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WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION.

sec. 28, we think it is desirable for Parliament to consider the advisability of declaring clearly and unmistakably its intention.

Questions answered: (1) *No*; (2) *Yes*.

Solicitors for the claimant, *Farlow & Barker*.

Solicitors for the respondents, *Baxter, Bruce & Ebsworth*.

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

B. L.

Foll
A R Marr Pty Ltd v Chaplin
66 ACTR 31

[HIGH COURT OF AUSTRALIA.]

HOAD . . . . . APPELLANT;
PLAINTIFF,

AND

SWAN AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 17, 18, 26.

KNOX C.J., ISAACS AND RICH JJ.

Contract—Sale of land—Payment by instalments—Time of essence of contract—Failure to pay instalment—Determination of contract—Action for breach—Election—Evidence.

The respondents sold land to the appellant under a contract by which a deposit of 15 per cent. of the purchase money was to be paid at once, 15 per cent. eighteen months after the date of the contract and the balance by six equal half-yearly instalments. The contract also provided that time should be of the essence of the contract. The appellant paid the deposit but failed to pay the first instalment on the due date.

Held, that the respondents were thereupon entitled to determine the contract.

The respondents having subsequently to the failure to pay the first instalment resold the land, the appellant brought an action against them to recover damages for breach of the contract, and a verdict was given in his favour by the jury.

Held, that the question as to whether prior to the resale the respondents had elected either to determine the contract or to treat it as still subsisting not having been submitted to the jury, as upon the evidence should have been done, there should be a new trial.

Decision of the Full Court: *Hoad* v. *Swan*, 20 S.R. (N.S.W.), 131, reversed.

APPEAL from the Supreme Court of New South Wales.

By three contracts dated 22nd January 1913 Arthur Donovan Swan, William Vanstone and Frederick James Kelly sold certain land of a total area of about 633 acres to John William Hoad. The contracts provided that upon execution of the contract the purchaser should pay a cash deposit equal to 15 per cent. of the purchase money, that eighteen months after the day of sale he should pay a portion of the purchase money equal to 15 per cent. of the total purchase money, and that he should pay the balance of the purchase money in six equal instalments payable at equal consecutive periods spread over six and a half years from the expiry of the period of eighteen months, interest being charged on the balance owing from time to time after payment of the deposit at 5 per cent. per annum, payable half-yearly. The contract also provided (clause 17) that if (*inter alia*) the purchaser should make default in payment of the purchase money or any part of it, or interest, he should forthwith redeliver up to the vendors possession of the land, and that if he should refuse or neglect to give up possession the vendors might proceed to eject him as if he were a tenant holding over after the determination of his tenancy, and for this purpose the purchaser became tenant at will of the land to the vendors. The contract further provided (clause 21) that time should be of the essence of the contract. The purchaser paid the deposit and went into possession of the land, fenced it, cultivated portion of it, and put cattle upon it. He did not pay the first instalment of the purchase money on the due date, namely, 22nd July 1914, and shortly afterwards left the land and enlisted for service in the

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Australian Imperial Forces. The vendors subsequently took possession of the land, and on 23rd December 1914 resold it to Bakewell Brothers Ltd. In 1918 the purchaser brought an action in the Supreme Court of New South Wales against Arthur Donovan Swan, William Vanstone and Catherine Kelly (executrix of Frederick James Kelly) claiming £3,000 damages for breach of the agreements of 22nd January 1913. The action was tried before *Cullen* C.J. and a jury. The learned Chief Justice put the following questions to the jury, who, having found a verdict for the plaintiff for £495, gave the answers set out after the questions respectively :—(1) Did the plaintiff prior to 23rd December 1914 abandon any intention to fulfil the contract? Answer: No. (2) Was there an arrangement made between the defendants and the plaintiff that while the cattle were on the place they would not take the place away from the plaintiff? Answer: Yes. (3) At what amount do you estimate the value of the land on 23rd December 1914 less the indebtedness present and future of the plaintiff in respect of the balance of the purchase money? Answer: £495.

The defendants having moved before the Full Court to set aside the verdict for the plaintiff and to enter a verdict for the defendants or to grant a new trial, the Full Court ordered that the verdict for the plaintiff should be set aside, and that a verdict should be entered for the defendants with costs: *Hoad* v. *Swan* (1).

From that decision the plaintiff now appealed to the High Court.

Loxton K.C. (with him *Davidson*), for the appellant. There was no breach of the contract by the appellant which entitled the respondents to rescind it. The contract having been in part performed, the failure to pay the first instalment was not such a breach of the contract as went to the root of it, and, notwithstanding the provision that time is of the essence of the contract, it is only a breach which goes to the root of the contract that entitles the other party to treat the contract as at an end (*Hoare* v. *Rennie* (2); *Pordage* v. *Cole* (3); *Withers* v. *Reynolds* (4); *Cornwall* v. *Henson* (5);

(1) 20 S.R. (N.S.W.), 131.
(2) 29 L.J. Ex., 73.
(3) 1 Wms. Saund. (1871 ed.), 548.
(4) 2 B. & Ad., 882.
(5) (1900) 2 Ch., 298.

Clough v. *London and North-Western Railway Co.* (1); *Bentsen* v. *Taylor, Sons & Co.* (2)).

[RICH J. referred to *General Billposting Co.* v. *Atkinson* (3); *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (4); *Panoutsos* v. *Raymond Hadley Corporation of New York* (5); *Marshall* v. *Powell* (6).

[ISAACS J. referred to *Stickney* v. *Keeble* (7).]

The evidence supports the finding that the appellant did not intend to abandon the contract. The respondents being joint owners of the land and co-adventurers, one of them had authority to bind the others (*Gleadon* v. *Tinkler* (8); *Wood* v. *Braddick* (9); *Oppenheimer* v. *Frazer & Wyatt* (10)).

[RICH J. referred to *Brodie* v. *Howard* (11).]

The evidence shows that, if the respondents had, on failure to pay the first instalment on the due date, an option to treat the contract as at an end, they did not exercise that option, but treated the contract as still subsisting.

Maughan K.C. (with him *Mason*), for the respondents. A contract for the sale of land is entire and indivisible, and in order that the appellant should be able to complain of a breach of this contract he should be able to say that he was at the date of the breach ready and willing to carry it out. Unless he can do so, he has no remedy at common law.

[ISAACS J. referred to *Hensley* v. *Reschke* (12).]

To an allegation that he was not ready and willing, it is no answer to say that he had not abandoned the contract. The effect of the provision that time shall be of the essence of the contract is that a failure to perform a condition on the date fixed is a breach going to the root of the contract, and so a failure to pay an instalment on its due date gave the respondents a right to rescind the contract. They exercised that right by reselling the property. What was done by the respondents immediately after the appellant failed to

(1) L.R. 7 Ex., 26.
(2) (1893) 2 Q.B., 274.
(3) (1909) A.C., 118, at p. 122.
(4) 9 App. Cas., 434, at p. 446.
(5) (1917) 2 K.B., 473, at p. 478.
(6) 9 Q.B., 779.
(7) (1915) A.C., 386.
(8) Holt N.P., 586.
(9) 1 Taunt., 104.
(10) (1907) 2 K.B., 50.
(11) 17 C.B., 109.
(12) 18 C.L.R., 452.

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pay the instalment was no more than an indication of an intention to sue for the instalment, and cannot be taken to be an election to treat the contract as still subsisting.

[ISAACS J. referred to *Doe d. Nash* v. *Birch* (1).]

The question of whether the appellant was ready and willing to carry out the contract should not have been left to the jury, for on his own evidence he was not at the date of the resale ready and willing to pay the first instalment on demand, as he should have been.

Loxton K.C., in reply, referred to *Matthews* v. *Smallwood* (2).

Cur. adv. vult.

Aug. 26.

The written judgment of the COURT, which was delivered by ISAACS J., was as follows :—

The parties at the trial agreed to disregard the actual pleadings, and to try what *Cullen* C.J. described as "the real issue, namely, whether the respondents had a right to sell the property on 23rd December 1914." His Honor observed that any necessary amendments should be taken as having been made. Unfortunately "the real issue" is a composite one, consisting of various issues of law and of fact which were not defined, and were in controversy even after the charge to the jury; and, as some of the essential issues of fact are still left unsettled, a new trial is necessary. It is proper to say only so much as is necessary for the purposes of this appeal.

The cause of action now under consideration is that the respondents, before the time for completion, resold land which they had already agreed to sell to the appellant, and incapacitated themselves from carrying out the contract with him. They assert a right to do so on two grounds, which must be carefully distinguished. The first is that as the appellant failed to pay a stipulated instalment on the stipulated day, 22nd July 1914, he had committed a breach which entitled them to treat the contract as at an end. The second is that, quite apart from actual breach, the appellant had announced his inability to perform an essential part of the bargain, and this also

(1) 1 M. & W., 402, at p. 408. (2) (1910) 1 Ch., 777.

gave them the right to elect to terminate the contract. *Pring* J. held that the defendants were clearly entitled to a verdict and judgment on the ground that the appellant was not ready and willing to perform the contract, having failed to pay and having stated that he was unable to pay the instalment due on 22nd July; *Gordon* J. held in favour of the defendants on the ground that the appellant had repudiated the contract; and *Ferguson* J. simply stated his concurrence. It is requisite therefore to deal with both grounds.

The first step necessary in the consideration of the matter must be decided in favour of the respondents. The question being here not whether the appellant's actual default entitled the respondents to sue him for damages but whether it entitled them to refuse to proceed further with the contract, it must be resolved by reading and construing the contract as a whole. Clause 21 provides: "Time shall be of the essence of the contract." There is nothing else in the contract which is inconsistent with this clause receiving its natural meaning. In *Bettini* v. *Gye* (1) *Blackburn* J. says: "Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one." The learned Judge proceeds further to elucidate the whole subject argued before us as to the right to terminate a contract for breach, but the passage quoted is all that is here material. *Bettini* v. *Gye* is a common law case under the *Common Law Procedure Act*, which still survives in New South Wales, and so it is placed in the forefront. Where parties have made such a stipulation as clause 21 without qualifying it, then it cannot be said, as it was said by Lord *Blackburn* himself in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2), that the breach does "not go to the root or essence of the contract." The test is instantly satisfied, and where that is so, the vendor, even if the failure is a trivial one, is entitled, as the Privy Council said in *Brickles* v. *Snell* (3), to stand upon "the letter of his bond." So far the matter is clear. The appellant not only was not ready to pay the instalment due on 22nd July 1914, but he actually failed to pay it. The respondents then clearly had the right to

(1) 1 Q.B.D., 183, at 187. (2) 9 App. Cas., at p. 444.
(3) (1916) 2 A.C., 599, at p. 604.

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terminate the contract if they had chosen to do so. They had the right of choice and, whichever course they took, they not only bound the appellant but they necessarily bound themselves. Waiver of such an express stipulation as clause 21 reattaches the jurisdiction of equity to give its remedies, for in that event the stipulation as to time ceases to be applicable (*Steedman* v. *Drinkle* (1)). And similarly at law, where the party having the right to terminate the contract so acts as to insist on its performance—and he may do so if he thinks it more advantageous to him to hold the defaulting party to his full undertaking—he cannot afterwards fall back on his freedom to elect. The evidence given at the trial as to the conduct of the parties and the negotiations between them after the plaintiff had made default was such as to make it proper to leave to the jury the question whether the defendants had elected, prior to the resale, to determine the contract or to treat it as subsisting, or whether, up to that time, they had made no election : but none of these questions were submitted to the jury. It is not desirable that we should express any opinion as to the effect of this evidence further than that it was not so decisive in favour of either view as to justify a direction to the jury. The Supreme Court appear to have assumed that the appellant's statement that he was unable to pay the instalment which had become due necessarily amounted to a repudiation by him of all his obligations under the contract, and *ipso facto* relieved the respondents from any further performance of it. But even if the statement did amount to a total repudiation, as to which we do not think the evidence is necessarily conclusive, the question whether the respondents elected to treat the contract as existing, still remains for determination, and, as we have already indicated, the state of the evidence required that this question should be submitted to the jury. Next it is assumed that if he did make such statement, he is concluded by his statement. He would not necessarily be concluded thereby. He would be at full liberty to treat it as an admission only and repel it by counter evidence, which might or might not be believed. In *Slatterie* v. *Pooley* (2) *Parke* B. says : "What a party himself admits to be true may reasonably be presumed to be so." Where no estoppel exists, he is, however, entitled

(1) (1916) 1 A.C., 275, at p. 280.

(2) 6 M. & W., 644, at p. 669.

to prove the admission to have been wrong; the burden of proof of disproving it is on him, and he should do it satisfactorily. The position is fully discussed by Lord *Atkinson* for the Privy Council in *Chandra Kunwar* v. *Narpat Singh* (1). That is all on the basis that the statement is regarded as an admission only. If, however, as pointed out by Lord *Atkinson*, the circumstances establish estoppel, if the respondents were induced by it to act upon it as being true, then the appellant would be precluded from denying it. If the respondents, believing such a statement, had acted upon it, on the principle stated in *Johnstone* v. *Milling* (2), *Bradley* v. *H. Newsom Sons & Co.* (3) and *National Provident Institution* v. *Brown* (4) the contract would have been ended, and no contradiction would have been of any avail, or indeed admissible. Whether they did so is a matter in controversy as a fact, and the evidence as before is open to the jury to consider in that connection. It need scarcely be added that nothing here said is intended to indicate any view of the facts other than that they are not conclusive one way or the other, and that the jury must form their own opinion.

In these circumstances, it is evident that the ultimate facts have not been sufficiently ascertained by the jury, and a new trial is necessary.

A question was raised about the damages, but, for obvious reasons, this is a matter on which it is proper that nothing should now be said.

Appeal allowed. Judgment appealed from reversed. New trial ordered. Costs in all Courts to abide the result of the new trial.

Solicitor for the appellant, *J. M. Hooke*, Taree, by *Thos. Rose & Dawes*.

Solicitors for the respondents, *Houston & Co.*

B. L.

(1) L.R. 34 I.A., 27, at p. 35.
(2) 16 Q.B.D., at pp. 460, 472.
(3) (1919) A.C., 16, particularly at pp. 35 (Lord *Haldane*), 36 (Lord *Sumner*) and 51-54 (Lord *Wrenbury*).
(4) (1919) 2 K.B., 497.