[HIGH COURT OF AUSTRALIA.]

HOARE . . . . . APPELLANT;
DEFENDANT,

AND

McCARTHY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 20, 23, 24.

Griffith C.J., Barton and Isaacs JJ.

Building Contract—Certificate for payment—Authority of architect—Termination of authority—Refusal to act—Knowledge of contractor—Estoppel.

By a building contract made between the defendant and the plaintiff the latter, in consideration of a specified sum to be paid to him at the times and in the events mentioned in the general conditions, agreed to do all the works, matters and things mentioned and referred to in the specification and general conditions in the manner thereby respectively required, and to observe, abide by and perform the general conditions. By the general conditions, which were in a printed form, it was provided that throughout the general conditions, the specification and the contract the word "architect" should mean "the architect for the time being employed by the proprietor in relation to the works," and also that no payments on account of the contract price should be made except on a written certificate of the architect. In the heading of the general conditions the name of A was written, followed by the printed word "architect," and in the heading of the specification it was stated to be the specification of the various works required for the particular building, "to the entire satisfaction of" A, "architect, or his representative."

Held, that the naming of A as the architect did not override the provision in the general conditions, and, therefore, that when he ceased to be employed by the defendant as the architect he had no longer authority to give certificates entitling the plaintiff to payments.

Held, further, that, on the evidence, at the time when a certain certificate was given by A he had refused to act any longer as, and had therefore ceased to be, the architect, and that, as the plaintiff had not acted to his prejudice on the faith of the certificate, the defendant was not estopped from asserting that A had ceased to be the architect.

Decision of the Supreme Court of Victoria (*Cussen* J.) reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Francis James McCarthy against Mary Hoare in which it was alleged that by a building contract dated 28th April 1914 the plaintiff agreed to do certain work and labour and provide certain materials in connection with the erection of a hotel for the defendant and that the defendant agreed to make payment for the same in the manner set out therein, that the plaintiff had completed the contract and that the defendant had paid only portion of the amount due in respect of the contract. The plaintiff claimed payment of £814 14s. as being the balance due and, alternatively, for work and labour done and materials supplied. By her defence the defendant alleged (*inter alia*) that no certificates had been given by the architect for any sums exceeding the amount which had been paid by the defendant.

An order was made by *Madden* C.J. that the question whether any and which of the documents dated 27th March 1915 and 23rd April 1915, purporting to be certificates under or in relation to the contract and to have been made by W. A. Dalton, were valid certificates and binding upon the defendant, should be first tried. The question was tried by *Cussen* J., who made an order declaring and determining (so far as is material) that both the documents were valid certificates binding upon the defendant.

From that decision the defendant now, by leave, appealed to the High Court.

The material facts are stated in the judgments hereunder.

Bryant and *Schutt* (with them *Lowe*), for the appellant.

Davis (with him *Dethridge*), for the respondent.

During argument reference was made to *Clarke* v. *Murray* (1);

(1) 11 V.L.R., 817.

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Hudson on Building Contracts, 4th ed., vol. I., pp. 414, 606; *Halsbury's Laws of England*, vol. III., p. 221; vol. XIII., p. 384; *Ryan* v. *Fergerson* (1); *Dudgeon* v. *Pembroke* (2); *Murray* v. *Cohen* (3); *Trueman* v. *Loder* (4); —— v. *Harrison* (5).

Cur. adv. vult.

Oct. 24

GRIFFITH C.J. This is an action upon a building contract containing the usual condition under which the builder is to be paid on certificates given by the architect. The contract was to build a hotel at Traralgon for the price of £2,650. Tenders were invited in the usual way, and the plaintiff was the successful tenderer. When the formal contract was signed it embodied by reference what are called "general conditions," such as are usually found in building contracts, and specifications of the particular work to be done. By the contract the contractor agreed to do the work mentioned and referred to in the specifications and general conditions and in the manner thereby respectively required, and to abide by and perform those general conditions. The general conditions were in a printed form with a blank space at the beginning, apparently intended to be filled up with some contractual words. Then followed the words "in conformity with the following specifications and accompanying drawings numbered 1 to inclusive, and such other detail drawings as may be hereafter given in further illustration of those above referred to." Then appeared the printed words "C. H. Pattison, Architect," the name being in large capitals, evidently showing that the general conditions had been prepared and were used by an architect of that name in respect of any works of a like nature carried out under his supervision. The name "C. H. Pattison" was struck through, and the name "W. A. Dalton" was written in its place, also in capital letters. Then came the general conditions, including one that the works were to be done to the "entire satisfaction of the architect," and another, No. 27, which was as follows:—"Throughout these general conditions, and throughout the specification and contract, unless repugnant to the

(1) 8 C.L.R., 731.
(2) 2 App. Cas., 284, at p. 293.
(3) 9 N.S.W.L.R. (Eq.), 124.
(4) 11 A. & E., 589, at p. 593.
(5) 12 Mod. Rep., 346.

sense or context, words importing the singular number shall include the plural number, and words importing the plural number only shall include the singular number. The word architect shall mean the architect for the time being employed by the proprietor in relation to the works above referred to." As a matter of construction I think that the last sentence governs the whole condition. It follows that throughout the general conditions, and throughout the specifications and contract, the word "architect" bears that meaning.

The specifications, which contained a detailed list of the work to be done, are headed in this way: "Specification of the various works required, labour and all materials, except where otherwise specially mentioned below, for a two-storied brick hotel at Traralgon for Miss Hoare, and according to the accompanying plans, and to the entire satisfaction of W. A. Dalton, Architect, 325 Collins Street, Melbourne, or his representative."

The first point taken by the plaintiff is that, construing these documents together, they meant that Dalton, as a *persona designata*, was to be the architect throughout the contract, and that no one else could be appointed in his place except by the mutual consent of the parties, that is to say, that the words "to the entire satisfaction of W. A. Dalton" in the heading of the specification are so contrary to condition No. 27 as to override it, with the result that the name "W. A. Dalton" should be substituted throughout the general conditions where the word "architect" is mentioned. In support of that argument it is urged that while the general conditions are printed the specifications are type-written, and that in such a case the doctrine stated in *Dudgeon* v. *Pembroke* (1) that, where parties using a printed form agree to a written term which is inconsistent with some of the printed words, effect should be given to the written words rather than to the printed words, should be applied. In my opinion, the doctrine has no application to the present case. The general conditions and specifications were both part of an invitation to tender drawn up by the defendant or her agent, and whatever they meant under those circumstances is their meaning in the contract. In my opinion, the naming of the architect in the heading of the specifications did not override or qualify the

(1) 2 App. Cas., 284, at p. 293.

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express terms of condition No. 27. They merely indicated that Dalton would be the architect until he ceased to be employed by the proprietor. The term "architect," therefore, means the person who is for the time being employed by the proprietor.

The plaintiff bases his case upon two certificates signed by Dalton, one on 27th March 1915, and the other on 17th August 1915, and he must show that at those times Dalton was the architect for the time being employed by the proprietor. The defendant in her defence alleged that "certain documents purporting to be such certificates given by one Dalton were and each of them was not given by the architect under the said contract and/or were and each of them was so given by the said Dalton after his authority to act as such architect had been duly determined and the plaintiff had notice thereof." The learned Judge who heard the case was of opinion that on the proper construction of the contract Dalton and no one else was the architect for the purpose of the contract, and for that reason he held that both the certificates were good whatever might have happened in the meantime to terminate Dalton's employment. I am unable to agree.

But another question remains to be determined, which is a question of fact, namely, whether on 27th March, when the first of the two certificates was signed by Dalton, he was the architect within the meaning of the contract. Upon that question the facts appear to be these :—Some time before 22nd March there had been some friction between the defendant and Dalton, who claimed an instalment of his architect's fees, which the defendant refused to pay. We have nothing to do with the merits of that dispute. But the matter culminated about 22nd March, five days before the first certificate was given. On the 20th and 22nd Dalton had conversations with Mr. Byrne, a clerk of the defendant's solicitors. Somewhat different versions of those conversations are given by Byrne and Dalton. According to Byrne's account, on 20th March Dalton, who was claiming £60 or £70, said that unless he got what he asked he would not go near the work again; Byrne then said that if Dalton took up that position the defendant would be forced to appoint another architect, and that Dalton might disentitle himself to any remuneration; Dalton then asked if the defendant would

advance him £50, and Byrne said that he would obtain instructions and let Dalton know. According to Byrne's account of the interview of 22nd March, he offered Dalton £25 on account of his fees; thereupon Dalton said: "I won't take it, and I'll have nothing more to do with the job;" Byrne replied: "If you take this course another architect will at once be appointed in your place;" Dalton then said: "I don't care; you can do as you like; I wash my hands of the whole matter, and this is final." On the same day Byrne had an interview with Mr. Dye, who was the defendant's representative in Melbourne, and Dye engaged another architect, Mr. Klingender. Dalton gives a different account of the conversation of 22nd March. He says that he did not make any definite refusal to go on as architect.

On the same 22nd March Dalton wrote a letter to Mr. Dye, who represented the defendant in Melbourne. The learned Judge thought that that letter was written after the second conversation between Dalton and Byrne. In that letter, after complaining that he could not get money from the proprietor, and stating that he wanted £75 on account of his fees, he said:—"As my first request" (that was for £50 or £60 on account of his fees) "has not been met I will not now accept less than the above. It has only to be paid once. If not paid I decline to spend more time or money over the matter especially as suggested I may not get any. This is my final decision, and without any offence to you. It will be no use trying to communicate with me, as I shall be away in the country till Saturday" (that would be 27th March). "Further I have not heard from contractor, and am now going to inform him that he must send his account direct to Miss Hoare as I expect to be dismissed." The learned Judge thought that that letter did not amount to an absolute refusal to act further, and that it was written after the conversation of 22nd March. But from the internal evidence of the letter itself and of Dalton's own account of the conversations, it is apparent that it was written after the conversation of 20th March and before that of the 22nd. The learned Judge, being of the opinion that the letter was written after the conversation of 22nd March, thought that that conversation should not be construed as such a positive refusal by Dalton to continue to act any longer as Byrne said had been given

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in the conversation. There is no reason to suggest that Byrne's evidence is not truthful or accurate, but the learned Judge based his conclusion on the letter being written after the conversation of 22nd March. I, on the other hand, come to the conclusion from the internal evidence of the letter that it must have been written after the conversation of 20th March only and before that of the 22nd. One is very reluctant to differ from the opinion of a Judge who has heard the evidence on a question of fact, but that reluctance is less when no doubt is thrown on the credibility of the witnesses. Then, looking at the terms of the letter I come to the conclusion that this meaning is at any rate open :—"Understand that unless you agree to the conditions I now impose, I will have nothing more to do with the matter. That is my final decision." That is to say, "I will not act further in the matter until you tell me you agree to my conditions, and it is no use your telling me whether you agree to them until next Saturday as I shall be in the country."

Early on that Saturday morning, which was 27th March, the defendant's solicitors wrote a letter to Dalton acknowledging his letter of 22nd March, and saying: "We have delayed replying until now, as in your letter you say 'It will be no use trying to communicate with me as I will be away in the country till Saturday.' . . . You recently requested that Miss Hoare should advance you £50 against fees coming to you on completion. This Miss Hoare refused to do, but we verbally informed you she was willing to advance £25, which you refused to accept. We have now to intimate to you that in view of your refusal to act further in the matter, Miss Hoare has been forced to appoint another architect in your stead."

I have already pointed out that after the conversation of 22nd March Mr. Dye had acted on the assumption that Dalton had directly refused to act further for the defendant and had accordingly engaged another architect. The letter from which I have just quoted shows that the defendant's solicitors interpreted Dalton's letter of 22nd March in the same sense. This letter was sent to Dalton's office in Melbourne and delivered there not later than 10.30 in the morning of the 27th, which was the day which Dalton had mentioned as the earliest day on which an answer to his letter of

the 22nd would reach him. In the meantime, earlier on the same day, Dalton had written out the certificate of 27th March, and left it in his office in an envelope addressed to the plaintiff. Some time during the morning, probably between 11 and 12 o'clock, and after the defendant's solicitor's letter had been delivered, the plaintiff called in and received the envelope containing the certificate. The question is whether when that certificate was given Dalton was the architect within the meaning of the contract. I come to the conclusion that at that time Dalton had ceased, by his own action, to be the architect within the meaning of the contract. It is then said that that does not matter, because notice of his ceasing to be the architect had not been given to the plaintiff. I do not think that that is a correct view of the law. A person who alleges the authority of another to bind a third person must prove the existence of the authority at the time when the act in question is done. That may be done either by showing express authority existing at that time or by showing that the alleged principal held the alleged agent out as his agent to do the act. But the foundation of the doctrine of holding out is estoppel—that the principal has by his conduct estopped himself from denying the authority of the agent. Nothing is suggested here that can amount to estoppel. The plaintiff went into Dalton's office and there found a letter addressed to him containing the certificate, but, unfortunately for him, the authority of Dalton to give the certificate had ceased. If anything had been done by the plaintiff on the faith of the certificate to his prejudice, the case would have been different.

For the reasons I have given I am of opinion that at the time when the certificate of 27th March was given Dalton was no longer the architect within the meaning of the general conditions. It follows that that certificate is inoperative. The certificate of 17th August suffers the same fate. As to the latter certificate, indeed, the case is hopeless, for long before that time everyone concerned knew that Dalton was no longer employed as architect under the contract.

For these reasons, I think the answer to the question referred to the learned Judge should be that both certificates are invalid.

BARTON J. I have arrived at the same conclusion as the learned

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Chief Justice. In view of the way in which he has dealt with the whole of the matter, it does not suggest itself to me that there is anything more I can say which would not be a superfluity. I therefore content myself by saying that I agree that the appeal should be allowed.

ISAACS J. read the following judgment:—As to construction: The contract is the document signed and sealed by the parties. The other documents have importance here only so far as they are adopted by the contract itself.

The contract first identifies the specifications and general conditions; it states the consideration, £2,650, and says of it "to be paid to the contractor at the times and in the events mentioned in the general conditions," and in that connection the specifications are not referred to. Then the contractor's duties are described; he is to do "all and singular the works matters and things mentioned and referred to in the said specification and general conditions and in the drawings respectively referred to and in the manner thereby respectively required." In that connection, it must be remembered that the primary function of a specification, as its name denotes, is to describe the work, its nature, materials and method and extent. The primary function of the general conditions is to prescribe the mutual obligations in relation to the performance of the contract on both sides. The documents may in certain respects overlap, but their primary functions must not be lost sight of. I attach importance to the word "respectively." Then the contract definitely declares that each of them the contractor and the employer "shall and will observe, abide by, and perform the said general conditions on his part." The contract seems to me broadly to look to the specifications for the work to be done and to the general conditions for the obligations of the parties.

Then we have also to remember that the heading of the specifications was originally framed for the purpose of obtaining tenders; to some extent its purpose was exhausted when the contract was made. The heading I take as a rough introduction to the nature of the works to be tendered for, leaving the precise terms of the

bargain to be ascertained from the description of the work, the plans and the general conditions. The 27th condition makes express reference to the specification, as well as the other two documents, and with all three in view says expressly as a condition of the contract: "The word architect shall mean the architect for the time being employed by the proprietor in relation to the works above referred to."

I must confess I am unable to see any difficulty. In my opinion, the employer was not bound to retain Mr. Dalton as "architect" to give certificates and declare satisfaction. If she was so bound by reason of the heading to the specifications as to the governing clause, then Dalton's representative would have the same power, because the heading puts the representative in the same position as Dalton.

Then as to whether Dalton was in fact the architect for the time being on 27th March, when McCarthy received the certificate, I am of opinion he was not. He had distinctly withdrawn by his letter, and the employer's representatives had accepted that withdrawal. I do not think it necessary to consider whether the second telephone conversation worked a dismissal, or was in itself a renunciation by Dalton. There was a second conversation, as is admitted, and I think it is clear at all events that the letter of 22nd March was not in any respect withdrawn or weakened by it. By that letter Dalton definitely abdicated unless and until he received a promise which never was given, and which he knew from the telephone conversation even as he relates it would not be given. He was not in fact the architect for the time being when he wrote and when McCarthy received the certificate of 27th March, and *à fortiori* the other certificates of 23rd April and 17th August.

The remaining question is as to whether the employer is estopped from disputing McCarthy's right to regard the certificate as that of the architect for the time being. The onus lies on the party to prove that he in reliance on the continuous employment of Dalton was induced to act to his prejudice. Action in that sense includes inaction (*per James* L.J. in *Ex parte Adamson*; *In re Collie* (1)). But, in my opinion, it is here McCarthy fails. All that happened was that

(1) 8 Ch. D., 807, at p. 817.

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he obtained a certificate from an unauthorized person, who, as he *bonâ fide* believed—so we must assume for present purposes,—was still authorized. He knew within two or three days that Dalton had given the certificate without authority. He had not altered his position in the least degree. The principle of estoppel in favour of the person induced to act is stated by the Privy Council to be "that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it" (*Sarat Chunder Dey* v. *Gopal Chunder Laha* (1)). But there must be the loss and injury. Here there is none, and so the contractor, not being able to rely on estoppel, fails to produce the certificate agreed on. He must apply to the architect for the time being.

I agree that the appeal should be allowed.

Appeal allowed. Order appealed from varied by omitting the declaration as made and by declaring that both certificates are invalid and by directing that the costs of the trial of the question be the defendant's costs of the action. Respondent to pay costs of appeal.

Solicitors for the appellant, *Whiting & Aitken.*

Solicitors for the respondent, *Madden & Butler* for *G. H. Wise,* Sale.

B. L.

(1) L.R. 19 Ind. App., 203, at p. 215.