[HIGH COURT OF AUSTRALIA.]

BOROUGH OF TAMWORTH . . . APPELLANT;
DEFENDANT,

AND

SANDERS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1904.

SYDNEY, *Dec.* 7, 8, 12.

Griffith C.J., Barton and O'Connor JJ.

Contract—Municipality—Removal of nightsoil—Clause fixing remuneration of contractor—Right to collect his own fees and charges—Liability of municipality for fees which contractor fails to collect—Nuisances Prevention Act (*N.S.W.*), (No. 24 *of* 1897), *sec.* 27.

In a contract entered into between a municipal council and a contractor, for the removal of nightsoil from the premises of householders within the municipality, the only provision for remuneration was a clause which authorized the contractor "to collect his own fees and charges," which were not to exceed a certain limit.

Held, that the contractor was not entitled to recover from the council, in an action on the contract, the fees and charges which he had failed to collect from the householders to whom his services were rendered.

Decision of the Supreme Court, (1904) 4 S.R. (N.S.W.) 537, reversed.

APPEAL from a decision of the Supreme Court of New South Wales, (1904) 4 S.R. (N.S.W.), 537.

The respondent entered into a contract with the appellant borough for the removal of nightsoil &c. within the municipality under the *Nuisances Prevention Act*, 1897. The remuneration of the contractor was fixed by clause 14 of the contract, which was in these terms: "The contractor shall collect his own fees and charges, which shall not exceed the following, viz.:—For pan closets sixpence per pan per service, and for emptying cesspits, sixpence for every cubic foot." The respondent carried out certain work under the contract, and failed in some cases to obtain from the

householders the fees and charges due from them for services rendered under it. He then sued the borough to recover these amounts. His declaration set out the agreement, and alleged as a breach "that the defendant borough wrongfully refused to pay to the plaintiff such of the fees and charges in the fourteenth clause of the said agreement provided for as the plaintiff was unable to collect by reason of the refusal to pay of the persons liable to the defendant borough for such fees or charges or part of them under the *Nuisances Prevention Act*, 1897."

The defendant borough demurred to the breach so assigned upon the grounds:—

"1. That it was not a term of the said contract that the defendant should pay to the plaintiff any of the plaintiff's fees and charges which he should be unable to collect:

"2. That there could not be fees and charges of the plaintiff remaining unpaid to the plaintiff for which persons could be liable to the defendant under the *Nuisances Prevention Act*."

The Supreme Court overruled the demurrer, and ordered that judgment on the demurrer should be entered for the plaintiff. The reasons for the decision sufficiently appear from the judgments.

The defendant borough now appealed by special leave.

Gordon K.C. (with him *Piddington*), for the appellant.

Armstrong (with him *Brissenden*), for the respondent, moved that the leave to appeal should be rescinded on grounds (1) of delay, (2) that the amount involved was below the appealable amount, (3) that on the application for special leave the appellant did not fully disclose all matters that should have been placed before the Court, (4) that the appellant had not made out that the case was one for the granting of special leave, (5) acquiescence in the judgment of the Supreme Court. The judgment on the demurrer was given on 12th August, and application for special leave to appeal was not made until 8th September. After the judgment the appellant applied to the Court for leave to plead, and for extension of time, which were granted. They then pleaded a general denial of indebtedness. There was, therefore, in this case, no sum of money involved at all in the action. The High

H. C. OF A. 1904.

BOROUGH OF TAMWORTH v. SANDERS.

Court was not informed that there was a defence on the merits, although at the trial the defendants might have succeeded, and so rendered the decision on the demurrer purely academic. By filing a defence and asking for leave to plead the defendants have waived their right to appeal: *Brady* v. *Donnelly* (1).

Per Curiam : We think that we should hear the appeal.

Gordon K.C., for the appellant. The question turns on the construction of clause 14 of the contract. It is a common form of farming out contract. The contractor takes upon himself the whole responsibility of doing the work, with the right to remunerate himself by collecting the fees from the householders. There is nothing illegal in the arrangement. Secs. 17, 18, 19, and 20 in effect provide that no householder is to do the work himself or employ an unauthorized person to do it for him, and that the council shall provide a proper person to carry out the work under proper inspection. There is nothing in those sections to prevent the contractor from making his own arrangements with the householder, as to payment &c., so long as he satisfies the inspector that the work is properly done. The fixing of a maximum in the clause suggests that particular arrangements are to be made subsequently as to the amount of fees and charges. The words "*his own* fees and charges" also point to the intention that the contractor was to look to the householder for his remuneration. If he was intended to be a mere collector for the municipality, the fees and charges could not properly be termed "his own." They would belong to the municipality. If the householders fail to pay, they can be sued in the name of the borough, even if no special contract has been made between the contractor and householder. If such a contract is made, the contractor can sue in his own name. The action here is not for work done, but on a special contract to indemnify the contractor for what he failed to collect from the householder. No such guarantee is implied in the contract. The utmost that the contractor can expect from the borough in this connection is that it should do nothing to prevent

(1) 1 N.Y. (Comstock) Rep., 126.

him from collecting his fees, and possibly that it should assist him in doing so by suing on his behalf, on his giving an indemnity. If the contractor has chosen to put himself in this position he cannot complain. He could have provided for the difficulty otherwise, but has not done so. It is immaterial whether under sec. 27 the borough could or could not recover these sums from the householders before paying them to the contractor. [He referred to *Ex parte Byrt* (1), and *Ex parte Sheldon* (2).]

Armstrong, for the respondent. Clause 14 should be construed as appointing the contractor to be the collector of the fees on behalf of the borough. As a security for payment for his work, and to save the council the expense of collecting, he is allowed to collect the fees and pay himself out of them. The words "his own fees" do not mean that they are to be his own in the sense that nobody else has any voice in their disposal, but are equivalent to the adverbial phrase "for himself." He is to collect the fees for himself, without having to call upon the council to get them in for him in the first instance. Apart from this clause there is in the contract no stipulation for payment. It must be presumed that there is some provision for payment, and that payment is to be by the borough, not by third persons. The borough could not contract that other persons should pay. It is therefore extremely improbable that the contractor would have accepted such a problematic remuneration as is contended for by the appellant. Clause 9 speaks of the rates provided under the contract. Those would be inappropriate words if clause 14, which provides for the rates, referred to rates to be arranged under a different contract altogether. Clause 15 also implies that the contract is to be the only guarantee of payment.

[GRIFFITH C.J.—Apart from clause 14 I should be inclined to endeavour to read the contract in the sense that work was to be done subject to an agreement for payment outside of, but not inconsistent with, the deed.]

The indefiniteness of the terms of the deed point to a subsequent arrangement to be made as to a specific amount between the parties to the contract. The other construction would imply that an

(1) 14 N.S.W. W.N., 34. (2) 16 N.S.W. W.N., 44.

H. C. OF A. 1904.

BOROUGH OF TAMWORTH v. SANDERS.

illegal contract was contemplated, *i.e.* a contract between the householder and the contractor. It is the policy of the Act to prevent ratpayers making any arrangements themselves. Their views as to the frequency of removals &c. might not be up to the standard necessary for the health of the community. All arrangements should be made directly between householder and borough council, if the Act is to be properly carried out. Upon the construction of clause 14 contended for by the appellant, there would be no way of compelling the householder to pay. The only procedure open is that prescribed by sec. 34, which is quasi-criminal, and must be taken by the inspector or officer appointed. The contractor could not sue civilly in the name of the borough council. Sec. 27 only provides for the recovery by the council of expenses actually incurred. It therefore could not sue for fees which the householder had failed to pay the contractor. The result is that the contractor is left without means of enforcing payment for services rendered.

If the appeal is allowed the costs should be paid by the appellant, or, if not, they should not be given against the respondent. The appeal is a mere indulgence, on a matter of no general importance.

[GRIFFITH C.J.—It was put to us on the application for special leave to appeal that this was a form of contract in general use in such cases, and therefore affecting municipalities in general, and if it is illegal for a borough to enter into contracts by which ratepayers are to make arrangements with the municipal contractor to pay him for services rendered, it will be a serious matter to all the boroughs that have made such contracts.]

Gordon, K.C., in reply. The Full Court expressed the opinion that such contracts were illegal, and therefore the question involved is one of general importance. The contract is in a common form.

Cur adv. vult.

12th Dec. GRIFFITH C.J. This is an appeal from a judgment of the Supreme Court of New South Wales overruling a demurrer to the plaintiff's declaration. The plaintiff entered into a contract

with the defendant, a municipal borough, for the removal, disposal, and destruction of nightsoil within the borough. The contract was made for the purpose of carrying out the provisions of the *Nuisances Prevention Act* (No. 24 of 1897). The amount involved is less than the appealable amount, and special leave was granted to appeal, on the ground that, on the view of the matter taken by the Supreme Court, an important question of general interest was involved. The contract contained a number of elaborate provisions as to the duties of the contractor, but it contained no provision for his remuneration except in the terms of a clause numbered 14. [His Honor read the clause.] The plaintiff in his declaration set out the contract at length, and alleged the following breach: [His Honor read the breach as stated above.] It was common ground between the plaintiff and the defendants that the remuneration, and the whole remuneration, that the contractor was to receive for his work was to be the fees and charges fixed by the proper authority, whatever that might be, for the work done. It was not suggested that the plaintiff could claim any more than that, nor was it denied that he was entitled to receive the whole of these fees and charges, and that the defendants could not keep any portion of them for themselves. The plaintiff, however, contended that the corporation was to be responsible to him for the payment of the charges by every householder for whom work was done; that the plaintiff was merely their collector, keeping what he collected. The defendant borough, on the other hand, contend that the proper construction of the contract was that, as his remuneration for the work that he performed, the plaintiff was to receive and keep for his own benefit all the fees he collected, but that he was to undertake the collection for himself, and at his own risk, and was not entitled to demand from the corporation any more than he collected. Another way of putting the defendants' case is that the liability incurred by the corporation was subject to a collateral agreement by which the plaintiff undertook to be responsible for the collection. The question is, which is the true view to take of the contract, and that seems to me to be merely a matter of the construction of the written document.

The learned Chief Justice, who delivered the judgment of the Supreme Court, referred to several sections of the Act, and amongst

H. C. OF A. 1904.

BOROUGH OF TAMWORTH v. SANDERS.

Griffith C.J.

others to sec. 17, which prohibits householders from doing this sanitary work themselves, without the written sanction of the council, which is not to be given except under special circumstances. He referred also to secs. 15 and 18, which provide that the council shall see that the work is properly carried out. The learned Chief Justice then went on (1): "It is obvious, therefore, that the legislature casts upon the municipality the duty of removing all nuisances of the class referred to in clauses 18 and 19 by their own officers or contractors, whilst clause 17 forbids the owner or occupant from himself removing any nuisance of this description from his premises, unless under exceptional circumstances. The 27th clause then provides that all reasonable expenses incurred by the council in carrying into effect any of the provisions of the Act shall be *repaid* to the council by the owner or occupant within one week after written demand has been served upon him, otherwise the same may be recovered by summary process, as provided for by sec. 34 of the Act." Sec. 27 does not refer to sec. 34 in terms, but it is clear that the sums recoverable under the earlier section are to be recovered in the manner provided by the later section. He then went on to say: "It is obvious, therefore, that the plaintiff, who has not entered into any contract with the owner or occupant, cannot recover as against such owner or occupant for the work done. Under the Act the work *must* be done by the servants or contractors of the borough. The owners or occupiers are forbidden to do the work themselves, nor can they employ others to do it for them, but they are liable to repay to the council all reasonable expenses incurred by the council in carrying out the work, within one week after a written demand of the amount made by the council or inspector of nuisances has been served upon them." So far, I say respectfully, I agree with the opinion expressed by the learned Chief Justice. Then he goes on to give the reason for the decision: "It follows, therefore, that in order to recover against the owner or occupier, the council must first pay the contractor for the work done, and then proceed against the owner or occupier for repayment of all reasonable expenses incurred in doing the work upon the premises of such owner or occupier." It is there, I venture to think, that the learned Chief Justice fell into error. The words of sec. 27

(1) (1904) 4 S.R. (N.S.W.), 537, at p. 539.

are "all reasonable expenses incurred by any council in carrying into effect any of the provisions of the Act upon or in respect of any premises shall be repaid to the council by the owner or occupier," &c. The learned Chief Justice appears to infer from that that the council must first have paid the contractor, and it would not be a long step to go on from that to say that this contract imports such an obligation. But those words, or words almost identical, have been the subject of judicial interpretation. During the argument we intimated that we thought that the word "repaid" did not necessarily imply that the money had to actually be paid out of pocket in order to be an "expense incurred." A man incurs domestic expenditure before he pays his household bills. In the case of *The Queen* v. *The Vestry of St. Mary, Islington* (1), the construction of a very similar clause was under consideration. It was a case before *Pollock* B., and *A. L. Smith* J., afterwards Master of the Rolls. Certain duties are cast by the *Burials Act*, 1858, upon the churchwardens, and it is provided that the costs and expenses shall be repaid by the overseers out of the poor rate. *Pollock* B., says (2): "That brings us to the first objection raised by the Vestry, which is founded on the word 'repay'; it is contended that a churchwarden cannot under that section be entitled to be repaid money, unless he has already paid it himself in the first instance. There is no doubt much is to be said in favour of that contention; but when we remember the nature of the subject-matter in respect of which this legislation was passed, there is no difficulty in placing a reasonable construction on the word 'repay,' so as to make it include cases in which the churchwarden, acting under the authority of the vestry, has become liable for the payment of these costs and expenses; and this seems to me the reasonable construction which we ought to place on the language of the section." *A. L. Smith* J., said (3):—"The whole question really is, whether sec. 18 means that the churchwarden is only to be paid the expenses by the overseers after they have been actually expended, or whether it applies also to money which has to be expended by the churchwarden; and in my judgment the former

(1) 25 Q.B.D., 523. (2) 25 Q.B.D., at p. 527.
(3) 25 Q.B.D., at p. 528.

H. C. OF A. 1904.

BOROUGH OF TAMWORTH v. SANDERS.

Griffith C.J.

reading of the section leads us to an absurd conclusion, the latter to a sensible one. I think, therefore, that this ground of opposition to the mandamus fails."

The learned Chief Justice went on, in his judgment, to say (1): "In this case it appears to me that the effect of the contract is to make the plaintiff a collector for the borough, but that in the case of dispute, and the owner or occupier refusing to pay (perhaps because he thinks the charge unreasonable), the borough must first pay the plaintiff, and then proceed to recover repayment against the owner or occupier. Suppose a large number of the owners or occupiers in the borough, thinking the charge unreasonable, refuse to pay, the plaintiff, not having any contract with the owner or occupier, who cannot do the work themselves, or contract for it being done, cannot recover as against them; neither, according to the defendants' contention, can he recover against the defendants, because he has undertaken to collect the fees agreed upon between him and the defendants, and which are due from the owner or occupier to the defendants as soon as they have been paid by them to the plaintiff, and not before." These are the reasons for the judgment. For the reasons already given I cannot agree with the meaning put by the learned Chief Justice, upon the words "incurred" and "repaid." Again, expenses may be incurred by a man either by himself personally or by his agent. Those incurred on his behalf by his agent are as truly incurred by himself as if they had been incurred by himself by word of mouth. That a contractor may be an agent has been pointed out by this Court not very long ago in Victoria, in *Roberts* v. *Ahern* (2). In that case it was held that an independent contractor employed by the Commonwealth Government to do certain work, similar to that which is the subject-matter of the present case, was in doing so, acting as the agent of the government, and subject to the same exemptions. The council therefore may incur expenses through their contractor though he is not their paid agent. So that difficulty is not in the way. It is said that it would be unjust that the contractor should not be himself able to sue for these rates. It appears however that by law he cannot. But if the corporation, through him, have incurred the expenses, they can

(1) (1904) 4 S.R. (N.S.W.), 537, at p. 540. (2) 1 C.L.R., 406.

recover them, and, if the true effect of this clause of the contract is that the plaintiff is entitled to have all these fees and charges for himself, probably he would be able to call upon the corporation to assist him in recovering them. It would be no answer if the ratepayers, for whom the work is done, and for whose benefit the expenditure is incurred, were to say: "We are entitled to inquire into the nature of your contract of agency." That is a matter entirely for the council and their agent, and is of no concern whatever, as between the householder and the council.

But in truth, it is not necessary, in my opinion, to have recourse to the consideration of these matters at all. The question simply is, what is the construction of the words used in the contract. The plaintiff and defendants are competent parties. Whatever the bargain made between them is, it must be carried out. The Court cannot make a new one for them. If they choose to make a contract on the terms that the contractor shall not be able to recover directly from the borough any money, the Court cannot say that he shall be entitled to recover it. The words of the contract are: "The contractor shall collect his own fees and charges, which shall not exceed the following," and then there is a scale of charges. That clause certainly suggests, if it does not necessarily imply, that the contractor may collect a smaller amount if he thinks fit. It merely provides the maximum that may be charged. If the corporation are liable to pay him, a singular question arises. How are they to know what rates he demanded from the householders, whether the maximum or a lesser sum? How are they to know how much work he has performed? How are they to know what amount to demand from the householders, and how are they to prove their case if they sue them? The matter is entirely within the contractor's knowledge, and they would be completely at his mercy. Then what effect is to be given to the words "shall collect his own fees and charges?" They clearly imply that the fees and charges are to be his own property when collected, and that he is to collect them. Assuming that the contractor has no means of recovering the fees and charges from the householders, when a contract is made with them, how does that affect the contract with the borough? If the contractor is willing to undertake work on the

H. C. OF A. 1904.

BOROUGH OF TAMWORTH v. SANDERS.

Griffith C.J.

terms that he will collect his own fees and charges, and accept the right to do so as his whole remuneration, the Court cannot say that he is entitled to go further. There would be nothing unlawful in such a contract. There is nothing unlawful in the employment of an agent on the terms that the agent shall undertake the collection of all the money he is entitled to receive under it. As a matter of construction, the present contract seems to me no more than that. Upon such a contract the only breach that could be assigned would be that the borough prevented the contractor from collecting his fees. That would be a breach, because in every contract there is an implied term or condition that neither party shall hamper or impede the other in carrying it out. This contract contains, in my opinion, an implied condition that the contractor shall be satisfied with what he can collect. It follows that an action will not lie against the borough for the recovery of what he cannot collect. It appears to me that the Court below was misled by the interpretation which they put upon the term "repaid." That difficulty being out of the way, there is no reason why the words of the clause should not receive their natural interpretation. I am of opinion, therefore, that the demurrer should have been allowed.

BARTON J. I concur.

O'CONNOR J. There is no doubt that the *Nuisances Prevention Act* places upon the municipality the whole duty and responsibility of carrying out the work provided for in this contract, and that it prevents the owner of a property from making any contract or arrangement for carrying out the work himself, except in special circumstances pointed out in sec. 17. It appears that the municipality entered into a contract with the plaintiff for the purpose of carrying out the sanitary work which is particularised in the contract. The municipality may employ their servant, or their agent, in any form of contract they think fit, to carry out this work. They may employ him on the terms of mere wages, they supplying all the utensils or materials, or they may, on the other hand, employ him on the terms of a special contract, he supplying all these things, and they making payment to him. Then again,

with regard to the payment, they may provide that it shall be given in any form that the parties agree to. It is, therefore, entirely a question between the municipality and the person they employ to carry out the work, on what terms he is to carry it out, and on what terms he is to be remunerated. Apparently, by a previous contract, the whole responsibility and duty of carrying out this work was put upon the plaintiff as a sub-contractor, so much so that there is even a clause (No. 10) by which he undertakes to indemnify the municipality against all claims, penalities, and demands whatsoever which may result from any act or omission of the contractor. The terms upon which the plaintiff, as contractor, is to be paid are, as I have said, entirely a matter between him and the municipality. There is no part of the contract dealing directly with this payment but clause 14, and the sole question for our determination is what is the meaning of that clause. Certain sections of the Act have been referred to, but it appears to me that they can only be looked at in order to ascertain the probabilities in favour of one construction rather than the other. But the sections themselves have no direct bearing upon the liability of the parties under the contract. Now, when I look at the clause, I agree with my learned brother the Chief Justice in the construction he has put upon it. It appears to me that the contract for remuneration set out on the face of the document, is that the plaintiff, taking the whole control and management of this work, having in his hands the fixing of fees within the limit of sixpence, stipulates that he will take everything he can collect for his services but that he is to get nothing more. There is nothing unlawful in a contract of that kind, and it appears to me there is nothing unreasonable in it either. The average amount of collections, the sum which is actually received in cash, is a matter which can be very easily ascertained, and I see from a provision in the contract that there was a previous contract in existence to the terms of which it refers. So that there is no reason why the contractor should not be able to inform himself of the amount of cash received on an average from these collections, and there is no reason why the parties should not deal with one another on that basis. The breach the plaintiff has alleged is one, it seems to me, quite

H. C. OF A. 1904.

BOROUGH OF TAMWORTH v. SANDERS.

O'Connor J.

impossible to read into the clause, for it charges not only that the plaintiff is to have for himself the fees he collects as the agent of the municipality, but that he is to be paid as well those fees he cannot collect. In other words, it admits that part of the remuneration is to be the fees he collects, but it charges that there is really a guarantee that the municipality shall pay those he cannot collect. Now, I am unable in the words of this contract to find anything of that kind. It appears to me, giving full meaning to the words, looking at the whole circumstances, and the whole contract, that they only bear one interpretation, that is that the plaintiff is to be paid for the work he does the whole of the fees which he collects, and that he is to have nothing more.

Reference has been made by my learned brother, the Chief Justice, to the provisions of sec. 27 of the *Nuisances Prevention Act*. I do not take the same view as His Honor as to the construction of that section. It appears to me that before the municipality can recover from an owner of property under that section, they must have incurred a liability to somebody for the carrying out of the work. Of course it is not necessary that the liability should be paid, it is sufficient that it should have been incurred. My view of the terms of the contract is that the municipality incurred no liability for any purpose to the plaintiff in regard to these fees which he had to collect. But this is altogether apart from the question of the meaning of the contract, which, as I said before, depends entirely upon the construction of its terms. Having stated what in my opinion that construction ought to be, I agree that the appeal must be upheld.

Appeal allowed. Judgment entered for the defendant on the demurrer. Application to rescind special leave to appeal dismissed with costs.

Solicitors, for the appellant, *Fitzhardinge & Zlotkowski* for *A. J. Creagh.*

Solicitor, for the respondent, *F. Norrie*, for *J. M. Proctor.*