I.H. CARRUTHERS LTD v. PEREIRA

SUPREME COURT. 1965. 24, June. MOLINEAUX C.J.

Master and servant - goods of company entrusted to trader - failure of trader to account - contract of service - alleged variation of contract by verbal agreement - whether trader liable for goods stolen.

A written agreement may be modified by a subsequent oral agreement or by conduct of the parties provided, however, that there must be some true consensus and not just a form of unilateral action by one of the parties. Accordingly where the defendant, in breach of a written agreement with his employer the plaintiff, issued credit and failed to account to the plaintiff for the amounts involved, it was held that this amounted to a unilateral action on the part of the defendant; and that in accordance with the agreement, the amounts not accounted for constituted a debt due by the defendant to the plaintiff.

A servant to whom goods or money of an employer have been entrusted as trustee - the property in such goods or money still remaining with the employer - is not liable for the loss of part of the trust property by theft in the absence of negligence.

Judgment for plaintiff.

ACTION to recover the balance of goods and money entrusted to a servant and not accounted for.

Jackson, for plaintiff.
Phillips, for defendant.

Cur. adv. vult.

MOLINEAUX C.J.: In this action the plaintiff seeks to recover from the defendant the sum of £520.18.3 which according to the statement of claim represents the balance owing on an account for goods of the plaintiff received by and entrusted to the defendant between 1 March 1961 and the 31 May 1962 in the course of his employment as trader for the plaintiff at Iva, Savaii, and for which he is alleged to have failed to account. Following correspondence between the solicitors for the parties this amount was reduced by some £79 leaving in issue the sum of £441.0.4.

It was contended for the defendant that £200.14.7 represented debts given out by him in the course of trade pursuant to a specific authority in that behalf issued by the managing director of the plaintiff company, and that £147 approximately was the value of cash and goods stolen from the store on the 8 February 1960 during his temporary absence from the premises and for which he should not be held liable. The balance of £93 odd was conceded.

The plaintiff is a duly incorporated company having its registered office at Apia and carrying on business in Western Samoa and elsewhere as island merchants. On the 10 April 1958 the plaintiff entered into an agreement in writing with the defendant whereby the defendant was to operate the plaintiff's store at Iva, Savai'i, on a wages, plus commission basis. The terms of the agreement provided for the defendant to take charge of the station premises and to run the same as a general cash store, and during the continuance of his employment to devote the whole of his time to his duties as trader. He has at all times to obey the instructions of the plaintiff company or authorised agents. There is provision for payment of wages at a monthly rate plus commission in respect of sales effected by him on behalf of the company. His employment may be terminated by one month's notice on either side. He is not free to conduct a business

on his own account and the agreement provides that all transactions are to be carried out in the name of the plaintiff company. It is clear from the language of the agreement that the relationship of the parties is intended to be that of master and servant and that the agreement is in fact a contract of service. It contains stringent conditions against the issue of credit and there is no doubt that as at the time of entering into this contract the provisions relating to this aspect of the business were clear and unequivocal. The defendant, or trader as he is referred to, undertakes to run the station premises as a general cash store. All the goods of the company are to be sold for cash only and at no other prices than those fixed by the company. No credit is to be given by the trader in any case whatsoever except when such credit is approved in writing by the company, and then only to such amount as may be fixed in such written approval. There follows a penal clause the terms of which are set out as follows:

> "Cl. 9. If in breach of the provisions of this agreement the Trader should give out goods or money belonging to the Company on credit without the written authority of the company or of the company's authorised agent, then all such credit shall be deemed to have been given out by the trader on his own behalf and not on behalf of the company and the value of such credit shall constitute a debt due and owing by the trader to the company for which the company may sue the trader and towards the liquidation of which the company may appropriate all or any part of any moneys due or becoming due by the company to the trader including moneys of the trader on deposit with the company provided always however that notwithstanding anything heretofore contained in this paragraph all credit by the trader on his own behalf and without the consent in writing of the company as aforesaid shall be deemed to be the property of the company until the company shall have delivered to the trader a debit note for such credit when the same shall immediately become a debt due by the trader to the company as aforesaid and it shall be in the discretion of the company whether it shall deliver to the trader such debit note or not".

It was not denied by the defendant that he had issued credit to the extent of £200.14.7, by giving out what he called "debts" to various customers. These were all recorded by him and set down in a book. He had done this, he said, on the specific authority of the managing director of the plaintiff company. It was argued for the defendant that this represented a verbal agreement which in effect modified the terms of the written contract relating to the particular question of the issue of credit. Although it is well recognised that a written agreement may be modified by a subsequent oral agreement or by conduct in such an event there must be some true consensus, not just a form of unilateral action by one of the parties. The plaintiff emphatically denies any such arrangement and the defendant is confronted with the difficulty of setting up something strong enough to operate as a waiver. In my view there are three factors which mitigate against his being able to do this successfully:

(1) The plaintiff's denial that there was ever such an arrangement, and his firm contention that it was the policy of the company never to issue credit.

(2) The debts referred to did not appear in the monthly returns submitted by the defendant.

(3) The pattern of issuing credit appears to have commenced before the date upon which the alleged authority to do so was given by the managing director.

In the light of this evidence I am unable to conclude that there was

any arrangement between the parties that would tend to operate as a modification of the terms of the written agreement relating to the issue of credit and it follows that these debts are to be construed according to the provisions of clause 9 (supra) as constituting a debt due by the defendant to the company. What the defendant did in fact amounts to a unilateral action on his part in breach of clause 8 of the written agreement and the plaintiff is entitled to judgment for the amount involved.

As to the loss of money and goods following the burglary I find for the defendant. It is clear from the agreement that all goods remained the property of the company until sold, and that pending sale the trade is a trustee thereof for the company. Clause 22 provides that "all goods in the said station are entrusted to the possession of the trader by the company shall remain the property of the company until actual sale and delivery thereof by the trader and until such sale and delivery of such goods shall be held by the trader as the trustee thereof for the company". It was thus agreed that the defendant should be a trustee of the goods in the store and of the moneys held by him on behalf of the company pending a proper account and as such he is not liable for the loss of part of the trust property by theft in the absence of negligence: see Halsbury's Laws of England 3rd Edition Volume 38 p. 967, paragraph 1675. The defendant left his wife in charge of the store while he was absent in Apia. This was to the advantage of the plaintiff as the store remained open for business and it was a practice that the managing director of the plaintiff company was aware of. The defendant did not go away and leave the store unlocked and the precautions taken by him were I think reasonable. She was familiar with the business and I do not think that he was negligent in leaving the store in her care during his temporary absence. It is to be noted that the agreement itself contemplates that the trader's liability is not absolute in that there may be contingencies upon the happening of which he would be excused in the event of there being a shortage on stock-taking. Clause 22 sets out the circumstances under which allowances are to be made upon such a deficiency being disclosed. These contingencies include allowances for breakage, leakage, accidental happenings and deterioration. Indeed loss by burglary may well be vis-a-vis the trader, assuming he has taken reasonable precautions, an accidental happening of the kind contemplated. The property in the goods still being with the company until sale the loss by burglary must, in the absence of negligence on the part of the defendant as servant, lie where it falls. The remedy available to the plaintiff is against the persons who were apprehended and convicted of theft. The defendant is not liable in my opinion for the amount of goods and cash lost in the burglary.

There is, however, some difficulty in arriving at the correct amount of the loss. The defendant claimed that this was a £147.0.0 odd of which £69.0.0 was cash as evidenced by the fact that that was the amount for which the three burglars were prosecuted and convicted. The quantities and value of the stock stolen are not specified however and it is accordingly impossible to arrive at a specific amount. The onus is on the defendant here. On the other hand from a stocktaking carried out shortly after the burglary by an officer of the plaintiff company it appears that the deficiency amounted to £132.16.5 being £49.0.11 cash and £83.15.6 the value of the stock. The defendant apparently signed this stocktaking sheet at some stage although he demurred at the time and the witness Anesi gave evidence that the defendant had been charged for the amount of goods in cash taken at the burglary which he placed at £132.0.0 odd. This figure is the one that seems to be most supported by the evidence and the one that I accordingly adopt. For the reasons stated the defendant is not liable for the amount of goods and cash taken in the burglary which I fix at £132.16.5.

This disposes of the two principal matters at issue between the parties. The balance of £93.0.0 was not contested. In the result there will be judgment for the plaintiff for £308.3.11 being the amount claimed, adjusted by counsel to £441.0.4 less £132.16.5 the amount of cash and goods taken in the burglary, plus costs as fixed by the Registrar.