defects which the utmost skill on the part of the seller could not have detected.

Also, Jacobs J. held that the release note merely stated that the part had been inspected by the supplier at the time of manufacture and conformed to the design specified. The defendant argued that this meant that the Bell agents had complete responsibility for the quality of the bolt. Jacobs J., however, did not view this as a bar to implying a warranty in the contract between the plaintiff and the defendant.

Admitting that the evidence of the managing director supporting the defendant's argument was most in favour of excluding the general rule, his Honour held that it was nevertheless insufficient. All it did in effect was to show that no independent inspection by the defendant was intended.

[27] (1953) 90 C.L.R. 295, 311.
[28] (1974) 4 A.L.R. 77, 91.
[29] [1969] 2 A.C. 31, 84. If the law were always logical one would suppose that a buyer who has obtained a right to rely on the seller's skill and judgment would only obtain thereby an assurance that proper skill and judgment had been exercised and would only be entitled to a remedy if the defect in the goods was due to failure to exercise such skill and judgment; but the law has gone further than that. By getting the seller to undertake to use his skill and judgment the buyer gets under s. 14(1) of the Act of 1893 an assurance that the goods will be reasonably fit for his purpose and that covers not only defects which the seller ought to have detected but also defects which are latent in the sense that even the utmost skill and judgment of the seller would not have detected them.

Therefore the conclusion reached by Jacobs J. was that the *prima facie* rule ought not be displaced, that the circumstances did not amount to such as to exclude the implication of a warranty, for the reasons stated. It may be taken from this that Jacobs J. placed emphasis on the fact that what the defendant relied on to negate the general rule implying warranties, was of 'dubious import'. That is, his divergence from the majority view was due entirely to the fact of there being no 'unusual circumstances' in the contract for work and materials in this case.

One further aspect which needs to be examined briefly, is the policy argument in favour of granting the plaintiff a remedy. This was not resorted to in the judgment of Jacobs J. but was discussed by the majority. The policy of allowing a 'chain of liability' to be established is another good reason for implying a warranty, if it is not excluded by the clear terms of the contract. That is, if the planitiff can recover damages, the contractor, theoretically, will not have to suffer the loss, for he will have bought from a seller who may be liable under sale of goods legislation and so liability may be passed on until it comes to rest on the guilty manufacturer. Otherwise, if the plaintiff suffers loss because of latent defect, and cannot sue the contractor, he will have no contractual redress. This latter was the outcome of this case. As it happened here, the third party, the Australian distributor of Bell parts, could not have sued the American manufacturer because of the existence of an exeption clause in their contract of supply. But as was in *Young & Marten*, this is immaterial to the plaintiff's claim. If the contractor or the seller disposes to buy from the manufacturer on such terms, he takes the risk of having to bear the loss.[30]

In conclusion, the High Court was correct in its statement of principle to be applied, that at common law a contract for work and materials carries with it implied warranties, analogous to if not the same as are applicable to contracts for the sale of goods. There is a qualification to this rule, and that is, that where there are

[30] It is perhaps interesting to consider whether the American manufacturer would have been held liable by virtue of the law of products liability in America. Strict liability attaches to a manufacturer whose product is recognizably dangerous in respect of those who come into contact with it. The theory is one of strict liability in tort divorced from any contract rules. The leading case in this field is *Henningsen v. Bloomfield Motors Inc.* 32 N.J. 358, 161A. 2d 69 (1960) where both the car sales dealer and the manufacturer were held liable in respect of injuries suffered by the buyer's wife when the steering gear failed on the car. The rule which emerged was that:

> the burden of losses consequent on use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur.

Accordingly the manufacturer may have been held liable to the plaintiff as the person responsible for injury caused by his product. This liability remains notwithstanding that the bolt was fitted in the course of servicing the helicopter, the main thing is that it reached the plaintiff in substantially the same way as it left the manufacturer. Indeed, it emerged from the facts of the case that the parts reached the defendant in factory sealed packs. It would not be open to the manufacturer to object, in that case, that the bolt was tampered with after manufacture. Strict liability operates quite independently of negligence. It has been held that the maker of a component part of the final product is liable for any loss, provided that the part does not undergo any substantial change: *McVee v. Brunswick Corp.* 354F 2d 577 (1965); *Putman v. Erle City Mfg. Co.* 338F 2d 911 (1964); *King v. Douglas Aircraft Co.* 159 SO 2d 108 (1963) *cf. Golberg v. Kollsman Instrument Corp.* 12 N.Y. 2d 432. It would appear that a manufacturer may disclaim any warranty but the courts in America have 'struggled to obviate injustice' by finding that the disclaimer was not brought home to the buyer, and so on. Prosser concludes that so far as strict liability of the manufacturer is concerned, no reliance whatever can be placed on any disclaimer: Prosser W. 'The Fall of the Citadel' (1966) 50 Minn. L.R. 791; Prosser W. 'The Assault upon the Citadel' (1960) 69 Yale L.J. 1099.

circumstances to the contrary, clear from the nature of the parties' agreement, such implied warranties may be excluded. Jacobs J. took the view that a question of law was involved each time.

In applying this statement of principle to the facts of this case, the High Court erred when it treated the DCA requirements as to the release note and the inability of the defendant to check for defects as sufficient to displace an implied term relating to the quality of the parts used in maintenance. The High Court purported to cover all this by saying that in excluding an implied warranty, it was acting pursuant to the intention of the parties and therefore would not 'superimpose'[31] on the terms of the parties' agreement. The approach of Jacobs J. is much preferred. His Honour looked for evidence that the parties had, in clear terms, excluded the notion of any implied warranty attaching to their contract by the operation of law. The factors which could have been seen to amount to this, he considered were neutral. These same factors persuaded the majority that this was not a case where the normal consequences could flow, for the parties had chosen to restrict the role of the court and therefore no implication of warranties could take place.

Warranties are usually to be implied in contracts for work and materials, providing for the fitness for purpose of materials used and for quality of those materials. This is the general rule. Warranties should only be found excluded on the clear unambiguous statement of intention of the parties themselves. The factors which led the court to find that there was no room for the implication of warranties in this case were of 'dubious import', and the better view would seem to be that the general rule ought to have been left undisturbed and allowed to let the normal warranties attach to this contract for work and materials.[32]

As a final point, s. 74 of the Trade Practices Act 1974 (Cth) ought to be mentioned as this now makes statutory provision for the implication of a warranty to the effect that materials supplied in connection with a contract of services are reasonably fit for their purpose. Where it applies such warranty may not be excluded, restricted or modified (s. 68). However, the plaintiff would need to show that it was a 'consumer' within the meaning of s. 4(3) in order to have such a warranty of fitness for purpose implied into its contract. This, in the present case, would not be possible and the case falls outside the provision because the goods are not of the kind ordinarily acquired for private use or consumption.

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[31] (1974) 4 A.L.R. 77, 85.

[32] This view is in accord with the provisions now applicable for the sale of goods although it should be noted that the Act allows its implied conditions to be negatived other than by express agreement: see s. 61 Goods Act 1958 (Vic.) *viz.* 'where any right duty or liability would arise under a contract of sale by implication of law it may be negatived or varied by express agreement or by the course of dealing between the parties or by usage if the usage be such as to bind both parties to the contract'.