[HIGH COURT OF AUSTRALIA.]

SUMMERS AND ANOTHER . . . . PLAINTIFFS;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

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MELBOURNE, *June* 18, 19, 25.

Isaacs J.

Contract—Construction—Mode of performance—Trade usage—Evidence—Mutual abandonment of contract—Readiness and willingness to perform contract.

To establish a trade usage it must appear that the usage is so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into the contract, but that presumption will not be made where there is a written term of the contract which is inconsistent with it to such an extent as impliedly to exclude it.

A contract provided for the supply of a specified number of blocks of marble, each of which should be of such dimensions as to admit of its being worked and polished so as to produce pillars of a specified size.

Held, that the contract could not be performed by supplying blocks of such dimensions that two or more pillars of the specified size could be cut from them, even though that would be a more convenient and businesslike mode of supplying them.

Where there had been no express rescission of a contract for the supply of goods within a specified time and no express repudiation or refusal to perform it,

Held, on the evidence, that the parties had by their conduct mutually abandoned or abrogated the contract.

The persistent maintenance by one of the parties to a contract of an untenable construction of it on a matter of essential substance should be regarded as inconsistent with a continuing intention to observe the contractual obligations, and so would disentitle him to recover damages for not being permitted by the other party to complete the contract.

HEARING of action.

An action was brought in the High Court by Charles Francis Summers and Ellen Peterson against the Commonwealth in respect of a contract made between the plaintiff Summers and the Commonwealth for the supply and delivery of marble by the plaintiff Summers to the Commonwealth. The plaintiff Summers claimed £350 for damages for refusal to accept the marble, alternatively as to £162 on a *quantum meruit*, and the return of £25 lodged by him as security. Alternatively both plaintiffs claimed, or alternatively the plaintiff Peterson claimed, that the £25 and/or the £162 should be paid to the plaintiff Peterson. The Commonwealth, by counterclaim, claimed £50 as damages for a breach of a covenant by the plaintiff Summers not to assign the contract.

The action was heard by *Isaacs* J., in whose judgment hereunder the material facts are stated.

Walker and *Owen Dixon*, for the plaintiffs.

Morley, for the defendant.

Cur. adv. vult.

June 25.

ISAACS J. read the following judgment:—This is an action in respect of a contract to supply 671 cubic feet of marble for Australia House, London. The plaintiff Summers was the contractor, and the plaintiff Peterson sues as assignee of Summers. The plaintiffs claim £350, made up as follows: (1) damages for refusal to accept the marble; (2) alternatively as to £162 on a *quantum meruit* for 240 cubic feet tendered, and (3) the return of £25 lodged as security. The plaintiffs made these claims alternatively as between themselves. There was also stated a claim for costs and charges in connection with certain litigation between Summers and one Walker, a quarry owner, but as that was abandoned I say nothing further about it.

The contract was under seal, and was made on 2nd February 1914. It incorporated the plan and specifications and general conditions and the tender. It was expressed to be for the "Supply and delivery f.o.r. Darling Harbour, Sydney, of 'Dark Caleula'

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marble for use in connection with the erection of new Commonwealth offices London." The price was 13s. 6d. per cubic foot. It provided for "the full and proper completion of the works . . . strictly in accordance with or as the same may reasonably be inferred from" the documents incorporated. The material parts of those documents are as follows:—(1) The specification describes itself as "Specification for supply and delivery of marble in blocks free on railway truck Darling Harbour, Sydney, in accordance with particulars detailed in attached schedule and drawing and to the satisfaction of the Commonwealth Works Director for New South Wales." (2) The specification provides: "the size of each block to be full enough to admit of its being worked and polished in London without blemish on every side if need be, to the sizes set out in the schedule. The blocks to be quarried so that the figure of each piece shall when it is in finished position lie in the same general direction. Each block to be numbered on two faces with incised numerals. Payment will be made at the tendered rate per cubic feet measured according to the sizes set out in the schedule." (3) The schedule showed the respective sizes of what the body of the specification calls the "blocks." As instances, pilaster shafts C are 4′ $5\frac{1}{2}$″ x $8\frac{1}{2}$″ x $8\frac{1}{2}$″, and column shafts are 4′ $5\frac{1}{2}$″ x 1′ 10″ x 1′ 10″. There are 120 pieces provided for and these are divided into A, B, C, D for shafts and A, B, C and D for bases, each letter in each case having attached to it a specific length, breadth and thickness. (4) The general conditions provide, by condition 28, that if the contractor (*e*) neglects or omits to carry out the instructions of the Works Director, or (*f*) and (*g*) assigns the contract or any moneys payable or to become payable under it, without consent as provided in the contract, then the Minister, after calling on the contractor to show cause within a stated period and the contractor failing to do so satisfactorily, may take the works out of the contractor's hands, and may complete them, and deduct the cost from any money coming to the contractor. The 29th condition further provides that, instead of proceeding under the 28th condition, the Minister, after notice to show cause and failing to show it satisfactorily, may cancel the contract. In that case all moneys owing and the deposit may (*inter alia*) be forfeited. The 35th condition is in these terms:

"None of the conditions of this contract shall be varied, waived, discharged or released, either at law or in equity, unless by the express consent of the Minister testified in writing under his hand."

The plaintiff Summers on the day the contract was made assigned to the plaintiff Peterson, by way of security for £100 borrowed, all his rights under the contract including rights to the deposit, and other moneys payable by the Commonwealth. He gave no notification of this to the Department. He had no quarry of his own, but had previously inspected for the Commonwealth, and favourably reported on, the marble in a quarry near Orange, called "Caleula," belonging to a man named Walker. On 28th February he entered into an agreement with Walker for the supply to him (Summers) of the marble necessary to carry out the contract with the Government. Walker's price to Summers was 8s. a cubic foot in the rough. Walker had several blocks of various sizes already quarried, but these blocks had to be cut or sawn down in order to meet the Commonwealth requirements. Eight of these blocks as they were in the quarry were delivered by Walker to Summers, and by Summers were tendered to the Government. The only change effected by Summers in their condition was to mark on their surfaces, partly by slightly incised marks covered with red paint and partly by paint alone, the places where, if divided, these blocks would, in Summers' opinion, produce blocks of the size stipulated in the schedule.

The main contest between the parties is whether, as the defendant contends, the contract required Summers to deliver "blocks" of the scheduled size, modified only by the provision in the specification that they should be full enough to bear working and polishing in London and still measure the scheduled sizes, or whether, as the plaintiff Summers contends, it permitted him to deliver blocks from which a number, and as I understand the contention any number, of the schedule size blocks could be cut, the number only being limited by what might be considered reasonable. A great deal of evidence was given by the plaintiff Summers partly under the guise of "trade usage," and partly under the name of "reasonable inference" from the words in the deed, as showing the necessary or proper way of sending marble to London for the purpose. Trade usage has not been pleaded, but no objection was raised to the evidence on that

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ground. More serious objections, however, exist. First, the plaintiff Summers admits he is not in the trade. He knows nothing about any trade usage in Australia. The evidence he gives is not in any case sufficient to establish a trade usage so as to affect the defendant even if the plaintiff were qualified. To be sufficient the trade usage must " appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract." (*Juggomohun Ghose* v. *Manickchund* (1).) That does not appear. But, further, no such implication can ever be made where there is any written clause which is inconsistent with it to such an extent as impliedly to exclude it (*Tucker* v. *Linger* (2)). The express terms of the contract are quite inconsistent with the plaintiff's contention. His learned counsel urged strenuously that, as the evidence was all one way as to the convenience and business propriety of sending the large blocks to London to be there sawn into the requisite sizes, I should assume that that was the intention of the parties to the contract, because they must be assumed to be contracting for what was a reasonable mode of performance. But when the terms of the contract are examined the document cannot be controlled by the evidence referred to.

What the parties have agreed to as the subject matter of their contract is not simply marble in one or more blocks sufficient to produce the 120 pieces ultimately required, but those pieces themselves, though not in a " worked and polished " state. The latter operation was to be done in London. Take the provision quoted: " the size of each block to be full enough to admit of its being worked and polished in London without blemish on every side if need be, to the sizes set out in the schedule." Now, " each block," which naturally means each block referred to in the contract, is to be, not exactly of the schedule size, but to be so much larger as to admit of *its* being " worked and polished " without blemish *on every side*, to the schedule size. Each " block " therefore is eventually to be brought to schedule size. Next, " working and polishing " is not a term apt to express the sawing a big block into what are still potential, but are not yet actual, pilasters and column shafts.

(1) 7 Moo. Ind. App., 263, at p. 282.

(2) 8 App. Cas., 508, at p. 511.

Again, the working and polishing is, if necessary, to be "on every side," that is, of "each block." Now, that would be impossible upon the plaintiff's construction, because the obvious purpose of the clause is to present an unblemished surface to view. On the plaintiff's construction it would mean, in the case of each block he tendered, working and polishing the six outer sides of the block. But no amount of working and polishing on the sides of the blocks he tendered could effect the desired object in respect to a piece contained potentially in the interior of the block but destined, when extracted, to present its own surface to view. Interpreted in the plaintiff's way, the clause becomes absurd. The provision as to payment being made at the tendered rate, "measured according to the sizes set out in the schedule," means naturally that each piece is to be measured to see if it answers the appropriate scheduled size. As to this part of the case I interpret the contract in the sense contended for by the defendant. I need hardly say I do so quite apart from the evidence of Mr. Murdoch as to his interviews on 15th and 16th April with the plaintiff. I believe that evidence, but interpret the contract independently. I should, however, observe that the plaintiff in his own letter of 16th April, addressed to the Department, refers to the method of delivering the blocks he offered as a "modification" of his contract. The blocks of marble tendered by the plaintiff, therefore, did not comply with the requirements of the contract, and were rightly rejected. Further, it is clear on the evidence that as to four of them they were in fact insufficient, owing to their size and shape, to furnish the pieces which the plaintiff marked out on them.

There was a controversy between the plaintiff and Tait, the defendant's inspector at Orange, as to whether Tait passed and approved of the blocks tendered. I may say, both as to this and as to the conflict between the plaintiff and Murdoch, the defendant's architect, I accept the evidence of the defendant's witnesses. They seemed to have a clearer and better recollection of the matters of which they spoke, they are supported by the probabilities, and by the documents and by the ordinary course of duty. Tait did not accept or pass the blocks. He had no power to do so; for, if he had assumed to do so, it would have been in plain contravention of

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condition 3, which provides for the work being done "in strict accordance with the provisions of the specification . . . and to the entire satisfaction of the Works Director." Then condition 35, already quoted, operates to prevent waiver except by the Minister in writing.

For every reason the plaintiff's case as to the main contention fails. Then what effect has that on the rest of the case? He claims damages for not being permitted, not only to deliver those 8 blocks totalling 240 cubic feet, but also for not being permitted to deliver the balance, namely, 431 cubic feet. It is quite clear to me that he was not ready and willing to perform the contract on the basis contended for by the defendant, and as I have found he was bound to do. The marble as he tendered it, and the marble as he contracted to tender it, were two different articles. A potential pilaster or a potential statue is not an actual one, although the necessary marble is there in the block.

The evidence of Murdoch as to the interviews of 15th and 16th April, and 7th May in particular, and the general circumstances of the case convince me that the plaintiff was not ready and willing to provide the articles stipulated for. He may have been, and probably was, moved to some extent by what he thought was the general desirability of following the course he suggested, but he was also pressed by financial reasons and by the absence of the appliances to do the necessary work. But, whatever the real or dominant reason, he was not prepared to do the work he bargained for, and, after strenuous efforts to get various Ministers to agree to his views, he dropped the matter. In a letter of 1st May 1914 he was asked distinctly if he would proceed. In his reply next day he said he would, provided he was exonerated from criticism as to method and cost. On 7th May he personally informed Mr. Murdoch he could not do so for financial reasons. Cancellation was authorized by the Minister, and on 20th May the first step towards the intended cancellation took place in the form of a letter to the plaintiff. He was required by the Director of Works to proceed, otherwise steps would be taken to determine the contract under No. 28 of the conditions. Reading that letter, the contractor, being referred to condition 28, would or might naturally think that

the contract, though it might be terminated as to his performing it, would remain for other purposes. The notice is not sufficiently clear and distinct, and for any ambiguity the plaintiff is not to suffer. However, by a letter next day, he point-blank and emphatically refused to carry out the contract as interpreted by the Department. The Department then waited till 9th June, and gave a notice of cancellation, still purporting to be under condition 28, and still ambiguous. It was also stated in the letter that the question of the refund of security was in abeyance. On 18th June the plaintiff saw Mr. Glynn, and said that he did not desire cancellation but modification of the contract. Now, I cannot regard the letter of 9th June as a lawful cancellation of the contract. It purports to be given under condition 28. That condition, however, does not provide for a complete annulment of the contract, and, having regard to the nature and consequences of such a notice, I am bound to read it strictly. I cannot, as invited, read it as a rescission under the implied common law power of accepting the plaintiff's repudiation of the contract in his letter of 21st May; first, because it purports to be under the terms of the contract itself, and next because it maintains a hold over the security. But the security was lodged on the express stipulations of the contract as to the conditions on which the defendant could forfeit it. The letter of 9th June, as I read it, asserts a right under the contract to determine whether the security should or should not be forfeited, and so the letter rests, and would be understood by the recipient to rest, on the contract and not on the general common law power. But after that the plaintiff took no step towards performing his contract, which originally was to have been completed in four months. He seems to have maintained his determination not to proceed on the defendant's basis, and to have acquiesced in considering his obligation at an end. The Department also considered it at an end, because they procured the marble from Walker and it has been used in London. After 18th June 1914 the next date I have is 4th May 1916, when the writ was issued.

Whatever the terms of a contract may be, it is possible for the parties so to conduct themselves as mutually to abandon or abrogate it. A position not altogether dissimilar arose in the case of *De Soysa*

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v. *De Pless Pol* (1). There, neither party had repudiated or refused to perform the contract, nothing in the nature of rescission had occurred, but, said Lord *Atkinson* for the Privy Council (2) :—"One party to a contract is not bound to give to the other unlimited time after a day named to do that which the other has contracted to do. There must be some point of time at which delay or neglect amounts to refusal. . . . In truth, the projects seem to have been to a great extent, if not altogether, abandoned by all the parties concerned." In my opinion, that is the legal position here. Informally, but effectively, the parties have so acted in relation to each other as to abandon or abrogate the contract.

The plaintiff's attitude falls within the proposition laid down by this Court in *Cohen & Co.* v. *Ockerby & Co.* (3), and almost simultaneously by several learned Lords in the case of *Morris* v. *Baron & Co.* (4). I quote the following words of Lord *Parmoor* (5) :—"The question . . . arises whether the persistent maintenance of an untenable construction of a contract on a matter of essential substance should be regarded as not consistent with a continuing intention to observe the contractual obligations. I think that the answer should be in the affirmative. If this be so, the respondents could not substantiate their counterclaim for damages."

The plaintiff's claim for damages, therefore, must fail for two reasons : (1) want of readiness and willingness to perform his contract on the agreed basis ; (2) mutual abandonment or abrogation of contract.

The claim for a *quantum meruit* was pressed, but is not maintainable. The subject matter of the contract was a sale of goods, and here the defendant received neither goods nor services. The evidence of the plaintiff in support of his claim for damages is that the marble was practically unsalable in Orange, and so put no value on it. Doubtless it had some value, but the amount is not proved, even if that were all that was required to complete the plaintiff's right to succeed. Further, as I have already said, four of the blocks were insufficient to provide the pieces in respect of which they were tendered, for I accept Mr. Walker's evidence. But a *quantum*

(1) (1912) A.C., 194.
(2) (1912) A.C., at p. 202.
(3) 24 C.L.R., 298.
(4) (1918) A.C., 1.
(5) (1918) A.C., at p. 41.

meruit would not lie in any case, because at the time there existed the special contract. The authorities are clear that where there is a special contract, a claim on a *quantum meruit* for matters included in that contract cannot exist so long as the special contract exists. If the special contract is put an end to, then circumstances evidencing or implying a new promise to pay may be shown, and so a *quantum meruit* may be sustained. No such circumstances appear.

There remains only the claim for the return of the £25 deposit. That having been deposited on the special terms of the written contract and that contract having been in law terminated, not by virtue of any provision contained therein but by virtue of tacit mutual abandonment, the abandonment must include abandonment of the right to retain the £25 any longer. This, then, belongs to one of the plaintiffs. As between themselves—and they claim alternatively—it passes to Peterson by virtue of the assignment, and she may have to account for it to Summers. I may add that unless the contract is terminated the claim for the £25 must fail.

I pass now to the counterclaim. The defendant counterclaims £50 for breach of covenant against assigning. A very interesting question of law, or rather of construction, would arise if it were necessary to determine this (*Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (1)). But as the Commonwealth intimated by its counsel that, in the event of no damages being awarded against it on the claim, it would not press this counterclaim, I say nothing further on the point, beyond saying that as the counterclaim still stands, and must be disposed of, I give judgment for the defendant upon it for the undoubted breach, for 1s., but only on the basis mentioned, namely, that no damages are awarded on the plaintiff's claim.

Judgment will be entered on the claim for the plaintiff Peterson for £25, the amount of the deposit, and on the counterclaim for the defendant for 1s.

Judgment for the plaintiff Peterson on the claim for £25 *and for the defendants for* 1*s. on the counterclaim.*

(1) (1915) A.C., 79.

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Solicitor for the plaintiffs, *J. W. Dixon.*

Solicitor for the defendant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

MYERSON . . . . . APPELLANT;
DEFENDANT,

AND

COLLARD AND THE COMMONWEALTH . RESPONDENTS.
INFORMANT AND PROSECUTOR,

ON APPEAL FROM A COURT OF QUARTER SESSIONS OF NEW SOUTH WALES.

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SYDNEY, *July* 30, 31; *Aug.* 12.

Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

War Precautions—Offence—Seizing chattels of soldier's dependent—Mens rea—"Belonging to," meaning of—Goods held under hire-purchase agreement—Evidence—War Precautions Act 1914-1916 (*No.* 10 *of* 1914—*No.* 3 *of* 1916), *sec.* 6—*War Precautions* (*Active Service Moratorium*) *Regulations* 1916 (*Statutory Rules* 1916, *No.* 163 *and No.* 283), *reg.* 12.

Reg. 12 of the *War Precautions* (*Active Service Moratorium*) *Regulations* 1916 provides that "(1) No person shall, under a bill of sale, or writ of execution or other process issued by a Court, or by way of distress, or under the provisions of a hire-purchase agreement made prior to the first day of June 1916 or to the enlistment of a member of the Forces, whichever last happens, seize or take possession of—(*a*) any chattels which are used by any female dependent of that member of the Forces to support or assist in supporting herself or any of the family of the member; or (*b*) any furniture or wearing apparel belonging to any such member or female dependent."

Held, by the Court, that *mens rea* is not necessary to constitute an offence against the regulation.

Held, also, by the Court, that the words "belonging to" connote beneficial ownership by the member of the Forces or female dependent: