British Crane Hire v Ipswich Plant Hire [1973] ABC.L.R. 11/13

CA on appeal from Judgment of Deputy Judge Kenneth Jones before Lord Denning MR; Megaw LJ; Sir Eric Sachs. 13th November 1973.

THE MASTER OF THE ROLLS:

1. In June, 1970, a big earth-moving machine got stuck in the mud. It sank so far as to be out of sight. It cost much money to get it out. Who is to pay the cost?

2. The Defendants, Ipswich Plant Hire Limited, were doing drainage and other engineering works in the marshy land next the River Stour, near Cattawade Bridge in Essex. They are themselves in the hiring business, letting out cranes and so forth. But on this occasion they were doing the work themselves. They needed a dragline crane urgently. They got in touch with the Plaintiffs, the British Crane Hire Corporation Limited, and asked if they could hire a dragline crane. The Plaintiffs responded quickly. They delivered it on Sunday, 28th June, 1970. They let it on hire to the Defendants, together with the driver, Mr Homphrey. No doubt the driver remained the servant of the Plaintiffs when he was driving the crane. The Plaintiffs took it as far as they could by road. Then it was unloaded.

3. On the next day, Monday, 29th June, 1970, the manager of the Defendants, a Mr Meadows, directed the driver the way to go across the marsh. When they got to a particularly bad patch, Mr Meadows warned the driver that he ought to have *"navimats",* that is, sets of timber baulks which could be laid on the marsh and form a kind of roadway for the machine. The Defendants ought to have supplied the *"navimats",* but they had not yet arrived. Mr Meadows told the driver to wait for the "navimats". But the driver did not wait. He took his chance. He went on without *"navimats"*. He got over that patch safely. Further on, there was another bad patch of marsh. The driver took his chance again. This time he fared worse. The dragline crane sank into the marsh. That was the *"first mishap"*. They got it out after a good deal of work. There was no doubt that it was the fault of the driver, Mr Homphrey, in not waiting for the *"navimats"*. His negligence was the cause of that first mishap. His employers, the Plaintiffs, must bear the cost of it.

4. On the next day, Tuesday, 30th June, 1970, the "navimats" arrived. But there was a second mishap. On that day the dragline crane had to cross another bad patch. The driver, Mr Homphrey, was this time using the *"navimats"*. He had to make a turning movement or *"spragging"*. He had just completed it when, in spite of the *"navimats",* this machine sank into the marsh. It went out of sight. Great efforts were needed to get it out. Heavy equipment was brought in. Eventually, at great expense, the machine was got out.

5. The question arises on the second mishap. Who is to bear the expense of recovering the machine from the marsh? The Judge found that the sinking in the marsh was not the fault of the driver Homphrey, but the fault of Mr Meadows, the Site Agent of the Defendants. The Judge thought that Mr Meadows ought to have directed the crane by a safer route across the marshy ground. On that account he held the Defendants liable for the expense. That finding was challenged before us by Mr McCowan for the Defendants. He pointed out that the driver and the Site Agent had gone together over the ground and decided on this route. I was impressed by Mr McCowan's submissions on this point. I doubt whether it would be right to hold the Site Agent guilty of negligence.

6. It seems to me that this second mishap may have been a piece of bad luck which occurred without the fault of anyone. It was a hazard due to the nature of the marsh itself at that point.

7. But it does not follow that the Plaintiffs fail on their claim. Even though the Defendants were not negligent, nevertheless the Plaintiffs say that the Defendants are liable in contract for the costs of recovering the machine from the marsh. The Plaintiffs say that the contract incorporated the conditions on a printed form under which the Defendants are liable for the costs.

8. The Judge found that the printed conditions were incorporated into the contract. The Plaintiffs appeal from that finding. The facts are these: The arrangements for the hire of the crane were all on the telephone. The Plaintiffs agreed to let the Defendants this crane. It was to be delivered on the Sunday. The hiring charges and transport charges were agreed. Nothing was said about conditions. There was nothing in writing. But soon after the crane was delivered, the Plaintiffs, in accordance with their practice, sent forward a printed form to be signed by the hirer. It set out the order, the work to be done, and the hiring fee, and that it was subject to the conditions set out on the back of the form. The Defendants would ordinarily have sent the form back signed: but this time they did not do so. The accident happened before they signed it. So they never did so. But the Plaintiffs say that nevertheless, from the previous course of dealing, the conditions on the form govern the relationship between the parties. They rely on No. 6:- *"Site Conditions: The Hirer shall take all reasonable precautions to ensure that the crane can safely be taken onto and kept upon or at the site and in particular to ensure that the ground is in a satisfactory condition to take the weight of the crane and/or its load. The Hirer shall where necessary supply and lay timber or other suitable material for the crane to travel over and work upon and shall be responsible for the recovery of the crane from soft ground"*.

9. Also on No. 8:- *"The Hirer shall be responsible for and indemnify the Owner against ... all expenses in connection with or arising out of the use of the plant"*.

10. In support of the course of dealing, the Plaintiffs relied on two previous transactions in which the Defendants had hired cranes from the Plaintiffs. One was 20th February, 1969; and the other 6th October, 1969. Each was on a printed form which set out the hiring of a crane, the price, the site, and so forth; and also setting out the conditions the same as those here. There were thus only two transactions many months before and they were not known to the Defendants' manager who ordered this crane. In the circumstances I doubt whether those two would be sufficient to show a course of dealing.

11. In ***Hollier v. Rambler Motors. (***1972) 2 Q.B., page 76, Lord Justice Salmon said he knew of no case *"in which it has been decided or even argued that a term could be implied into an oral contract on the strength of a course of dealing (if it can be so called) which consisted at the most of three or four transactions over a period of five years"*. That was a case of a private individual who had had his car repaired by the defendants and had signed forms with conditions on three or four occasions. The plaintiff there was not of equal bargaining power with the garage company which repaired the car. The conditions were not incorporated.

12. But here the parties were both in the trade and were of equal bargaining power. Each was a firm of plant hirers who hired out plant. The Defendants themselves knew that firms in the plant-hiring trade always imposed conditions in regard to the hiring of plant: and that their conditions were on much the same lines. The Defendants' manager, Mr Turner (who knew the crane), was asked about it. He agreed that he had seen these conditions or similar ones in regard to the hiring of plant. He said that most of them were, to one extent or another, variations of a form which he called *"the Contractors' Plant Association form"*. The Defendants themselves (when they let out cranes) used the conditions of that form. The conditions on the Plaintiffs' form were in rather different words, but nevertheless to much the same effect. He was asked one or two further questions which I would like to read:-

"(Q) If it was a matter of urgency, you would hire that machine out, and the conditions of hire would no doubt follow?

(A) They would.

(Q) Is it right that, by the very nature of your business, this is not something that happens just once a year, nor does it happen every day either, but it happens fairly regularly?

(A) It does.

(Q) You are well aware of the condition that it is the hirer's responsibility to make sure that soft ground is suitable for a vehicle or machine?

(A) It is; it is also the owner's responsibility to see that the machine is operated competently".

13. Then the Judge asked: *"But it is the hirer's job to see what in relation to the ground? (A) That suitable timber was supplied for the machine to operate on in relation to soft ground"*.

14. Then Counsel asked: *"And in fact it is the hirer's job to recover the crane from the soft ground, if it should go into it? (A) If the crane sank overnight of its own accord, I dare say it would be"*.

15. From that evidence it is clear that both parties knew quite well that conditions were habitually imposed by the supplier of these machines: and both parties knew the substance of those conditions. In particular that, if the crane sank in soft ground, it was the hirer's job to recover it: and that there was an indemnity clause. In these circumstances, I think the conditions on the form should be regarded as Incorporated into the contract. I would not put it so much on the course of dealing, but rather on the common understanding which is to be derived from the conduct of the parties, namely, that the hiring was to be on the terms of the Plaintiffs' usual conditions.

16. As Lord Reid said in ***McCutcheon's*** case, in 1964 1 Weekly Law Reports, page 128, quoting from the Scottish textbook Gloag on Contract:- *"The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other"*.

17. It seems to me that, in view of the relationship of the parties, when the Defendants requested this crane urgently and it was supplied at once - before the usual form was received - the Plaintiffs were entitled to conclude that the Defendants were accepting it on the terms of the Plaintiffs' own printed conditions - which would follow in a day or two. It is just as if the Plaintiffs had said: *"We will supply it on our usual conditions"*, and the Defendants said *"Of course, that is quite understood"*.

18. Applying the conditions, it is quite clear that Nos. 6 and 8 cover the second mishap. The Defendants are liable for the cost of recovering the crane from the soft ground.

19. But, so far as the first mishap is concerned, neither Condition 6 nor Condition 8 (the indemnity clause) is wide enough to cover it: because that mishap was due to the negligence of their own driver. It requires very clear words to exempt a person from responsibility for his own negligence: see ***Gillespie's case,*** (1973) 1 Q.B., at page 415. There are no such words here.

20. Even though the Judge did not find that the conditions were incorporated, he held that there was an implied term that the hirer should return the chattel to the owner at the end of the hiring. Mr McCowan pointed out that that implied term was not distinctly pleaded or relied upon. But, nevertheless, there is much to be said for it. When a machine is let out on hire for use on marshy land, and both parties know that it may sink into a marsh, then it seems to me that, if it sinks into the marsh, it is the hirer's job to recover it, so as to restore it to the owner at the end of the hiring. Take a motor-car which is let out on hire, and by reason of a gale, or an icy road, it goes off the road into a ditch. It is the hirer's job to get it back on to the road and restore it at the end of the hiring. Just as when he takes it on a long journey and falls ill a long distance away. It still is his duty to get it back and restore it to the owner at the end of the hiring. Of course, if it is lost or damaged and he can prove that it was not due to any fault on his part, he would not be liable. A bailee is not liable for loss or damage which he can prove occurred without any default on his part: but the return of the vehicle is different. It is the duty of the hirer to return the vehicle at the end of the hiring to the owner, and to pay the cost of doing so. Although he is not liable for loss or damage occurring without his fault, nevertheless he is liable to do what is reasonable to restore the property to the owner.

21. So, apart from the express conditions, it may well be, if it had been pleaded, that the Plaintiffs could have recovered for the second mishap on an implied term. But, as it was not distinctly pleaded, I prefer to decide the case on the ground that Conditions 6 and 8 formed part of the contract of hiring: and under them the Plaintiffs are entitled to succeed in regard to mishap No. 2. I would affirm the decision of the Judge, but on a different ground.

LORD JUSTICE MEGAW:

22. I agree.

SIR ERIC SACHS:

23. With regard to the appeal,, it is appropriate to start from the unchallenged finding that there was no negligence on the part of the Plaintiffs' driver, Homphrey, and that by and large the finding of negligence on the part of Meadows, who was the Defendants' Site Agent, cannot really be sustained. Accordingly, the position has to be approached upon the basis that this dragline sank without negligence on the part of either party.

24. What, then, was the position? Here we have two well-established firms engaged in the business of letting out major equipment — cranes — used by large-scale contractors. One of the two parties, the Defendants, on this occasion urgently required on a Friday that a dragline be delivered on Sunday for work on Monday on a marshy site. It was a 26-ton machine. It is well known that the use of great machines on marshy sites on which, if anything goes wrong, the machine may well sink in, involves risks, even if all concerned use reasonable care - risks that are higher than if those machines are used on normal ground, including soft surface ground. No-one knew of that risk better than the Defendants, who were aware of the site characteristics: and it was that risk which eventuated in this case so that, with no-one at fault, a 26-ton machine actually sank almost out of sight.

25. The business realities of the situation are plain. If the Defendants had on Friday said to the Plaintiffs, *"Of course, if the machine sinks, you take that risk and pay the costs of recovery",* the reply would have been: *"That is nonsense, and you don't get the machine".*

26. Moreover, to hold that the Plaintiffs did take the risk impliedly would be unrealistic and obviously contrary to the mythical officious bystander's views. But the matter goes further. Both sides knew, as my Lord has pointed out) that contracts of this type are normally subject to printed conditions, and my Lord has already cited the passages in the evidence of the Defendants' manager Mr Turner which are relevant to that fact. I would only add that this particular machine was worth something upwards of £10,000: and when the learned Judge asked Mr Turner *"Have you ever let out £10,000 worth of machinery without attaching conditions?",* the answer came: *"We did not, no".*

27. In those circumstances, how does the case stand as regards the terms of the contract? To avoid possible misunderstanding in relation to anything that may be contained in this Judgment of mine, I would make it clear that nothing I am about to say, in relation either to the implied common law terms or to the express terms of the contract, is to be considered as having any relation to the position where the owner and the user are in wholly different walks of life, as in ***Hollier's*** case - where one, for instance, is an expert in a line of business and the other is not. Nor does anything I am about to say put any burden on the user of such a machine if the owner's servant - in this case the driver - causes damage by negligence; nor does anything I am about to say deal with the question of damage sustained by a chattel, as opposed to liability to return it, if it is intact or reasonably repairable.

28. The Court's task, as my Lord has pointed out, is as stated by Lord Reid, *"to come to a conclusion as to what each party was reasonably entitled to conclude from the attitude of the other".*

29. Taking first the relevant common law, this has been considerably canvassed in this Court and was pronounced upon by the learned trial Judge; and accordingly I agree with my Lord that it is right to say something about it. In my judgment, the learned trial Judge went too far when he said at page 52 that the Defendants were under this obligation that they would return the machine to the Plaintiffs at the end of the hiring. I would not be prepared to hold that the obligation of a bailee is absolute or can be stated in such plain wide terms. On the other hand, it does seem to me that someone who hires a chattel is under an obligation to return that article to the owner unless he shows good cause for not returning it. What is good cause must depend on the particular facts of the case and must involve questions of degree. In relation, for instance, to an ordinary passenger car, at one end of the scale would come a tyre puncture where there was a spare wheel aboard: such a puncture would be no excuse for leaving the car on the road. Similarly, if that car skidded without anyone's fault into a ditch, there would be no good cause to leave it there just because to get it out required £5 worth of services from a garage. On the other hand, if some great boulder descended on the vehicle and damaged it beyond repair, that might well be good cause for not returning it. As regards getting stuck in a snowdrift or a marsh, I would not think such a happening could normally constitute good cause.

30. In the present action, however, neither the pleadings (which had not been settled by Mr Nelson), the evidence, nor the arguments at trial sufficiently raised the issue of the Defendants' common law liability as a bailee for the case to be dealt with on that footing. Accordingly, I turn to consideration of the express terms of the transaction in this particular case. In my judgment, the responsibility was expressly placed on the user for the sinking of this machine into that marsh. Clauses 6 and 8 have already been recited by my Lord. They do not impose on the user liability in cases where the owner's own servant was negligent; they are reasonable; and they are of a nature prevalent in the trade which normally contracts on the basis of such conditions. That was shown by the evidence and by

reference to the conditions in a G.P.A. contract which, although expressed in a different way, yet had the same general tenor.

31. In all the circumstances, the Plaintiffs were (to use Lord Reid's words) entitled to conclude that the Defendants accepted the Plaintiffs' conditions, at any rate if they were reasonable: and I have no doubt but that both parties contracted on the basis of these conditions. Accordingly, they apply to mishap No. 2 and they do not touch mishap No. 1 whore the Plaintiffs' own driver was negligent. I thus agree that the appeal should be dismissed, and so should the cross-appeal.

THE MASTER OF THE ROLLS: Mr Nelson, you ask for the appeal to be dismissed with costs; and you will have to pay the costs of the cross-appeal, I suppose. The appeal will be dismissed with costs.

MR NELSON: I am much obliged.

MR McCOWAN: The same for the cross-appeal?

THE MASTER OF THE ROLLS: The cross-appeal must be dismissed with costs.

Mr Anthony McCowan, Q.C. Mr Rodger Bell and Mr P.I.F. Vallance instructed by Messrs Stephenson, Harwood & Tatham appeared on behalf of the Appellants (Defendants).
Mr R.F. Nelson instructed by Messrs Young, Jones, Golding Patterson, Agents for Messrs D. Wood & Co., Birmingham appeared on behalf of the Respondents (Plaintiffs).