[HIGH COURT OF AUSTRALIA.]

JARVIS . . . . . APPELLANT;
DEFENDANT,

AND

PITT LIMITED . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1935.

ADELAIDE, *Sept.* 16, 17.

SYDNEY, *Oct.* 17.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Contract—Offer and acceptance—Specifications for building—Tenderers to use specified stones—Price list of stone supplied by quarry-master to tenderers—Tender and acceptance thereof—Effect as between quarry-master and tenderer.

Tenders were called for the erection of a stone building according to specifications prescribing stone from a specified quarry. The architects had obtained from the quarry-master a statement of his terms and prices for the supply of the stone required. Upon the face of the statement, the terms and prices were based on the assumption that all the stone for the building would be taken from the quarry. At the instance of the architects, a copy of the statement was given to each builder proposing to tender. The builder whose tender was accepted, as he needed stone, gave orders from time to time to the quarry-master for the sizes and quantity required. But, before the entire quantity had been ordered, differences arose between the quarry-master and the builder and with the assent of the building owner the builder obtained the residue of the stone for the building from other sources. The quarry-master brought an action against the builder for breach of contract in refusing to take all the stone for the building from him. The builder denied that he had become contractually bound to the quarry-master to take all the stone from his quarry.

Held that a contract for all the stone had been made between the builder and the quarry-master; the latter in furnishing tenderers with terms and prices of stone had made a proposal for a binding agreement that he would supply and the successful tenderer would take all the stone for the building.

Per Rich, Dixon, Evatt and *McTiernan* JJ.:—The tender to the building owner may be taken as implying a willingness to assent to the quarry-master's proposal as well as to that of the building owner, and the acceptance of the

tender completed in one or other of two ways the formation of the contract between the builder and the quarry-master. If the builder's tender is treated as implying an offer to agree to the quarry-master's proposal, it is an acceptance for and on behalf of the latter. If, on the other hand, each tender is treated as a conditional acceptance of the quarry-master's proposal, conditional on the tender proving successful, then the building owner's acceptance fulfilled the condition.

Per Starke J.: Ordinary business prudence required that the quarry-master should be under an obligation to supply the builder with the stone he undertook to use in the building, and little evidence indicating the latter's acceptance was necessary; the builder based his tender on the prices quoted by the quarry-master and gave orders for stone over a considerable period of time; the conclusion of the trial Judge that there was a contract was justified by the evidence.

Decision of the Supreme Court of South Australia (*Richards* J.) affirmed.

APPEAL from the Supreme Court of South Australia.

The appellant, Harwood Samuel Coombe Jarvis, was a building contractor. The respondent, Pitt Ltd., was a quarry owner, part of whose business was to supply stone to building contractors. Early in 1933 the University of Adelaide proposed to build a new hall known as the Bonython Hall. Freestone won from the respondent's quarries at Murray Bridge apparently found favour with the architects employed by the University for the building. At the time when they were preparing the plans and specifications for the building, the quarries of the respondent were not working. The respondent, however, at their request sent two tons of stone to a stonemason's yard near Adelaide, where it was worked into blocks. The architects approved of the stone and supplied the respondent with the draft plans and specifications for the building, which showed to what extent the stone would be used. The respondent's managing director went through the plans and specifications and made an estimate of the stone required. He also made out for the architects a statement of the respondent's prices and terms. The specifications contained the following provision:— "Stonework for external facing and a few heads and sills and the aisle plinth blocks showing inside is to be selected hard Murray Bridge freestone from the quarries of Pitt Limited equal to marked samples worked in the yard of W. H. Martin Ltd., North Unley" About three weeks before tenders closed, the architects and

H. C. OF A. 1935. JARVIS v. PITT LTD.

the respondent's managing director together went through the statement of terms and prices for the supply of stone, and the architects made some slight alteration in its form. While this discussion was taking place, the appellant asked for a statement of terms and prices, and, in his presence, the architects requested the respondent to send a copy of the statement to each builder who was tendering. The architects supplied the respondent with a list of the builders who were tendering, and a copy of the statement was sent by the respondent to each such builder, including the appellant. The statement was in the following form:—"27th April 1933. Builder's price net—Plus sales tax. Freestone for proposed Bonython Hall. The price for hard Murray Bridge freestone as per sample which the architects specify for above job as follows:—Delivered on job, or anywhere same distance from Mile End Railway Yards. 22/- per ton for shoddies only in stones not larger than approx. 2′ 6″ x 1′ 6″ x 1′ 6″ or smaller than approx. 10″ x 6″. 8/- per cub. ft. for remainder of stones in random size sawing blocks. from 12 to 60 cub. feet. Contractor will state size he prefers and we will aim at those sizes when first cutting. Fixed sizes 20% extra. No stone cubed under one foot. We will supply a lot of small sizes required at 8/- per ft. but if we have to cut larger pieces to waste then our price will be 20% extra. We, considering the peculiarity of our quarry and knowing the sizes of all stones required in the building, reserve the right to supply stones to cut one or more. No stones supplied as shoddies are to be used for dressed stones. When stones are slack, or irregular, the measurement to be charged for is to correspond with the size of stone (finished sizes) required in the building that can be sawn out of same. Pitt Limited."

After receiving the statement the appellant obtained a sample of the stone of the respondent and made an inquiry from its managing director upon a point affecting quantity. Then he made out his tender and submitted it. His tender was accepted by the University, and he entered into a formal contract with the University to erect the hall in accordance with the plans and specifications. Subsequently the appellant informed the respondent's managing director that he was ready for stone. On 1st August 1933 he ordered a truck-load of stone from the respondent, and, on 8th August 1933,

the first truck-load of stone was delivered by the respondent to the appellant on the site of the hall. On various later dates, up to and including 10th October 1933, further loads were delivered. Differences then arose between the appellant and the respondent, and the appellant, with the approval of the University, obtained the balance of the stone from other sources.

The respondent brought an action against the appellant in the Supreme Court of South Australia, claiming, by way of liquidated damages, the balance of the price of stone already supplied, and, by way of unliquidated damages, damages for breach of contract to take further stone. On each point the trial Judge (*Richards* J.) decided in favour of the respondent. His Honor held that in the circumstances a contract had been constituted between the appellant and the respondent under which the appellant was obliged to take from the respondent the whole of the stone required for the hall.

From this decision, so far as it held the respondent entitled to unliquidated damages, the appellant now appealed to the High Court.

Mayo K.C. (with him *Povey*), for the appellant. The appellant made no contract to take from the respondent the whole of the stone required for the building. There must be an intention to contract (*The Crown* v. *Clarke* (1)). There was never any such intention here. Each party thought that he had a contract with the University and acted throughout on that assumption. The document given by the respondent to the appellant was not an offer; it was merely a price circular. If it were an offer, it could not be accepted by conduct. By implication, acceptance was required in the same way as the offer was made, namely, by writing delivered by post. If it were an offer which could be accepted by conduct, the conduct of the appellant gave no indication of the state of mind necessary to constitute an intention to contract. In any event, if there were an offer to supply the whole of the stone, and if that offer were subsequently accepted, it does not follow that the appellant, by accepting, bound himself to take the whole of the stone. All the stone that he took, and was bound to take, was specifically ordered.

(1) (1927) 40 C.L.R. 227.

H.C. OF A. 1935. JARVIS v. PITT LTD.

Ligertwood K.C. (with him *Bleby*), for the respondent. From the statement and the circumstances the Court should imply a contract by the respondent to supply, and by the appellant to take, the whole of the stone required for the building. The appellant had the statement before him in making up his tender. He was bound by his contract with the University to obtain all his stone from the respondent's quarries, and, therefore, had to be sure of getting the stone at the prices mentioned by the respondent. For that purpose he had to enter into a contract with the respondent. The respondent's offer was to supply the whole of the stone.

[DIXON J. Might not the contract, if implied, be to supply to the respondent all the stone that might be required by the University, so that, if the University agreed, as it did, to go elsewhere, that put an end to the obligation ?]

That is not the meaning of the contract upon a proper construction (*Tancred, Arrol & Co.* v. *Steel Co. of Scotland* (1)). By tendering on the faith of the respondent's offer the appellant bound the respondent to supply the whole of the stone, if the appellant's tender were accepted, and therefore he bound himself to take the whole of the stone. There was a written offer to supply the whole of the stone, which was accepted by the appellant's putting in a tender to the University based on that offer, by that tender being accepted and by the respondent being told by the appellant that such tender had been accepted. Alternatively, there was a continuing offer which was accepted by the subsequent conduct of the appellant and his relations with the respondent. The architects were the agents of the respondent to receive an acceptance of the offer, and the acceptance was completed by the appellant entering into his contract with the University.

Mayo K.C., in reply. If anything is to be implied, it is no more than a contract to take from the respondent such stone as the University should require. If there were any contract, it was of that kind, or of the nature of the contract in *R.* v. *Demers* (2).

Cur. adv. vult.

(1) (1890) 15 App. Cas. 125.

(2) (1900) A.C. 103.

The following written judgments were delivered :—

RICH, DIXON, EVATT AND MCTIERNAN JJ. The question raised by this appeal is whether the appellant, who was the successful tenderer for the erection of the Bonython Hall at the University of Adelaide, made a contract with the respondent, the proprietor of freestone quarries, to take from the respondent the whole of the freestone required for the erection of the building.

The appeal is from a judgment of *Richards* J., who decided that the appellant, who was the defendant in the action, had entered into such a contract. He further decided that, after receiving supplies of freestone under it, the appellant had refused further performance, that the grounds relied upon by the appellant to justify the refusal failed, and that he was liable to the respondent in unliquidated damages for loss of the balance of the contract and for a liquidated sum in respect of stone actually supplied. The appellant complains only of the judgment for unliquidated damages. The ground of his complaint against it is that, on the facts, he incurred no direct obligation to the respondent to obtain from its quarries the whole of the freestone required for the building, for the erection of which he had contracted with the University. No part of the judgment is impugned except the finding that a contract of such a nature was made. The question depends very much upon the interpretation which ought to be placed upon the conduct of the parties.

The freestone won from the respondent's quarries at Murray Bridge seems to have found favour with the architects employed by the University for the building. At the time when they were preparing the plans and specifications the quarries were not working, but at their request the respondent sent two tons of stone to a stonemason's yard near Adelaide where it was worked into blocks. The architects approved of the stone and furnished the respondent with the draft plans and specifications for the building, showing to what extent it would be used. The respondent's managing director went through them and made an estimate of the stone required. He made out for the architects a statement of the respondent's prices and terms. It appears from the evidence, although not very distinctly, that in some form the substance of the statement was

H. C. OF A. 1935.

JARVIS v. PITT LTD.

Rich J. Dixon J. Evatt J. McTiernan J.

before the architects when the specifications were settled. In any event, this might safely be inferred, for the specifications contained the following provision: "Stonework for external facing and a few heads and sills and the aisle plinth blocks showing inside is to be selected hard Murray Bridge freestone from the quarries of Pitt Limited equal to marked samples in the yard" of the stonemason already mentioned. Tenders were called for on these specifications. About three weeks before tenders closed, the architects and the respondent's managing director together went through the statement of terms and prices for the supply of stone and the architects made some slight alteration in its form. At the architects' request, the respondent sent a copy of it to each of the builders who were tendering. A list of them was supplied by the architects. Among others, the appellant received a copy. It appears that he had actually applied for it while the architects were discussing it with the respondent's managing director, and it was in the appellant's presence that the architects gave the instruction that it should be sent to all who were tendering. Having received it, the appellant obtained a sample of the stone from the respondent and made an inquiry from its managing director upon a point affecting quantities. Then he made up his tender. In doing so he relied, of course, on the respondent's statement of prices for stone.

While the tenders were under consideration, the respondent reopened its quarries and began the preliminary work necessary for the getting of the stone. Shortly after the appellant's tender had been accepted, he entered upon a discussion with the respondent of the details of the stone to be supplied, sizes, quantities and so on. In due course, he gave orders for stone and these were fulfilled. Then a controversy arose as to the classification of stone delivered and the use to which the appellant had put it, matters which affected the price to be paid. This controversy ultimately led to the appellants taking a stand which has been held to be a refusal to take stone in terms of the alleged contract, and, therefore, to amount to a renunciation.

The conduct of the parties, after the acceptance of the appellant's tender, has been relied upon by the respondent as implying, or at least admitting, a contract of the nature alleged. But, if a contract

with the respondent to take all the stone required had not been made by the appellant when he signed his contract with the University, it would be unsafe to treat his subsequent conduct as implying one. For, under his contract with the University, he was bound to obtain the stone from the respondent's quarries, and both he and the respondent naturally conducted themselves upon the assumption that the one must take and the other would supply the stone. Each, it is true, relied on the statement of prices and terms. But the respondent had furnished it to the University as a thing by which it was prepared to stand, and the reliance of both parties upon it in their controversy is not inconsistent with the absence of any actual general contract between them. Nevertheless their subsequent conduct does throw some light upon the significance which each attached to the prices and terms stated in the document. For, quite clearly, the appellant understood that the assumption that the respondent would supply all the stone for the building formed the basis upon which the prices were calculated and that the purpose of one at least of the terms stated was to ensure that blocks of a lower price were not used to take the place of those of a higher price. In quarrying and preparing the larger stones required to give "sawing blocks," that is, blocks from which the builder can saw the sizes he wants, or to give "dimension stones," that is, blocks cut to enable the production of prescribed dimensions by shaping, other stones of various and smaller shapes and sizes are obtained. These are called "shoddies," and under that description quarry-masters sometimes supply builders with comparatively small blocks of stone of no very regular shape, dressed sufficiently to avoid useless cost in cartage. Naturally the price of such stones is much less than that of the larger blocks, but no quarry-master could supply them unless he had a sale for the larger blocks. It was thus essential for the respondent's managing director, in making up his prices, to make an estimate, not only of the total amount of stone required for the whole building, but also of the proportion of shoddies to sawing and dimension blocks. In fact he did so: he estimated the shoddies at a tonnage amounting to a little under five-eighths of the whole quantity of stone required. He also provided against the builder using, as dressed stone, stone supplied as shoddies. The

H. C. OF A. 1935.

JARVIS v. PITT LTD.

Rich J. Dixon J. Evatt J. McTiernan J.

more material parts of the document which he prepared and the architects settled are as follows :—" Builders price nett—Plus sales tax. Freestone for proposed Bonython Hall. The price for hard Murray Bridge freestone as per sample which the architects specify for above job is as follows :— . . . 22/- per ton for shoddies only in stones not larger than approx. 2′ 6″ x 1′ 6″ x 1′ 6″ or smaller than approx. 10″ x 6″" (x 6″). " 8/- per cub. ft. for remainder of stones in random size sawing blocks from 12 to 60 cub. feet. . . . We will supply a lot of small sizes required at 8/- per ft. but if we have to cut larger pieces to waste then our price will be 20% extra. We, considering the peculiarity of our quarry and knowing the sizes of the stones required in the building, reserve the right to supply stones to cut one or more. No stones supplied as shoddies are to be used for dressed stones."

In considering whether a contract was formed between the appellant and the respondent for the sale and purchase of all the freestone required, the first step is to decide whether the statement of prices and terms is divisible, that is to say, to decide if, on the one hand, it is a statement of prices at which the respondent is willing to supply for the building stone of any particular class when ordered independently of orders for any other class of stone, or if, on the other hand, it is a statement of the prices for stone upon the footing only that all the stone required for the building is supplied. The latter seems clearly to be its meaning. It is headed " Freestone for proposed Bonython Hall." The specification is referred to. The entire quantity of stone is covered by the descriptions " shoddies " and " remainder of stones." The reservation of the right to supply " stones to cut one or more " states that the supplier knows the sizes of all the stones required in the building. The purpose of the next clause is obvious, viz., to prevent the use of stones supplied at 22/- a ton in reduction of the quantity needed of a class for which the price is 8/- a cubic foot. From this it follows that it is a quotation for the stone as an entirety.

The next question is whether the document was intended by the respondent as a proposal which, if acted upon, would bind it and whether it would be so understood. The cardinal consideration affecting this question is that the statement was presented to every

proposing tenderer as that containing the prices and terms upon which he could depend for the purpose of fulfilling the obligation that would be imposed upon him by the specification if he tendered with success. In one of their letters the appellant's solicitors described it as a quotation for the guidance of contractors in making up their tenders and said that, naturally having relied upon the quotation for his tender, he declined to pay an increase in price. Indeed it is difficult to see how a builder could safely tender unless he was secure from changes in price and could treat the respondent as bound to supply him, on the terms and at the prices stated, with the stone which the specification required him to obtain exclusively from the respondent. The University was seeking, as building owners do, a contractor who for a lump sum would undertake the entire responsibility of carrying out the works and providing all the materials. The contractor, not the University, was to pay the quarry-masters. Although, doubtless, the respondent's managing director spoke truly when he said that he regarded his company as having a gentleman's agreement with the University, the architects were right in describing it as, from the University's point of view, an ordinary quotation for their estimating purposes. For or against the University, it could have no greater effect. But to the builders tendering, the quotation necessarily wore another aspect. To them it was an offer to supply the stone for the building upon which the successful tenderer was entitled to rely, in other words, an offer which, when the main contract was made, would be incapable of withdrawal or modification without his consent. When, at the instance of the architects, the respondent sent the quotation to all the builders tendering, including the appellant, the purpose in view was more than to inform them of the respondent's present intention or of the prices obtaining at the moment. It was to assure them of the prices and terms in which the stone and all the stone would be available. This amounts to a proposal for a binding agreement.

But the question remains: What mode of acceptance was indicated, or how was acceptance communicated? Although the proposal was made to all tenderers, it was upon its terms to operate only in the case of him whose tender was accepted. The University procured

H. C. OF A. 1935.

JARVIS v. PITT LTD.

Rich J. Dixon J. Evatt J. McTiernan J.

the proposal and, through the architects, caused it to be communicated as a necessary incident of the transaction it invited. The specification of stone from the respondent's quarry and the respondent's statement of the terms of supply depended one upon the other. All parties were alive to the position that the man with whom the University contracted was meant without more to be entitled to a supply of the necessary stone from the respondent in terms of the statement. In these circumstances the tender of the builder may be taken to imply a willingness to assent to both proposals and the acceptance of the tender by the University involves two things. Not only is it an acceptance of the tender, but it performs one or other of two functions in respect of the respondent's proposal. If the builder's tender is treated as an offer to agree to that proposal, it is an acceptance of that offer for and on behalf of the respondent. If, on the other hand, each builder's tender is treated as an acceptance of the respondent's conditional or contingent proposal to him, conditional or contingent upon the acceptance of his tender by the University, the University's acceptance of the tender is the fulfilment of the condition, the happening of the contingency. The respondent's proposal, as has already appeared, was for the supply of all the stone, and that implies a promise on the part of the contractor to take it all. It is an offer to supply stone as ordered at the stated price, if all the stone needed is taken from the respondent. Accordingly, to assent to the proposal is to promise to take the entire quantity of stone required to fulfil the specifications. In this way a contract was formed between the respondent and the appellant binding the one to supply and the other to take all the stone specified.

The suggestion that the respondent did no more than make a standing offer susceptible of a series of acceptances effected by, and binding to the extent of, each order given, cannot be sustained.

Nor is there sufficient ground for limiting the agreement to such stone as shall in the event be actually required by the University from the respondent's quarry. It would seem, although the facts do not appear in the transcript, that the University absolved the appellant in the end from the obligation to procure stone from the respondent's quarries. The transaction between the appellant and the respondent, however, was based on the actual specifications

and did not contemplate their variation by the mutual consent of the University and the appellant. No implication should be made of a term providing for such an event.

For these reasons the appeal should be dismissed.

STARKE J. The question in this case is entirely one of fact, namely, whether the appellant and the respondent made a contract whereby the whole of the freestone required for building Bonython Hall in the University of Adelaide was to be supplied from the respondent's quarries. *Richards* J., of the Supreme Court of South Australia, resolved this question in the affirmative, and the argument addressed to this Court has not convinced me that he was wrong.

The University of Adelaide was desirous of building a great hall, which was to be called the Bonython Hall, and its architects prepared a contract, plans and specifications for the work. The architects inspected stone from the respondent's quarries, and inserted in the specification the following stipulation: "Stonework for external facing and a few heads and sills and the aisle plinth blocks showing inside is to be selected hard Murray Bridge freestone from the quarries of Pitt Limited equal to marked samples worked in the yard of W. H. Martin Ltd., North Unley." The respondent handed to the architects a document which stated the prices for hard Murray Bridge freestone, as per sample specified by the architects for building Bonython Hall. The architects requested that a copy of this document be handed to persons about to tender for the erection of the hall. Among these persons was the appellant. The appellant subsequently lodged a tender, in the preparation of which he made use of the document mentioned and the prices stated in it. The University accepted his tender. The contract prepared by the architects was executed by the parties about June 1933, and by it the appellant agreed, for a lump sum, to erect the hall in accordance with the plans and specifications already mentioned. The appellant and the respondent did not, however, enter into any written agreement for the supply of stone required for the hall. The respondent had opened up its quarries, engaged men, and removed some of the top soil or overburden before the appellant tendered for the work or the building

H. C. OF A. 1935. JARVIS v. PITT LTD. Starke J.

contract was executed. But soon after the contract with the University was executed, the appellant inspected the respondent's quarries and discussed the stone required for the purposes of the contract and its dimensions. Orders for stone followed. The stone was supplied, or prepared, from time to time.

It is now contended that the document stating the prices for hard Murray Bridge freestone as per sample, given to the appellant by the respondent, was a mere price list and involved no obligation to supply stone, and that in truth the parties were simply carrying out the stipulation in the University contract that the freestone required for the erection of Bonython Hall should be selected from the respondent's quarries. The argument is forcible, but, having regard to the circumstances, I think the better conclusion is that a contract was really constituted between the parties. The appellant was bound under his contract with the University to erect the Bonython Hall with freestone from the respondent's quarries. The respondent had supplied him with prices for every description of stone required for the erection of the hall. And the appellant had based his tender on those prices. It is difficult, in these circumstances, to avoid the conclusion that the respondent's prices constituted what business men would call a firm offer to the successful tenderer for the contract. All that remained was for such a tenderer to indicate in some way his acceptance of the offer. But little evidence is enough for that purpose in such circumstances as the present, for ordinary business prudence required that the respondent should be under an obligation to supply the appellant with the stone which he had undertaken to use in the building of Bonython Hall; here we have a tender based upon the prices stated in the document given to the appellant by the respondent, and orders for stone over a considerable period of time. The conclusion of the learned Judge that there was a contract between the parties for the whole of the stone required for building the hall is justified by the evidence, and therefore should not be displaced.

The amount of the judgment was not challenged before this Court.

The result is that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Povey, Waterhouse & Downey.*

Solicitors for the respondent, *Johnstone, Olsson & Bleby.*

C. C. B.