IN THE SUPREME COURT OF QUEENSLAND Appeal No. 157 of 1987

FULL COURT

BEFORE:

Mr. Justice Connolly

Mr. Justice McPherson

Mr. Justice Williams

BRISBANE, 5 MAY 1988

BETWEEN:

JAMES ZOLTAN NEMETH (Plaintiff) Respondent

- and -

BAYSWATER ROAD PTY. LTD. and MICHAEL KEITH JONES as Trustee for the M.K. Jones Family Trust carrying on business under the firm name of AIR PIONEER (Defendants) Appellants

JUDGMENT

MR. JUSTICE CONNOLLY: I am authorised by my brother McPherson to say that he would allow this appeal with costs, set aside the judgment of the District Court and in lieu thereof order that there be judgment for the plaintiff with costs on the appropriate scale for $1,959.89 with interest at 12 per cent from 16 February 1986.

I publish His Honour's reasons.

I agree in the order proposed by my brother.

I publish my reasons.

MR. JUSTICE WILLIAMS: I agree with the reasons published by my brother Connolly that the order proposed should be made.

MR. JUSTICE CONNOLLY: The order of the Court will be as proposed as my brother McPherson.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 157 of 1987

FULL COURT

BETWEEN:

JAMES ZOLTAN NEMETH (Plaintiff) Respondent

AND:

BAYSWATER ROAD PTY. LTD. and MICHAEL KEITH JONES as Trustee for the M.K. Jones Family Trust carrying on business under the firm name of AIR PIONEER (Defendants) Appellants

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CONNOLLY J.

McPHERSON J.

WILLIAMS J.

Reasons for Judgment delivered on the 5th May, 1988 by Connolly J. and McPherson J.

Connolly J. concurring with the orders proposed by McPherson J.

Williams J. concurring with the reasons of Connolly J. and the orders proposed.

"APPEAL ALLOWED WITH COSTS. JUDGMENT OF THE COURT SET ASIDE AND IN LIEU THEREOF JUDGMENT FOR THE PLAINTIFF WITH COSTS ON THE APPROPRIATE SCALE FOR $1,959.89 WITH INTEREST AT 12% FROM 16TH FEBRUARY, 1986."

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 157 of 1987

Before the Full Court

Mr Justice Connolly

Mr Justice McPherson

Mr Justice Williams

BETWEEN:

JAMES ZOLTAN NEMETH (Plaintiff) Respondent

AND:

BAYSWATER ROAD PTY. LTD. and MICHAEL KEITH JONES as Trustee for the M.K. Jones Family Trust carrying on business under the firm name of AIR PIONEER (Defendants) Appellants

JUDGMENT: CONNOLLY J.

Delivered the 5th day of May, 1988.

CATCHWORDS:

Counsel: Mr. S. Doyle for Appellants
Mr. G.J. Robinson for Respondent

Solicitors: Power Power T/a for Nissen Coates, Mackay, for Appellants

Clayton Murrell & Woolmer for Respondent

Hearing date: 21st April, 1988.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 157 of 1987

FULL COURT

BETWEEN:

JAMES ZOLTAN NEMETH (Plaintiff) Respondent

AND:

BAYSWATER ROAD PTY. LTD. and MICHAEL KEITH JONES as Trustee for the M.K. Jones Family Trust carrying on business under the firm name of AIR PIONEER (Defendants) Appellants

JUDGMENT - CONNOLLY J.

Delivered the 5th day of May 1988.

The facts in this case are set out in the judgment of my brother McPherson which I have had the advantage of reading. It is unnecessary for me to restate them. The respondent's case depended upon his establishing by parol evidence a contractual term supplementary to the provisions of an elaborate contract in writing which had been carefully negotiated between the appellant and himself. He brought his action in a District Court so that no attempt could be made to rectify the written contract. In these circumstances the difficulties facing the respondent will be apparent. Notwithstanding these difficulties he succeeded in the Court below. The question is whether the judgment he obtained can be sustained. The learned District Court Judge treated the case as one in which the contract of the parties was partly in writing and partly oral in reliance on observations of Lord Russell of Killowen C.J. in Gillespie Brothers & Co. v. Cheney Eggar and Co. [1896] 2 Q.B. 59 at p. 62. I am not in the least persuaded that this is the type of situation in which that approach can be adopted but it is unnecessary to express a concluded

opinion on the point for the respondent's case cannot be put higher than by considering whether, on the findings made by the learned trial Judge, he makes out a collateral warranty. I say this because either approach requires a conclusion that there was a promise by the appellant to operate the aircraft for a minimum of 5O hours per month.

Any discussion about the future turn-over of a business yet to be established is of its nature conjectural, an expression of hope which is not even based on past results. It is not a representation of fact, save insofar as it involves, by implication, a representation that the hope is honestly entertained. It is natural in such situations, and it was natural in this one, that the expectations of the party setting up the business may emerge in the course of his discussions with suppliers of goods and services with whom he negotiates. Moreover it is natural that his expectations are not without their importance to the other party and may influence his decision to enter into contractual relations. It may be accepted in this case that Mr. Nemeth was looking for a high rate of use of his aircraft for, on any view, the hire he was to receive was to be based on an hourly rate. It may be accepted that Mr. Nemeth would not have entered into this contract unless he believed that his aircraft would be used for at least 50 hours per month, although it is far from clear that this was brought home to Mr. Jones. It is not at all clear that Mr. Jones in fact intended Mr. Nemeth to act upon the statements which he is found to have made but it is obvious enough that the question was of commercial significance and a matter of importance to Mr. Nemeth and that much Mr. Jones must have known. None of this however goes far enough to warrant the conclusion that the statements were promissory in character. I agree with my brother McPherson that the statement in Mr. Nemeth's evidence that early in August Mr. Jones “offered 50 hours utilization” was no more than the interpretation he put on the conversation early in August about which he had already given evidence, Mr. Jones' actual words as sworn to by Mr. Nemeth being that he could do better than 30 hours

utilization and might even be able to do 50 hours or maybe even more.

The leading case in this area is J.J. Savage & Sons Pty. Ltd. v. Blakney (1970) 119 C.L.R. 435. This was a far more credible case of collateral warranty than the present for it involved statements by a dealer in motor boats in writing to a prospective purchaser of an engine as to the features of a number of makes. In relation to the make which the plaintiff purchased the defendant had given the "estimated speed" as 15 m.p.h. The plaintiff purchased his preferred make under a contract in writing which did not contain such a term. At p. 442 the High Court, in a unanimous judgment, observed:—

> "The Full Court seems to have thought it sufficient in order to establish a collateral warranty that without the statement as to the estimated speed the contract of purchase would never have been made. But that circumstance is, in our opinion, in itself insufficient to support the conclusion that a warranty was given. So much can be said of an innocent representation inducing a contract. The question is whether there was a promise by the appellant that the boat would in fact attain the stated speed if powered by the stipulated engine, the entry into the contract to purchase the boat providing the consideration to make the promise effective. The expression in De Lassalle v. Guildford [1901] 2 K.B. 215, at p. 222 that without the statement the contract in that case would not have been made does not, in our opinion, provide an alternative and independent ground on which a collateral warranty can be established. Such a fact is but a step in some circumstances towards the only conclusion which will support a collateral warranty, namely, that the statement so relied on was promissory and not merely representational."

The Court went on to observe that there were three courses open to the purchaser. Their Honours stated them as follows:—

> "He could have required the attainment of the speed to be inserted in the specification as a condition of the contract; or he could have sought from the appellant a

> promise - however expressed, whether as an assurance, guarantee, promise or otherwise - that the boat would attain the speed as a prerequisite to his ordering the boat; or he could be content to form his own judgment as to the suitable power unit for the boat relying upon the opinion of the appellant of whose reputation and experience in the relevant field he had, as the trial judge found, a high regard. Only the second course would give rise to a collateral warranty."
>
> Cf. Ross v. Allis-Chalmers Australia Pty. Ltd. (1980) 55 A.L.J.R. 8.

After observing that there was nothing in the evidence before the trial Judge to support the view that the purchaser took either the first or second of those courses, their Honours observed that the only conclusion open upon the evidence was that he had taken the third. Their Honours concluded:—

> "That the statement actually made by the appellant was intended to have some commercial significance upon a matter of importance to the respondent can be conceded; that the respondent was intended to act upon it, and that he did act upon it, is clearly made out. But those facts do not warrant the conclusion that the statement was itself promissory."

That is obviously the position here. If Mr. Nemeth had sought to take either the first or the second course suggested in Blakney, Mr. Jones would not have departed in the least from anything he had said previously if he had declined on the footing that, while he had high hopes of achieving a 50 hour utilization or better and indeed expected to do so, he could not prudently guarantee it. It follows that, in my judgment, the respondent should not have recovered damages for breach of a term providing for hire on the basis of a minimum of 50 hours utilization per month.

This leaves only the question of whether an apportionment of the monthly sum of $2,200.00 payable pursuant to the variation constituted by ex. 2 can be made.

While I do not doubt the interpretation placed by McPherson J. on s. 232 of the Property Law Act, I must say that the point was not argued. I am prepared to accept his Honour's approach for the purposes of this appeal but the point is an important one and should be open for reconsideration in an appropriate case.

In the result I agree in the order proposed by my brother McPherson.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 157 of 1987

Before the Full Court

Mr Justice Connolly

Mr Justice McPherson

Mr Justice Williams

BETWEEN

JAMES ZOLTAN NEMETH (Plaintiff) Respondent

- and -

BAYSWATER ROAD PTY. LTD. and MICHAEL KEITH JONES as Trustee for the M.K. Jones Family Trust carrying on business under the firm name of AIR PIONEER (Defendants) Appellants

JUDGMENT - McPHERSON J.

Delivered the fifth day of May 1988.

CATCHWORDS:

Contract - Interpretation - Parol evidence - Pre-contractual oral statement - Admissibility to add to contract - Scope of rule.

Contract - Terms - Pre-contractual statement - Estimate of extent of use of chartered aircraft - Whether amounting to contractual promise or undertaking.

Money counts - Periodical payment - Monthly amount due for hire of chattel - Contract discharged mid-month - Whether hire payment apportionable - Property Law Act 1974-1987, s. 232.

Counsel: Mr Doyle for Appellant (Defendant)
Mr. Robinson for Respondent (Plaintiff)
Solicitors: Power & Power t/a for Nissen Coates, Mackay, for Appellant
Clayton Murrell & Woolmer for Respondent
Hearing date: 21 April, 1988.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 157 of 1987

FULL COURT

BETWEEN

JAMES ZOLTAN NEMETH (Plaintiff) Respondent

- and -

BAYSWATER ROAD PTY. LTD. and MICHAEL KEITH JONES as Trustee for the M.K. Jones Family Trust carrying on business under the firm name of AIR PIONEER (Defendants) Appellants

JUDGMENT - MCPHERSON J.

Delivered the day of 1988.

In 1985 the plaintiff in this action in the District Court at Mackay was the owner of a Beechcraft Barron aircraft registered no. VH-JZN. On 22 October of that year the plaintiff and the defendant executed a written contract (ex. 1) by which the defendant agreed to take the aircraft on hire upon the terms and conditions contained in the contract. Because of the submissions at trial and on

appeal, it is, I think, necessary to set out the contract (ex. 1), which was signed, sealed and delivered by the parties, in full:—

"This Agreement is made the 22 Day of October, 1985.

BETWEEN:

(Hereinafter called "The Owner") of the one part

AND: AIR PIONEER of 108 Victoria St., Mackay in the State of Queensland (Hereinafter called "The Operator") of the other part.

WHEREAS:

A. The Owner has sufficient title and interest in a certain Beechcraft Baron C 55 aircraft registered in Australia as VH-JZN (hereinafter called "The Aircraft"), which said aircraft is available for use for commercial and income producing purposes; and

B. The Operator requires the use of an aircraft for the conveyance of fare paying passengers and considers that the aircraft is suitable for its purposes and the operator has requested the owner to hire the aircraft to the operator for the term at the rate of hire and upon and subject to the covenants, conditions, restrictions and stipulations hereinafter appearing.

Now the parties hereto hereby agree as follows:—

1. This agreement shall continue for the period of six (6) months on and from the date hereof (hereinafter referred to as "The Original Term") and shall cease at the end of that period.

2. In considerations of the owner making the aircraft available to the operator pursuant to this agreement, the operator will pay to the owner a sum equal to one hundred and ninety dollars ($190.00) for each tachometer hour during which the operator utilises the aircraft (and the operator hereby acknowledges that the tachometer hours registered on the aircraft as at the date of the operator taking possession is 22.10.85, 101.8 hours). Notwithstanding the aforementioned hourly rates, the owner will make the

aircraft available to the operator for an initial eight hours for fuel only costs of seventy dollars ($70.00) per hour to assist with ferry costs.

3. The hiring charge payable by the operator to the owner during the original term of this agreement shall be paid by calendar monthly payments with the first payment to be made within forty (40) days of the first calendar month after delivery of the aircraft to the operator, and calendar monthly thereafter.

4. The operator will take possession of the aircraft not later than the twenty-second day of October, 1985 at Adelaide in the order and condition in which it then is and on conclusion of the original term, the operator will return the aircraft to the said address in at least equally good repair and condition.

5. The operator will take possession and control of the aircraft pursuant to this agreement as is where is and before causing the aircraft to be taxied or flown will obtain any and all necessary certificates, licences and permits to enable the aircraft to be taxied and flown lawfully.

6. The operator will maintain and cause to be maintained full and accurate log books and records recording in good faith all hours and parts of hours of use of the aircraft, all trips and journeys, all maintenance and repair work, all inspections and all such other matters as are recorded in log books kept for similar types of aircraft used for similar purposes, and the operator will also maintain all such instruments in or about the aircraft as are required to record the use thereof.

7. The operator will use the aircraft in every respect at the risk of the operator. The operator hereby indemnifies the owner and covenants to keep the owner indemnified from against and in respect of all claims, demands, actions, suits and proceedings of whatever nature or kind arising out of the use or attempted use of the aircraft during any period in which the aircraft is subject to this agreement whether or not any such claim, demand, action, suit or proceedings is based on or refers to negligence on the part of the operator of the aircraft or any servant of the

operator or any defect in the aircraft whether patent or latent or otherwise howsoever.

8. The operator acknowledges that it has made such inspections as it has wished to make of the aircraft and that it has relied solely upon the skill and judgment and knowledge and experience of its manager and the operator further acknowledges that (save as to title) the owner has made no representations whatsoever as to the nature of the aircraft or its condition or its fitness for any use or purpose whatsoever.

9. The operator acknowledges and agrees that all the terms of the agreement between the owner and the operator relative to the aircraft are contained in this written agreement and that no representation, warranty, covenant or other matter or thing whatsoever not specifically contained herein shall have any force or effect, or be of any validity whatsoever.

10. The owner will insure the aircraft against such risks as aircraft or similar kind and used for similar purposes are ordinarily insured against, paying all premiums necessary for that purpose, and the owner will upon reasonable request by the operator produce to the operator evidence of the owner having taken out and maintained such insurance cover.

12. The owner shall pay the cost of all maintenance and overhaul of the aircraft required at the prescribed hourly times of flying and all fuel and oil costs.

13. THE OPERATOR COVENANTS WITH THE OWNER AS FOLLOWS:—

A. To cause to be carried out, in consultation with the owner, in accordance with all relevant statutes and regulations all normal 100 hourly inspections and all general daily maintenance and all major inspections and overhauls.

B. To give reasonable notice to the owner of every impending inspection and overhaul and to obtain in good time the owner's approval of the carrying out of the work by a person, firm or company having all necessary qualifications.

C. To permit the owner by its servants agents and/or contractors to inspect the aircraft at all reasonable times when the same is not in use and to make the aircraft available for such inspections at intervals of not more than one (1) month.

D. To keep the aircraft clean, both inside and outside, and maintain the interior in an hygienic condition and to ensure that the same is at all times free from all manner of insect pests and disease carrying agents.

E. To take all reasonable precautions to protect and preserve the aircraft while the same is on the ground, either idle or in course of embarkation, disembarkation, loading or unloading and in particular, but without limiting the generality of the foregoing, to use all reasonable precautions to prevent the aircraft from suffering damage in any storm, cyclone or similar weather conditions.

F. To comply in every respect with all statutes and statutory regulations applicable to the use of the aircraft.

G. Not to do or permit anything to be done in or about the aircraft, whether the same is in flight or not, and not to make any omission or permit any omission to be made where such act or omission would or might render void or voidable any policy of insurance held by the owner in respect of the aircraft and without prejudice to any other right or power of the owner to pay to the owner all such expenses, loss and damage as the owner may sustain or incur by reason of any breach by the operator of this covenant.

H. Not to use the aircraft or permit the aircraft to be used for any unlawful purpose.

I. Not to sub-let or sub-hire the aircraft or permit any person or corporation to have the use thereof, other than as a fare paying passenger of the operator, or as a bona fide employee of the operator.

J. Not knowingly to do or permit to be done any act or thing which would or might endanger the aircraft or any person or freight carried therein and in particular, but without limiting the generality of the

foregoing, not to permit the aircraft to be landed on or take off from any inadequate runway and not permit any person, other than one who holds an appropriate pilots licence, to fly the aircraft.

K. Not to permit any lien, whether for repairs, landing charges or otherwise, to be established on or against the aircraft and if any such lien be established, then without prejudice to any other right or remedy of the owner, the operator shall pay any & all sum or sums of money required to procure the immediate satisfaction and release of the lien.

L. Not to take the aircraft or permit the aircraft to be taken outside Australia or Australian territorial waters.

M. Not to do anything or permit anything to be done which would or might tend to endanger the title of the owner to the aircraft or deprive the owner of the right to possession of the aircraft subject only to the terms of this agreement.

N. To give to the owner upon reasonable request at all times a full true complete and bona fide account of the operator's use of the aircraft during any period throughout the term of this agreement.

14. During the currency of this agreement the operator shall be entitled to exclusive possession of the aircraft subject to the owner's rights of inspection hereinbefore contained.

15. The operator shall not pledge or attempt to pledge the credit of the owner in any respect and shall not represent to any person that the operator is entitled to do so.

16. If the operator shall commit any breach of this agreement, then the owner may at its discretion thereupon by notice to the operator determine this agreement and resume possession, custody and control of the aircraft, but without prejudice to the right of the owner to recover all payments due up to the actual time of recovery of possession of the aircraft by the owner and any or all sums payable by the operator to the owner on account whatsoever under this agreement.

17. Any notice which either party hereto is required or permitted by this agreement to give to the other of them shall be deemed to be duly given if in writing signed by the party giving such notice or on behalf of that party by any director or agent thereof or solicitor for that party and delivered to the party or any director of the party to whom or which the notice is addressed personally or posted by prepaid post addressed to that party at its address hereinbefore stated or any subsequent address of which that party may give notice to the other of them.

18. All payments by the operator to the owner pursuant to this agreement shall be made to such person or corporation as the owner may from time to time direct and until otherwise directed shall be made to J.Z.N. Services.

19. If during the original term of this agreement the owner shall desire to sell the aircraft, he shall first offer the same for purchase by the operator at such price and upon and subject to such terms and conditions as the owner is prepared to accept from any purchaser, such offer being made in writing. The operator may accept any such offer by notice in writing to the owner delivered to the owner within seven (7) days from receipt of the owner's offer to sell. If the operator shall not accept the owner's offer in the manner aforesaid within the said time, the operator shall be deemed to have rejected the offer and the owner may thereupon sell the aircraft to any person or corporation at a price not lower than and upon terms and conditions not more favourable than those offered to the operator at any time within six (6) months after making the offer to sell to the operator.

20. Throughout this agreement the expression “The Operator” shall mean the said Air Pioneer and its successors and permitted assigns and the expression “The Owner” shall mean the said J.Z.N. Services and his successors and assigns. Words importing the singular number shall include the plural number, and vice versa, and words importing any gender shall include the other genders.”

After the aircraft had passed into the possession of the defendant it was destroyed in an accident near Brampton Island on 16 February, 1986. It is accepted by the parties that that event had the effect of frustrating the contract and so from that date of discharging them from further performance.

The question for determination at trial was whether any and what amount was, as the plaintiff claimed, due but not paid to him by the defendant in respect of hiring charges under the contract. As regards the period up to 31 January, 1986, the basis of the plaintiff's claim was that, although the defendant had paid all sums due to the plaintiff in accordance with cl. 2 of the contract, further amounts remained due in respect of an alleged oral agreement entered into before the written contract was executed. Whereas cl. 2 provides for payment of $190.00 for each tachometer hour “during which the operator utilises the aircraft”, the alleged pre-contractual oral agreement was that the defendant would utilize the aircraft for a minimum of 50 hours per month. On that footing, the defendant ought, during the period from 22 October, 1985 to 31 January, 1986, to have utilized the aircraft for a total of 166.6 hours (50 hours per month for 3.33 months) at $190.00 per hour. After deducting expenses and the amount already paid by the defendant under cl. 2, the sum claimed by the plaintiff on this account was $12,935.76.

For this and a further amount claimed, together with interest thereon at 12 per cent, the learned District Court Judge gave judgment in favour of the plaintiff after a trial occupying a day at the circuit sittings. The defendant now appeals against that judgment.

Mr Doyle of counsel, who appeared for the defendant both at the trial and on appeal, objected in the course of the trial to the admission of evidence concerning the prior oral agreement set up by the plaintiff in his pleadings. The objection was that the adduction of such evidence amounted to an attempt to add to, vary, or contradict the

terms of a written contract, and so involved an impermissible infringement of the parol evidence rule. The rule has, as McHugh J.A. said recently in State Rail Authority (NSW) v. Health Outdoor Pty. Ltd. (1986) 7 N.S.W.L.R. 170, at 191:—

> "no operation until it is first determined that the terms of the contract are wholly contained in writing. The tendering of oral evidence to prove a contractual term, therefore, cannot be excluded until it is determined that any terms in writing record the whole of the parties' agreement".

The rule is not really one of evidence or admissibility in the ordinary sense, but is more correctly regarded as an aspect of the rules governing interpretation of written instruments depending for its application upon the parties having merged or "integrated" their agreement in a written instrument : ibid; see also Stoddart Tiles Pty. Ltd. v. Alcan Australia Ltd. (1983), which is a decision reported only in Hocker Duffty & Heffey : Cases and Materials on Contract (5th ed.) 262, at 263, in which I expressed a similar opinion.

It follows that, the objection having been taken by Mr Doyle at the trial of this action, Hall D.C.J. correctly admitted the evidence subject to counsel's objection. In giving judgment his Honour accepted as proved the oral agreement or term alleged, and gave effect to it by awarding the sum of $12,935.76 which was claimed by plaintiff. In doing so, he acted upon the following statement of Lord Russell of Killowen C.J. in Gillespie Brothers & Co. v. Cheney Eggar & Co. [1896] 2 Q.B. 59 at 62:—

> "I will now state why I think that, even though there is a definite written contract made between the parties, it is impossible to exclude from consideration what took place before the contract was made - in other words, their antecedent course of conduct. In the first place, although when the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms

> of their bargains, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement."

On appeal, Mr Doyle submitted, in any respectful opinion correctly, that the foregoing statement of Lord Russell was obiter. The case was not one in which the plaintiff was seeking to adduce parol evidence to vary a written contract. It was one where the conduct and communications of the parties prior to execution of the written contract between them were relied upon in order to demonstrate that the plaintiff buyer had disclosed to the defendant seller the purpose for which goods sold were intended, so as to attract the implication of the statutory condition of reasonable fitness for purpose under s. 14(1) of the Sale of Goods Act 1895 (U.K.). The statement of principle by Lord Russell accords with some, but by no means all, of the forms in which the parol evidence rule has been expressed in the various authorities cited to us on this appeal. On occasions it has been said that the operation of the rule is attracted by the mere production of a written instrument which appears on its face to be "the final written expression of the full consensus of the parties" : See L.G. Thorne & Co. Ltd. v. Thomas Borthwick & Sons (A/Asia) Pty. Ltd. (1955) 55 S.R. (NSW) 81, at 88, 91. On those occasions it has sometimes also been said that the written instrument is to be conclusively regarded as stating the terms of the contract, so precluding resort to any extrinsic material : ibid; see also Gordon v. MacGregor (1909) 8 C.L.R. 316, at 323, per Isaacs J.; Hoyt's Pty. Ltd. v. Spencer (1920) 27 C.L.R. 133, at 139, per Knox C.J. On other occasions the question has been said to depend upon the intention of the parties : Gordon v. MacGregor (1908) 8 C.L.R. 316, at 320, per Griffith C.J.; Hoyt's Pty. Ltd. v. Spencer (1920) 27 C.L.R. 133, at 143, per Isaacs J.; to be gathered, not simply from the appearance of the written instrument, but also from their pre-contractual acts and communications : L.G. Thorne & Co. Pty. Ltd. v.

Thomas Borthwick & Sons (A/Asia) Pty. Ltd. (1955) 55 S.R. (NSW) 81, at 94, per Herron J.; Stoddart Tiles Pty. Ltd. v. Alcan Australia Ltd., supra, at 263-264; State Rail Authority (NSW) v. Health Outdoor Pty. Ltd. (1986) 7 N.S.W.L.R. 170, at 190-192.

For my part I cannot see that the rule can rest on anything more than a presumption as to the intention of the parties. In Gordon v. MacGregor, Isaacs J. spoke of it as a prima facie presumption (8 C.L.R. at 323). No doubt the force of the presumption will vary according to a variety of circumstances, including the nature, form and content of the written instrument concerned, making it naturally more difficult to displace when the instrument is one which, in appearance and detail, itself suggests that the parties intended it to be the exclusive record of their contractual rights and obligations. The real matter of difficulty, and the source of much of the controversy, arises in attempting to define the circumstances that may be considered in determining whether or not the presumption is rebutted. It can scarcely be doubted that a mere unilateral assertion in the proceedings that the written instrument does not embody all contractual terms is not sufficient to displace the presumption to which the parol evidence rule would otherwise give rise. In the passage from Gillespie Brothers & Co. v. Cheney Eggar & Co. [1898] 2 Q.B. 59, at 62, Lord Russell was not, I think, intending to suggest or imply the contrary. So understood, what his Lordship said is in accordance with a number of later authorities on the subject.

In the present case the question is whether there was anything in the evidence adduced by the plaintiff at the trial sufficient to rebut the presumption arising from the appearance, form, extent and contents of the written contract ex. 1. There is no doubt of the strength of the presumption in the present case. The contract is not in a standard printed form. Although it was prepared by Mr M.K. Jones, who as principal of the defendant's company has some experience of such contracts, the draft document passed

from him to the plaintiff, who made more than one amendment to it before execution. The provisions of ex. 1 are detailed, and it contains in cl. 9 a term by which the operator (who is the defendant in this action) agrees that the written document contains all the terms of the agreement. It is therefore not to be approached as a document representing only an informal or imperfect memorandum of the agreement of the parties. There are, moreover, some difficulties in reconciling the alleged oral agreement or term with the provisions of cl. 2 of the contract. The former is to the effect that the aircraft would be utilized for at least 50 hours a month. That may perhaps not involve direct inconsistency with cl. 2 providing for payment of $190.00 per “each tachometer hour during which the operator utilizes the aircraft”; but, if not, it falls short of it by only a very narrow margin. Direct inconsistency would have existed if the oral agreement contended for had been that 50 hours monthly utilization was to be paid for, whether the aircraft was used or not. It is, indeed, a little surprising that, in the terms in which it is advanced, the oral agreement should contractually bind the operator not merely to pay for, but actually to use as well as pay for, the aircraft for a minimum number of hours each month. What advantage for an owner is there in having his aircraft used, as distinct from paid for, for a minimum period each month?

In the end, however, the point last mentioned is one that goes primarily to the question whether any such enforceable agreement was made. As to that the learned trial judge accepted the evidence of the plaintiff, and it has not been suggested that, as a matter of evidence or credibility, he was not entitled to do so. The question, which being one of inference is as much a matter for this Court as for the trial court, remains whether the alleged agreement can fairly be regarded as having attained the quality and status of a contractual term. On that aspect the evidence of the plaintiff was that the matter of utilization was mentioned between the parties on two

occasions in August and two in September, 1985. In chief, the plaintiff testified as follows:—

> “Did you have any conversation with him about that ? Yes, we did.
>
> Let me interrupt you. You tell us in your own words what you said and what he said? Well, I said to Mr. Jones that I am looking for around about 30 hours' utilization per month. Mr. Jones said that he could do better than that. He might even be able to do 50 hours or maybe even more.
>
> Did you talk of any other details of hiring? Well, Mr. Jones said that he had another aircraft some time earlier but the owner, I think, sold it, if I remember correctly.
>
> When did you next talk to Mr. Jones about this aircraft? We talking about this aircraft next late in August, again.
>
> Do you remember in particular what you were talking about? Well, we also mentioned again the hiring hours and there was 50 hours, minimum 50 hours' utilization.
>
> How did you come to talk about that? See early in August he offered 50 hours' utilization and I took it that would be the minimum utilisation he would be able to provide me in that aircraft.
>
> How did it come up in the next aircraft? I asked.
>
> You asked? I asked and, ‘Is it really going to have 50?’
>
> ‘Yes’, he said, ‘it will have 50 utilisation, maybe even more’.
>
> That was in August? That was in August.
>
> Did you have other conversations with him? Yes, we have conversation and we had conversation in September, early in September.
>
> When else in September? And we had conversation later in September with a similar nature.
>
> How many times in September? Twice I think in my recollection.

> When you say conversation of a similar nature, what are you talking about? We were talking about that Mr. Jones really want the aircraft to charter here with it and the 50 hours will be flying time.
>
> Did you talk about the other details? And I asked Mr. Jones that if he would be prepared to furnish some agreement between us in writing and Mr. Jones sent that first agreement, that I should read over, and whatever clauses I think we should change, we'll change it.
>
> I take it you received a document? Received a document. I read it over. Some clauses are actually - we changed, but I wasn't care about it as not written on it the 50 hours' utilisation because it was a verbal agreement and I took it this is amount of 100 per cent of it will be 50 hours' utilisation. I took his word."

It was at that point that Mr Doyle raised the objection to which I have referred.

The only other evidence on the point concerned a statement by a Mr Patrick Jones, when he collected the aircraft from the plaintiff in Adelaide on 22 October, 1985, which was the occasion on which the contract was signed by the plaintiff and by "Patrick" Jones on behalf of the defendant. He was asked if the utilization of 50 hours would be maintained, to which he replied in the affirmative. Patrick Jones was not an officer of the defendant company; but His Honour held that, because Patrick was instructed to obtain execution of the contract (ex. 1), "he was in that sense at least clothed with an ostensible agency". With respect, I am unable to agree with that conclusion. The mere fact that a person is authorised simply to sign a contract on behalf of someone else does not justify an inference of fact, or warrant as a matter of law the conclusion, that he has authority, whether express, implied or ostensible, to give a warranty or promise additional to those contained in the written document presented for signature : see Hill v. Harris [1965] 2 Q.B. 601, at 617. In any event, subscription of Patrick's name or initials against the name of the defendant company on ex. 1 amounted to no more than the authentication by him of

the execution of the contract by the company itself : Richardson v. Landecker (1950) 50 S.R. (NSW) 250, at 259. There is no evidence to suggest that he was authorized to do more than that.

The question to be determined therefore is whether the passages in the evidence set out above can be said to give rise to a warranty or promise having contractual effect. In Dick Bently Productions Ltd. v. Harold Smith (Motors) Ltd. [1965] 1 W.L.R. 623, at 627, the mlatter was stated thus by Lord Denning M.R.:—

> "It was said by Holt C.J., and repeated in Heilbut, Symons & Co. v. Buckleton, that: 'An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so 'intended'.' But that word 'intended' has given rise to difficulties. I endeavoured to explain in Oscar Chess Ltd. v. Williams that the question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice. What conduct, then? What words and behaviour lead to the inference of a warranty?"

Adopting that approach, the problem nevertheless remains of determining what it is in the conduct or words of the parties that in an objective sense demonstrates that they intended a particular statement to be legally binding upon the party making it. After the passage from the case just cited, Lord Denning went on to say that there was prima facie ground for inferring that a warranty was intended if the statement or representation in question was made "for the very purpose of inducing the other party to act upon it, and actually inducing him to act upon it" by entering into the contract. But there is authority binding upon us to hold that such factors alone are not sufficient to convert the statement or representation into a promise or undertaking to be contractually bound to its factual accuracy or to its fulfilment: see J.J. Savage & Sons Pty. Ltd. v. Blakney (1970) 119 C.L.R. 435, at 443; Ross v. Allis-Chambers Australia Pty. Ltd. (1980) 55 A.L.J.R. 8.

Viewing the plaintiff's evidence in the light of the foregoing requirements, it does not seem to me to be possible to regard what was said on the subject of aircraft utilization as objectively intended to have contractual force or effect. The word “offered” does appear in his evidence, but it is clear from the context that the plaintiff was placing his own gloss upon the conversation with Mr Jones and was not repeating literally what the latter had said. According to that evidence, the plaintiff said he was “looking for” utilization “for around about 30 hours” per month, to which Jones responded that he could do better than that and “might even be able to do 50 hours or maybe even more”. Later, when asked, “Is it really going to have 50?”, Jones answered “it will have 50 utilisation; maybe even more”. Those were the conversations in August. The evidence about the September conversations (“the 50 hours will be flying time”) was even less precise.

Even allowing for the fact that the plaintiff may not have been entirely at home in the English language, I do not consider the statements passing between Jones and himself to be anything more than mere estimates, hopes, or expectations. They were certainly not statement of present fact, the extent to which the aircraft would be used evidently being a matter which would not be established with any degree of accuracy until it was in fact put to use. It must be rare, indeed, for a statement amounting simply to an estimate relating to future events, and recognizable as such by the parties, to be regarded as giving rise to contractual liability. When to this there are added the circumstances that the conversations in question took place some considerable time before the contract was executed; that, although the statement as given in evidence was vague and imprecise in form, the promise it was said to embody was of such a character and importance as to raise the expectation that, if intended to be contractually binding, it would more naturally have found a place in the written contract in question; that the parties, and particularly the plaintiff, had ample opportunity to insert it in the document if they had

intended it to be binding; and that the contract itself deals in cl. 2 with the same or a closely related matter, I have concluded that his Honour was in error in drawing the inference that the statement concerning minimum utilization of the aircraft amounted to a legally binding undertaking by the defendant to use it to the extent mentioned in conversation with the plaintiff.

In these circumstances, it does not seem to me to matter greatly whether that conclusion is based on the inference that the statement was not intended to be a contractually binding promise or warranty; or that the plaintiff has failed to displace the presumption that the written contract ex. 1 was intended by the parties as an exhaustive record of their contractual transaction. In either event the appeal on this aspect of the matter must be allowed.

In due course, as the hire progressed, the topic of minimum utilization of the aircraft became the subject of contention between the parties to the contract. Eventually a further memorandum (ex. 2) was signed incorporating an addendum to cl. 2, by which the defendant agreed to pay $2,200.00 for each calendar month and $59.00 for each tachometer hour, with a minimum of 30 hours utilization. It was agreed that the new arrangement should commence on 1 February, 1986. The aircraft was, as I have said, destroyed on 16 February, 1986, which was before even the first month of the new regime had elapsed. On account of the period 1 to 16 February his Honour awarded a total of $1,959.89, of which $702.80 represented payment for 5.5 hours actually flown at $51.00 per hour, and $422.25 the fuel and oil outlays. The balance, amounting to $1,257.14, represented 16/28 parts of the agreed monthly 30 hour minimum utilization fee. The defendant also appeals against the inclusion of the latter amount in the judgment sum.

Under the contract as varied by ex. 2 it is clear that the monthly sum of $2,200.00 was payable at the end of each month. At common law interest on money lent accrued due

from day to day; but, generally speaking and subject to that exception, payments due at specified dates did not accrue due unless and until the relevant date for payment arrived. This meant that, in the case of a lease determined between two rent days, no rent, or any amount on account of rent, was payable in respect of occupation for the incomplete period before termination : see Clun's Case (1613) Co.Rep. 127a, 127b. In England the matter attracted legislative attention during the nineteenth century, culminating in the Apportionment Act 1870, the provisions of which were adopted in Queensland by ss. 231 and 232 of the Property Law Act 1974-1985. So far as relevant, those provisions are as follows:—

> "232. (1) All rents, annuities, dividends, and other periodical payments in the nature of income whether reserved or made payable under an instrument in writing or otherwise shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.
>
> (2) The apportioned part of any such rent, annuity, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part forms part becomes due and payable, and not before; and in the case of a rent annuity or other such payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before".

The monthly utilizations payments under the varied contract in the present case cannot be regarded as "rent" in the proper sense of that term or as defined in s. 231 of the Act. On the other hand, I do not think it can be doubted that they amount to "other periodical payments in the nature of income...whether...made payable under an instrument in writing or otherwise...". Under s. 232(2) the apportioned part is not payable or recoverable until the entire portion becomes due and payable; but that would have happened here at the last moment of 28 February, 1986, which was well past when the action was instituted.

The monthly payment due under ex. 2 therefore seems to me to be apportionable and therefore due in respect of the incomplete period running from 1 February to 16 February, 1986. I reach this conclusion with some hesitation because the applicability of s. 232 was not the subject of submissions before us, and I notice that in Re Lucas (1885) 55 L.J.Q.B. 101, at 103, Bowen L.J. expressed a doubt whether the Act of 1870 "made rent due from day to day in every sense". On the other hand, Woodfall : Landlord and Tenant (28th ed.) para. 1-0772, at p. 308, does not question that the Act allows recovery of rent pro rata where the tenancy is determined in the middle of the period, and there is a considered decision of Manisty J., reported only in Cababe' and Ellis's Reports to the effect that the Apportionment Act applies to rent in respect of an incomplete period like this : see Hartcup & Co. v. Bell (1883) Cab. & El. 19. The effect of the Apportionment Act was summed up by Fry J. in Re South Kensington Co-Operative Stores (1881) 17 Ch.D. 161, at 165, who said:—

> "It declared that rents should be apportionable like interest on money lent. Now, how did the law stand before this Act was passed? Plainly in this way, that rent neither accrued due, nor was payable except on the day on which it was reserved; whereas interest or money lent accrued due de die in diem, although it might be payable at certain specified days. The effect of the section is to declare that rent, like interest, accrues due from day to day, and that the payments of rent, like the payments of interest, when they are periodical, shall be apportioned in respect of the time at which the rent, like the interest, accrued due."

See also Moriarty v. Agent's Garage & Engineering Co. Ltd. [1921] 1 K.B. 423, which was a case of apportionment of salary. In the result I am persuaded that s. 232 does apply to the monthly utilization fee of $2,200.00 in this case, and in consequence that the plaintiff was on that account properly awarded the amount of $1,257.14 calculated for the fractional period from 1 to 16 February, 1986 on the basis of 16/28 of the whole monthly sum.

In my opinion the appeal should be allowed with costs and the judgment of the District Court set aside; in lieu, there should be judgment for the plaintiff in the action for $1,959.89 with costs on the appropriate scale, together with interest thereon at 12 per cent from 16 February, 1986. I would be prepared to grant the respondent plaintiff a certificate under the Appeal Costs Fund Act.