JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 65/95

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN	LESTER JOHNSON	DEFENDANT / APPELLANT
AND	ROY MCGILL	PLAINTIFF / RESPONDENT

Clark Cousins for the appellant

Hector Robinson for the respondent

October 27 and December 17, 1997

PATTERSON, J.A.:

The plaintiff Roy McGill claimed to recover the sum of $613,600 due and owing to him by the defendant Lester Johnson for hire of a backhoe over a period of 118 weeks at $5,200 per week. He also claimed interest at the rate of 25% per annum on the said sum. The defendant resisted the claim. He denied the hiring and pleaded that he did not owe the plaintiff any sum whatsoever. G. G. James, J., accepted the plaintiff's claim and gave judgment against the defendant in the full sum claimed with interest at the rate of 15% per annum from 27th March, 1991, to the date of judgment, the 3rd May, 1995. The defendant appealed against the judgment.

The issue on appeal was stated by Mr. Clark Cousins to be:

> "Is a Plaintiff entitled to claim for the cost of hire under a contract for hire of a chattel to a Defendant where the chattel falls into disrepair and to the Plaintiff's knowledge is rendered useless to the Defendant?"

It should be noted, however, that that was not the issue raised either in the pleadings or at the trial. The appellant contended that the respondent had hired the backhoe to "Messrs. O. Brown and Q. Bailey, sub-contractors performing works on the Greater Mandeville Water Supply Project in Manchester, of which Lester Johnson Construction Company Limited was the main contractor." The appellant is the managing director of the main contracting company, and he said that the company's involvement in the contract went no further than an agreement to deduct from the sub-contractor's earnings, such sums as they certified were due and owing to the respondent for hire of the backhoe, and to pay the sums so deducted to the respondent.

The learned trial judge found as a fact that there was an agreement made in June, 1988, between the appellant and the respondent for hire of the backhoe. This agreement was for hire at the rate of $130 per hour over a forty hour week, that is, $5,200 per week. It was the appellant's responsibility to provide and pay the operator of the backhoe, and to service it, but the respondent would be responsible for all major repairs that may become necessary. The respondent said in evidence that he received the agreed weekly payments, the last of which was in November, 1988, but that cheque was dishonoured.

The respondent testified that between June and September, 1988, the backhoe broke down on more than one occasion, but, as agreed, he repaired it. The appellant agreed that was so, and said he last saw the machine working in the first week of September, 1988, and after that it was parked at the site office of his

company at Newport in Manchester. Vital parts were missing from the backhoe when the respondent saw it in December, 1988, parked at Newport - the alternator, battery, fan belt were missing, a tube had been taken from one of the tyres, and a pin that holds the front end together was also missing. Undoubtedly, the backhoe was not in the same condition of repair as when it was delivered to the appellant in June, 1988 at the home of the respondent in Denbigh, May Pen, Clarendon. The missing parts rendered it inoperable. It could not perform the purpose for which it was intended, nor indeed, the purpose for which it was let on hire. The repairs that were necessary to restore the machine to a working condition were not of the sort that the respondent had bargained for, and he was not inclined to take back his machine in that condition. He reported the matter to the police and to the appellant. He said the appellant told him that he had "learned about it", and that it was one Mr. Johnson who worked on the site had done the scrapping of the machine. The appellant promised to "get the machine together." The respondent threatened suit, and he said it was only then that the appellant returned the backhoe in February, 1991. It had been "partially fixed"; some things were missing but the appellant promised to remedy that.

There was nothing in writing evidencing the agreement reached between the parties for the hire of the machine. The hire commenced on the date that the appellant took delivery and possession of it, but the duration of the hire was not fixed. It seems to me that the parties must have contemplated that the contract would end when the appellant returned the machine; that must have been the common understanding, since no fixed period of hire was agreed on when the appellant took delivery at the respondent's premises. In ***Gloag on Contract*** 2nd ed. (1929) page 7, it is stated:

> "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."

That passage was cited with approval by Lord Reid in ***McCutcheon v. David Macbrayne Ltd.*** [1964] 1 W.L.R. 125 at page 128, and it is relevant to the facts in the instant case. It seems to me that in view of what the learned trial judge found to have been agreed between the parties, it was reasonable for the respondent to have concluded that the appellant would return the machine to his premises when he had no further use for it, and that it would be in as good a working condition then as when it was delivered, fair wear and tear excepted. The conduct of the appellant in returning the machine, late though it was, confirmed that he also understood the position to be so. There can be no doubt that an implied term of the contract was that the appellant should return the machine to the respondent at the end of the hiring. It was not the duty of the respondent to retrieve it from the site office of the appellant's company.

The appellant returned the machine to the respondent in February, 1991. The respondent said he was paid hire up to November, 1988; the appellant admitted in cross-examination that he made no payments between September, 1988 and the date the machine was returned. The amount claimed by the respondent covered the weeks between the 8th November, 1988, and the 15th February, 1991.

The learned trial judge found that "so long as the machine was in Defendant's possession, he was responsible for payment in respect of the machine" and a further finding was "that in the circumstances of this case there was no duty on the part of the Plaintiff to collect the equipment in order to mitigate

his damages." Mr. Cousins attacked both these findings. He contended that "the essence of the contract was operation not possession." He submitted that "after September, 1990, the respondent (sic) had no legitimate interest in performing the contract for hire; the job for which the backhoe had been retained was completed and it was in disrepair and inoperable." But, in my view, it was the duty of the appellant to return the backhoe to the respondent, if he had no further use for it. It is plain that the backhoe had fallen into disrepair and had become inoperable through no fault of the respondent; he was not responsible to replace missing parts. The appellant was under an obligation to take reasonable care of the backhoe while it was on hire to him, and he had failed in that regard. It may be, as Mr. Robinson suggested, that the appellant wrongfully used the missing parts for his own purposes. He must have realized that he was liable for the loss of the parts missing from the backhoe, and it seems that was the reason why he undertook to replace them before returning it.

Mr. Cousins contended further that the respondent's claim was substantially based on avoidable loss and his failure to take reasonable measures to mitigate his loss was the proximate cause of that loss. He argued that the conduct of the respondent was unreasonable in the circumstances of this case; he should have retrieved his machine, and mitigate his loss. In my view, the respondent was obliged to permit the appellant quiet enjoyment and peaceful custody of the machine, while the contract subsisted. The hiring was determinable at the option of the appellant or respondent. But it was the appellant who undertook to replace the parts, and it seems plain that the delay in bringing the contract to an end was due to his fault. It was in his interest to replace the missing parts and terminate the contract by returning the machine in an operable state of repairs. The resolution to

the issue on appeal in this case may be best summarised in the words of Lord Denning, M.R. in ***British Crane Hire Corporation Ltd. v. Ipswich Plant Hire Ltd.*** [1975] 1 Q.B. 303 at page 312:

> "It is the duty of the hirer to return the vehicle at the end of the hiring to the owner, and to pay the costs 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."

In this case, the contract of hire was not terminated until February, 1991. The appellant is obliged to pay the hire up to the time he terminated the contract by returning the machine to its owner, the respondent, in working condition. The measures taken by the respondent in an effort to retrieve his machine were reasonable in my view. I hold, therefore, that the learned trial judge was right in rejecting the defence and finding for the claimant. I would dismiss the appeal with costs to the respondent to be agreed or taxed.

Downer, J.A.

I agree.

Bingham, J.A.

Having read in draft the judgment of Patterson, J.A., I am in agreement with his reasoning and the conclusion reached that the appeal be dismissed with the order for costs as proposed.