[HIGH COURT OF AUSTRALIA.]

CARR . . . . . APPELLANT;
DEFENDANT,

AND

J. A. BERRIMAN PTY. LTD. . . . RESPONDENT.
PLAINTIFF,

CARR . . . . . APPELLANT;
PLAINTIFF,

AND

J. A. BERRIMAN PTY. LTD. . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

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SYDNEY, *April* 10, 13;

MELBOURNE, *June* 5.

Dixon C.J., Williams, Webb, Fullagar and Kitto JJ.

Building contract—Rescission—Repudiation—Powers of architect—Direction to omit work—Time of the essence—Conduct consistent with continuance of contract—Election not to rescind—Notice requiring performance—Continuing breach—Failure to remedy breach—Intention not to be bound—Further breach—Damages.

A clause in conditions annexed to a building contract provided: "The Architect may in his absolute discretion and from time to time issue . . . . written instructions or written directions . . . in regard to the . . . omission . . . of any work. The Builder shall forthwith comply with all Architect's Instructions".

Held, that the clause would authorize the architect, doubtless within certain limits, to direct that particular items of work included in the plans and specifications should not be carried out; but it would not authorize him to say that particular items so included should be carried out, not by the builder with whom the contract was made, but by some other builder or contractor. Such a power could be conferred only by very clear words.

Where a contract contains a promise to do a particular thing on or before a specified day, time may or may not be of the essence of the promise. If time is of the essence, and the promise is not performed on the day, the promisee is entitled to rescind the contract, but he may elect not to exercise that

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right, and an election will be inferred from any conduct which is consistent only with the continued existence of the contract. If time is not of the essence of the promise, the promisee is not entitled to rescind for non-performance on the day. If time is not originally of the essence, or, time being originally of the essence, the right to rescind for non-performance on the day is lost by election, the promisee can, generally speaking, rescind only after he has given a notice requiring performance within a specified reasonable time, and after non-compliance with that notice.

The effect of a builder's election not to rescind the contract upon a breach thereof by the building owner is to leave it open to the building owner to remedy his breach, and the builder will be bound to accept the late performance, though entitled to sue for any damage suffered by him through the delay, but a failure to remedy the breach might continue so long and in such circumstances as to evince an intention on the part of the building owner no longer to be bound by the contract.

Decision of the Supreme Court of New South Wales (Full Court): *Carr* v. *J. A. Berriman Pty. Ltd.* (1952) 70 W.N. (N.S.W.) 23, affirmed.

APPEALS from the Supreme Court of New South Wales.

A contract was entered into on 3rd May 1950 between T. Carr & Co., therein called "the proprietor", and J. A. Berriman Pty. Ltd., therein called "the builder", whereby the builder promised "upon and subject to the Conditions annexed hereto" to erect a building on land owned by the proprietor. The relevant provisions of the conditions are as follow:—

"1. The Builder shall carry out and complete the Works in accordance with this contract in every respect and in accordance with the directions and to the reasonable satisfaction of the Architect. . . . The Architect may in his absolute discretion and from time to time issue further drawings, details and/or written instructions, written directions and written explanations (all of which are in these Conditions collectively referred to as 'Architect's Instructions') in regard to:

(a) The variation or modification of the design, quality or quantity of the Works or the addition or omission or substitution of any work. . . .

(e) The postponement of any work to be executed under the provisions of this contract. . . .

The Builder shall forthwith comply with all Architect's Instructions. . . .

If compliance with Architect's Instructions involves any variation, such variation shall be dealt with under clause 9 of these conditions and the value thereof shall be added to or deducted from the Contract Sum.

If compliance with Architect's Instructions involves the Builder in loss or expense beyond that provided for in or reasonably contemplated by this contract, then, unless such instructions were issued by reason of some breach of this contract by the Builder, the amount of such loss or expense shall be ascertained by the Architect and shall be added to the Contract Sum.

9. No variation shall vitiate the contract, but, unless a price therefor shall have previously been agreed, all variations authorised by the Architect or subsequently sanctioned by him shall be valued and such price or value shall be added to or deducted from the Contract Sum as the case may be. . . .

13. The Builder shall not without the written consent of the Architect assign this contract or sub-let any portion of the Works; provided that such consent shall not be unreasonably withheld to the prejudice of the Builder. Such consent shall not relieve the Builder from responsibility for such sub-let portion of the works.

16. On or before the Date for Possession stated in the Appendix to these Conditions complete possession of the site and/or premises shall be given to the Builder who shall thereupon begin the Works forthwith and regularly and diligently proceed with the same and shall complete the same on or before the Date for Completion stated in the said Appendix subject nevertheless to the provisions for extension of time contained in clause 18 of these Conditions.

17. If the Builder fails to complete the Works by the date stated in the Appendix to these Conditions or within any extended time fixed under clause 18 of these Conditions and the Architect certifies in writing that in his opinion the same ought reasonably so to have been completed, the Builder shall pay or allow to the Proprietor such sum (calculated at the rate stated in the Appendix by way of Liquidated and Ascertained Damages for the period during which the said Works shall so remain or have remained incomplete) as in the opinion of the Architect, subject to arbitration in accordance with clause 26 hereof, is proper to be paid or allowed . . . "

Clause 18 provided that if the works should be delayed by any of various specified causes (such as weather, architect's instructions, and other matters not involving fault on the builder's part) the architect should "in writing make a fair and reasonable extension of time for completion of the Works either when the delay occurs or subsequently. Upon the happening of any event causing such delay the Builder shall immediately give notice thereof in writing to the Architect".

Clause 19 provided that if the builder should make default in suspending, or failing to proceed with the works with reasonable

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diligence, or in refusing to comply with a notice from the architect, the proprietor could determine the employment of the builder. Further terms of the clause set out the consequential rights of the proprietor, and the duties of the builder.

By cl. 20 it was provided that, on the occurrence of certain events, the builder could determine his employment under the contract, and his rights and remedies in that event were therein set out.

"26. . . . in case any dispute or difference shall arise between the Proprietor, or the Architect on his behalf, and the Builder, either during the progress of the Works or after the determination, abandonment or breach of the contract, as to the construction of the contract or as to any matter or thing of whatever nature arising thereunder or in connection therewith (including but not limited to any matter or thing left by this Contract to the decision, discretion, ascertainment or valuation of the Architect or the withholding by the Architect of any certificate to which the Builder may claim to be entitled, or the proper amount of any certificate whether issued or withheld, or the measurement and valuation mentioned in clause 9 of these Conditons, or the rights and liabilities of the parties under clauses 19 or 20 of these Conditions) then either party shall give to the other notice in writing of such dispute or difference and at the expiration of seven days unless it shall have been otherwise settled such dispute or difference shall be and is hereby submitted to arbitration in one of the following manners:

The award made by the said arbitrator . . . shall be final and binding on both Builder and Proprietor, and neither party shall be entitled to commence or maintain any action upon any such dispute or difference until such matter shall have been referred or determined as hereinbefore provided, and then only for the amount of relief to which the Arbitrator . . . by his . . . award finds either party is entitled".

The appendix to the conditions of contract provided for various matters, including the date for possession—29th May 1950; the date for completion—1st March 1951; and liquidated and ascertained damages—at the rate of £1 per week. Also annexed to the contract was a "Rise and Fall Agreement", which provided for adjustment of costs. Included in this agreement was a clause (cl. 1) in the following terms:—"It is agreed that it shall be the builder's obligation within a period of eight weeks from the date of the signing of the Articles of Agreement to enter into contracts for all goods, materials, services etc., required for the works, any contracts so entered into to be subject to their due and proper

observance, provided that in cases in which the builder satisfies the architect that it is not possible to enter into such contracts for any item of goods, materials, services etc., such items shall be known as ' items subject to adjustment '."

The specifications included the following items :—

" A. Excavator :—The general excavation over site will be carried by Proprietor with his own plant. The contractor is to assume that the building site will be handed over to him with a level of 44′–0″ throughout (in respect to datum 40′–3″ at kerb where shown on site plan).

D. Bricklayer :—All commons and face bricks will be supplied by Proprietors and delivered in a continuous flow to building site when and where required by contractor.

E. Steelwork :—All steel will be supplied by Proprietors and is to be manufactured by contractor to engineers' and architects' details. This refers to the fabricating of all stanchions, together with all footing details, all trusses, roof-trusses, girths, purlins, brackets etc. It further refers to the bending and placing of all reinforcement bars, to be used in all footings, retaining walls and beams and window lintels etc. The respective structural steel will be delivered by Proprietor to contractors or sub-contractor yard, subject that either is within 20 miles from the GPO Sydney without charge."

Other items of the specifications, namely, Roofer, Electrician, Glazier and Painter, provided for work to be done and materials to be supplied by the proprietor.

The site had not been excavated by the time specified, and, according to evidence accepted by the trial judge, the respondent continued to press the appellant to make the site avaliable to it. The trial judge accepted the evidence of Mr. J. A. Berriman, the managing director of the respondent, who gave evidence that when he visited the site, about 15th May 1950, it was covered with heavy machinery. The foreman on the site was told to move the machinery to an adjacent vacant area, but when he visited the site subsequently, once or twice a week, nothing appeared to him to have been done. On a visit near the end of July, he noticed that further material had been placed on the adjacent area. He had rung the architect on numerous occasions, complaining of the delay.

The respondent, on 7th June 1950, accepted a tender from Hurll & Douglas Pty. Ltd. for the fabrication of the steel work in connection with the building. The architect was aware of this sub-contract. The respondent entered into a further sub-contract for the bending of the steel, of which the architect was also notified.

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On 19th July 1950 the architect wrote to the respondent, and advised it that "Messrs. T. Carr & Co. have made arrangements with Arcos Products Pty. Ltd. . . . to supply and fabricate the structural steelwork for above job and . . . the respective order has been placed with this firm. In explanation I like to add that this arrangement was made necessary by the peculiar steel supply position of today." The solicitor for the respondent wrote to the architect on 20th July, asking for a copy of the contract, and, on 31st July, wrote as follows:—"I am instructed to inform you that the site has not been excavated in accordance with the provisions of clause A 1 of the specifications and that my client immediately upon execution of the contract arranged with a company for fabrication of the steel pursuant to clause E 1 of the specifications. My client regards the proprietor's failure to prepare the site and its arrangements with Arcos Products Pty. Ltd. contrary to clause E 1 of the specifications as two distinct breaches of the building agreement. I therefore give you notice of cancellation of the contract in accordance with the provisions of clause 20 (1) thereof and of my client's intention to institute immediate action for recovery of damages against the proprietor in accordance with the provisions of clauses 20 (3) (ii) and (v) of the said agreement."

The architect replied, on 1st August 1950:—"The resignation of your client from his contract with my client can, of course, not be accepted. Your client was fully aware of the fact that the site was not fully excavated at date of signing the contract and that my client was making all efforts to complete this job. However the condition of the weather (59 days of rain out of 91 days of duration of this contract) has made the completion of this work impossible and your client is fully entitled to the respective extension of contract time. I can therefore not accept the above as a breach of contract. The quoted fact that your client had assigned part of his contract to a steelfabricating firm brings your client in conflict with clause 13 of the Conditions of Contract. No written notice of such assignment was given to me nor written approval granted by me. Nowhere in the specification and conditions of contract has my client agreed to supply the steel immediately after signing of contract and therefore the step taken by your client can be considered as very hasty indeed. However full notice of omission under clause 1 (a) was given in my letter of 19th July 1950 to your client."

Further correspondence ensued, and, in a letter dated 7th August 1950, the architect wrote that "Messrs. T. Carr & Co. are still

ready and willing to perform their obligation under the . . . contract and are making every endeavour to complete the excavations now after the change of weather."

On 20th February 1951 the respondent issued a writ claiming damages, and on 6th March 1951 the appellant did likewise. The actions were set down in the list of Commercial Causes, and were tried by *Owen* J., sitting without a jury. His Honour entered judgment for the respondent in both actions, with damages of £2,992 in the first action.

An appeal in both actions to the Full Court of the Supreme Court (*Street* C.J. and *Herron* J., *Sugerman* J. dissenting) was dismissed (1).

An appeal in both actions was taken to the High Court.

G. E. Barwick Q.C. (with him *S. Isaacs* Q.C. and *H. H. Glass*), for the appellant. Both parties have waived their right to plead the arbitration clause. A *Scott* v. *Avery* clause is a bar to proceedings only if pleaded. In the court below, time was conceded to have been of the essence originally ; we do not make that concession here. *James Shaffer Ltd.* v. *Findlay Durham & Brodie* (2) is relevant on the question of the effect of the letter of 7th August. [He also referred to *Woodall* v. *Pearl Assurance Co.* (3) and *Jureidini* v. *National British & Irish Millers Insurance Co. Ltd.* (4).] Repudiation is not lightly to be inferred : *Ross T. Smyth & Co. Ltd.* v. *T. D. Bailey, Son & Co.* (5). In looking for an absolute refusal to perform, all the circumstances must be considered. The majority of the Supreme Court took no heed of evidence other than that of the builder. On the evidence there was no warrant for the conclusion that there was some evinced intention to refuse to abide by the contract. Even if the letter of 7th August goes as far as saying :— " I am only required to do the best I can ", it does not constitute a breach of the contract.

[DIXON C.J. referred to *Bowes* v. *Chaleyer* (6).]

Where time is of the essence, and the date is allowed to go by, a form of estoppel operates. The promisee cannot resile summarily from that position.

[DIXON C.J. referred to *Central London Property Trust Ltd.* v. *High Trees House Ltd.* (7).]

(1) (1952) 70 W.N. (N.S.W.) 23.
(2) (1953) 1 W.L.R. 106.
(3) (1919) 1 K.B. 593.
(4) (1915) A.C. 499.
(5) (1940) 3 All E.R. 60.
(6) (1923) 32 C.L.R. 159.
(7) (1947) K.B. 130.

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[Counsel referred to *Charles Rickards Ltd.* v. *Oppenhaim* (1); *Maynard* v. *Goode* (2).] The builder's right to terminate does not arise automatically at any time once the date has passed: *Taylor* v. *Brown* (3); *King* v. *Wilson* (4). If there be a breach in not handing over the site in a reasonable time, that gives rise to a right to give a notice. This is not a continuing breach. The promise is to deliver the site by a given date. After that date passes, the obligation is to hand it over in a reasonable time. If that is not done, there is a breach. If a notice is given for a reasonable day, that date becomes a condition. Time was not originally of the essence. Prima facie it is not so in a building contract. The date for completion does not make it so, nor is there any other circumstance. The builder was provided against various contingencies in the rise and fall agreement. If time was originally of the essence, it was waived in circumstances which, up to 31st July, estopped the builder from claiming that (a) the contract was not on foot; (b) he was entitled to rescind *brevi manu*. Once waived, time can be made of the essence only by a notice fixing the date. If, at the relevant time, i.e., 31st July, the promise to give possession was a promise to do so within a reasonable time, a breach of that promise could not of itself entitle the builder to rescind. The builder's notice was ineffective, except as a repudiation on his part, because: (a) failure to give possession at that point of time was not a fundamental breach; (b) the contract with Arcos was not a breach of time, or, alternatively, was not a fundamental breach; (c) notice under cl. 20 (1) was incompetent, the clause being irrelevant to the circumstances. The notice given could not be construed as the acceptance of a repudiation—a manifested repudiation. The rule as to repudiation is that the party repudiating must evince an intention. It must make an impact on the mind of the other party, who must accept the intention. On the other hand, a person can take advantage of a fundamental breach of which, at the time, he knew nothing. [He referred to *British & Beningtons Ltd.* v. *North Western Cachar Tea Co. Ltd.* (5) and *Shepherd* v. *Felt & Textiles of Australia Ltd.* (6).] Repudiation does not absolve from performance; it must be accepted. The notice given under cl. 20 cannot be relied on as an acceptance of the repudiation unknown to the builder: *British & Beningtons*

(1) (1950) 1 K.B. 616, at pp. 623, 624-625.
(2) (1926) 37 C.L.R. 529, at p. 542.
(3) (1839) 2 Beav. 180, at p. 183 [48 E.R. 1149, at p. 1150].
(4) (1843) 6 Beav. 124, at p. 126 [49 E.R. 772, at p. 773].
(5) (1923) A.C. 48.
(6) (1931) 45 C.L.R. 359.

Ltd. v. *North Western Cachar Tea Co. Ltd.* (1). There is no evidence of repudiation. We do not concede that the builder is entitled to damages; if he had suffered some detriment by being delayed, he might have been entitled: *Larking* v. *Great Western (Nepean) Gravel Ltd.* (2). In this case there is no continuing breach. After the breach on 31st July there is either no promise to hand over until after a notice fixing a new time, or there is no promise at all, but only a condition precedent to the operation of the builder's covenants. As to repudiation, in cases such as *Shepherd* v. *Felt & Textiles of Australia Ltd.* (3) the party in defending himself may say:—"I rightly determined the contract, because, although I didn't know, you had committed a fundamental breach." A party cannot say he accepted repudiation unless it existed, and he knew of it. In *James Shaffer Ltd.* v. *Findlay Durham & Brodie* (4) the argument went further. If a man repudiates by saying that he will not perform X, the other party cannot afterwards say:—"I am repudiating because he refused to do Y."

[DIXON C.J. referred to *Johnstone* v. *Milling* (5) and *Wilkinson* v. *Verity* (6).]

There are two things to keep separate. The breach is not handing over on the date. The majority of the Supreme Court relied on the "attitude" of the proprietor. If the builder had accepted it, it would have some significance, but he says he deals with the breach, not the attitude. This case is outside the rule that a person sued for a breach can rely on a fundamental breach of which he was unaware: *Morison, Rescission of Contracts* (1916), p. 8. Anticipatory breach has no significance *per se*. In any case, there is no evidence of repudiation.

K. A. Ferguson Q.C. (with him *W. Collins*), for the respondent. It is clear that Carr was using the site as a depository for goods and machinery, and intended to continue so to use it until he could dispose of them, or find some other place to put them, irrespective of his obligations under the contract. Berriman was wrongfully prevented from carrying out his contract. We submit that the question of time being of the essence is irrelevant, as this is a question of the intention of the parties, but, if it is relevant, time clearly was of the essence. [He referred to *Hudson, Building Contracts*, 5th ed. (1926), p. 240; 7th ed. (1946), p. 217; *Halsbury's Laws of England*, 2nd ed., vol. 3, p. 230.]

(1) (1923) A.C., at pp. 71-72.
(2) (1940) 64 C.L.R. 221.
(3) (1931) 45 C.L.R. 359.
(4) (1953) 1 W.L.R. 106.
(5) (1886) 16 Q.B.D. 460.
(6) (1871) L.R. 6 C.P. 206, at p. 209.

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[DIXON C.J. referred to *Hudson, Building Contracts*, 7th ed. (1946), p. 217, and *Roberts* v. *Bury Improvement Commissioners* (1).]

He would have an answer at law for not performing them, but they are still contractual obligations : *Holme* v. *Guppy* (2). Times were fixed for commencement and for completion—time was of the essence. A party has a right to cancel a contract when the other party has been guilty of a breach going to the root of it, or has led him reasonably to believe that he does not intend to be bound by it. When two parties enter into a written contract, their rights and obligations are determined by that writing, and where one party has been guilty of a breach going to the root of the contract, and the other elects to go on, the terms of the contract remain, and, at the most, the electing party elects to waive the right to cancel the contract. He does not waive the breach. Where the builder is entitled to possession of the site between two definite dates, and the owner keeps him out of possession, then the owner is in breach of his contract for every day he keeps the builder out of possession, even though the builder elects to treat the contract as alive. Under cl. 16 of the contract there are two obligations : one—express—to hand over possession on or before an agreed date ; one—implied—to allow the builder to be in possession from the agreed date for handing over until the agreed date for completion. The right to possession of the site is a right going to the root of the contract. The performance of the builder's obligations depends on it. Our right to cancel the contract on 31st July did not arise because the site was not handed over on 29th May, but because we were kept out of possession between 29th May and 31st July, at which latter date it was obvious that we would be kept out of possession for a further indefinite period. From 29th May, the owner was in breach of a continuing, essential term. In itself, this was sufficient to enable the builder to cancel the contract. Waiver relates only to past breaches. Distinguish waiver of performance of a contract—it requires consideration, or to be under seal, or estoppel or something similar must be present. The right to forfeit for a past breach must be exercised within a reasonable time : *Hudson, Building Contracts*, 5th ed. (1926), p. 483, 7th ed. (1946), p. 429. This rule does not apply to a continuing breach : *Platt* v. *Parker* (3). The fact that the breach had been committed on 29th May, was not the ground of cancellation. We were kept out of possession between 29th May and 31st July. The obligation continued—to allow us to be in possession.

(1) (1870) L.R. 5 C.P. 310.
(2) (1838) 3 M. & W. 387 [150 E.R. 1195].
(3) (1886) 2 T.L.R. 786.

[WILLIAMS J. Having waived the right to cancel on 29th May, must not you give a notice, whether it is a continuing breach or not ?]

Each day a fresh right arises.

[FULLAGAR J. How is this different from the case of sale of land, where the purchaser promises to pay on a certain day, and, after that day passes, the vendor answers a requisition ?]

We are prevented from carrying out our contract. An obligation subsists which persists—to allow us to be in possession. This may involve giving possession, but that is incidental. If it is a continuing breach, we acquire the right to cancel. Suppose that on 30th May we commenced an action for the failure to deliver possession, and on 6th June another because we were kept out of the site. We would succeed, because of the continuing obligation. Every succeeding day gives a cause of action.

[FULLAGAR J. The breach is the same. If you recovered damages in the first action, could you bring another on 29th May next year ?]

For the second obligation—to allow us to be in possession.

[WILLIAMS J. Is that an implied term ?]

Yes, essential for the builder. On 30th May the builder merely says " I will not cancel because you did not hand over yesterday." But there is a continual breach going on all the time. It is a breach of an implied obligation. If he is under a continuing obligation to allow us to be in possession, and it is an obligation going to the root of the contract, we can rescind. We asked for possession. Is it that because we did not add " in a reasonable time," we are unable to cancel ? The obligation to give a notice to make time of the essence does not apply to a continuing breach of a condition. After the one isolated breach, on 29th May, it is necessary to discover whether the proprietor has been guilty of a fundamental breach going to the root of the contract. On 30th May the builder had the right to cancel, because there had been a breach of a condition.

[FULLAGAR J. It goes to the root of the contract only if time was of the essence.]

Yes, but from 30th May on, day by day, the owner was in continued breach. The condition went to the root of the contract. One test is whether a fresh right of action arises each day for the breach of the condition. If so, that condition must be a continuing one. Our second submission is that the evidence shows that Carr did not regard himself as being bound by the contract. His argument is that he was entitled to keep us out of possession until we

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gave him a notice. By not cancelling for the breach of 29th May the respondent lost, at most, the right to cancel; the terms of the contract always remain the same. The appellant did not say how the alleged estoppel arose. There is no evidence that the failure to let us into possession between 29th May and 31st July was caused by any representation by us. There was no representation by us that we were not going to forfeit. The second ground entitled us to cancel—there was no attempt to clear the site, and further material was brought on to it. Only one inference can be drawn—Carr did not intend to be bound by his contractual obligations. He did not intend to hand over possession of the site so long as he required it for his own purposes. The respondent is entitled to say that no attempt was being made to comply with the contract: *Luna Park (N.S.W.) Ltd.* v. *Tramways Advertising Pty. Ltd.* (1). *James Shaffer Ltd.* v. *Findlay Durham & Brodie* (2) is not inconsistent with that case. When the respondent elected not to cancel, it must have kept the contract alive on the basis that possession must be given within a reasonable time. The parties fixed that time—three weeks or a month. That period had more than expired at 31st July. At its expiration the respondent was entitled to cancel. On that day also it was apparent that no real attempt was being, or would be made to hand over the site. The respondent was entitled to conclude that Carr had no intention of carrying out the contract. We rely upon the Hurll & Douglas incident, not as a reason for cancellation, but as further indication that Carr intended to carry out the contract as he thought fit, and not according to its terms. Carr had no justification under the contract for giving this work to the other firm. Clause 1 of the Conditions does not justify it. It is the same work, not "addition or omission or substitution of any work". We are entitled to damages for that breach, irrespective of whether we were entitled to rescind. Interference by rain cannot be relied on in order to lengthen what is a reasonable time. This is a fundamental condition: *Halsbury's Laws of England*, 2nd ed., vol. 3, p. 232. We do not rely on the letter of 19th July as justifying cancellation: it is a breach, and we were rightly given damages for it. We rely on it for the second ground of our argument. On the evidence, the appellant suffered no damage.

G. E. Barwick Q.C., in reply. There was a promise to do an act by a specified time. That was broken. The builder waived

(1) (1938) 61 C.L.R. 286 at pp. 302, 304.

(2) (1953) 1 W.L.R. 106.

it by his conduct, and that breach was not available at any subsequent time as a ground for cancellation. A notice became necessary: *Panoutsos* v. *Raymond Hadley Corporation of New York* (1). The respondent has tried to erect another promise—an implied promise to allow the builder to remain in possession. One cannot promise to allow someone not in possession to remain in possession. There was one promise, which was broken. The necessity to give possession was a contingency which must occur. The builder must give a notice. Mere delay is not a breach. The highest the evidence can be put is that Carr was delaying as long as the builder would stand it. The one breach entitles the builder to damages. He can reserve his right by a notice. *Panoutsos* v. *Raymond Hadley Corporation of New York* (2) is a good example of a promise which could be said to be broken every day. The court did not look at it in that way. Delivery of possession is a condition precedent to the performance of the builder's obligations. Damages continue day by day for the initial breach. A clear indication of intention not to be bound by the contract might be a repudiation. Mere dilatoriness in repairing the breach is not a repudiation. Both parties had geared themselves down. The builder had not done anything to get ready. This case is not like *Luna Park (N.S.W.) Ltd.* v. *Tramways Advertising Pty. Ltd.* (3). In that case, even after challenge, the defendant said he could do nothing else. The builder's obligation to complete by the given day was released by the failure to give possession by 29th May: *Hudson, Building Contracts*, 7th ed. (1946), pp. 378, 368; *Holme* v. *Guppy* (4); *Findlay* v. *Cameron* (5). The letter of 19th July was not in itself a breach; the builder acquiesced in it. Further, the architect's view of his powers was right. He had power under cl. 1 (a). It was an omission of work to be done by the builder. The Hurll & Douglas contract was subject to cl. 13; the builder could not sublet without consent. The builder is not entitled to damages if it be found that he had repudiated. The contract between the appellant and the new builder was not the same as that between the parties. There was also a delay of at least five weeks during which the appellant was trying to obtain the second builder.

Cur. adv. vult.

(1) (1917) 2 K.B. 473, at p. 478.
(2) (1917) 2 K.B. 473.
(3) (1938) 61 C.L.R. 286.
(4) (1838) 3 M. & W. 387 [150 E.R. 1195].
(5) (1878) 4 V.L.R. (L) 191.

H. C. OF A. 1953. CARR v. J. A. BERRIMAN PTY. LTD. June 5.

The following written judgments were delivered :—

WILLIAMS J. I agree with the reasons for judgment of *Fullagar* J. In my opinion both appeals should be dismissed with costs.

WEBB J. I agree that the appeals should be dismissed for the reasons given by *Fullagar* J.

FULLAGAR J. We have before us two appeals from a judgment of the Full Court of New South Wales, which dismissed appeals from a judgment of *Owen* J. The judgment of *Owen* J. was pronounced on the trial of two actions, which arose out of the same facts and were heard together. The first action, which was commenced on 20th February 1951, was brought by J. A. Berriman Pty. Ltd. against Tony Carr, claiming damages for breach of contract. The second action, which was commenced on 9th March 1951, was brought by Tony Carr against J. A. Berriman Pty. Ltd., claiming damages for breach of the same contract. In the first action judgment was given for the plaintiff company for £2,992 with costs. The second action was dismissed with costs. The Full Court dismissed appeals by Carr in both cases. The decision was that of a majority (*Street* C.J. and *Herron* J.). *Sugerman* J. was of opinion that the company's action should be dismissed, and that in the other action judgment should be entered for Carr for damages to be assessed.

The contract in question, which was made on 3rd May 1950, was a contract under which the company undertook to erect for Carr on certain land owned by him in Parramatta Road, Flemington, a factory building in accordance with drawings and specifications prepared by Mr. H. P. Oser, a Sydney architect. Mr. Oser is the architect referred to in the contract. It is necessary to refer to a number of the provisions of this contract. Clause 1 provides that the builder will, upon and subject to the conditions annexed, execute and complete the works shown in the drawings and specifications, and cl. 2 that the proprietor will pay to the builder the sum of £18,245 for the work or such other sum as may become payable in accordance with the conditions annexed.

The annexed conditions which are referred to in the contract are long and elaborate. Clause 1 is a long clause, but it is desirable to set out most of it. It provides : " The Builder shall carry out and complete the Works in accordance with this contract in every respect and in accordance with the directions and to the reasonable satisfaction of the Architect. . . . The Architect may in his absolute discretion and from time to time issue further drawings,

details and/or written instructions, written directions and written explanations (all of which are in these conditions collectively referred to as 'Architect's Instructions') in regard to: (a) The variation or modification of the design, quality or quantity of the Works or the addition or omission or substitution of any work. (b) Any discrepancy in or divergency between the Contract Drawings and/or Specification. (c) The removal from the site of any materials brought thereon by the Builder, and the substitution of any other materials therefor. (d) The removal and/or re-execution of any works executed by the Builder. (e) The postponement of any work to be executed under the provisions of this contract. (f) The dismissal from the Works of any person employed thereupon who may be incompetent or misconduct himself. (g) The opening up for inspection of any work covered up. (h) The amending and making good of any defects under clause 12 of those Conditions. . . . The Builder shall forthwith comply with all Architect's Instructions. . . . If compliance with Architect's Instructions involves any variation, such variation shall be dealt with under clause 9 of those conditions and the value thereof shall be added to or deducted from the Contract Sum. If compliance with Architect's Instructions involves the Builder in loss or expense beyond that provided for in or reasonably contemplated by this contract, then, unless such instructions were issued by reason of some breach of this contract by the Builder, the amount of such loss or expense shall be ascertained by the Architect and shall be added to the Contract Sum."

Clause 9 provides that no variation shall vitiate the contract, but, unless a price therefor shall have previously been agreed, all variations authorized by the architect or subsequently sanctioned by him shall be valued and such price or value shall be added to or deducted from the contract sum as the case may be. Clause 16 provides that on or before the date for possession stated in the appendix complete possession of the site shall be given to the builder subject nevertheless to provisions for extension of time contained in cl. 18. Clause 18 provides for extension at the discretion of the architect of the time provided for the completion of the contract by the builder in certain specified events which do not involve delay or default on the part of the builder. Its actual terms need not be set out, because none of the events mentioned in it occurred. The date stated in the appendix on which possession of the site is to be given by the owner to the builder is 29th May 1950. Clause 20 provides that the contract may be determined by the builder in a number of events, and it provides what the

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respective rights and liabilities of the builder and the proprietor are to be in the event of a determination by the builder under any of its provisions. The presence of this clause is to be noted, but its actual provisions do not matter, for, again, none of the events contemplated by it took place. Clause 26 contains an arbitration clause in very wide terms providing for practically every possible kind of dispute which could arise under the contract. It provides that the award of the arbitrator shall be final and binding on both parties, and it further provides that neither party shall be entitled to commence or maintain any action upon any dispute or difference until such matter shall have been referred to or determined by the arbitrator, and then only for the amount of relief to which the arbitrator finds either party to be entitled. The contract contains a "rise and fall" clause in usual terms. This clause contains a provision that the builder shall within eight weeks of the date of the making of the contract enter into contracts for the supply of all necessary goods, services, &c.

The provision for arbitration contained in cl. 26 might have given rise to difficulties in the cases. It is in what has come to be known as the *Scott* v. *Avery* form, and it is very wide in scope. The provision that neither party shall be entitled to commence or maintain an action except upon an arbitrator's award might have been raised as a defence in each action: see *Woolf* v. *Collis Removal Service* (1). It has, however, doubtless deliberately, not been pleaded in either action, nor has any argument been based on it. In both courts below and also in this Court the cases were conducted by both parties without regard to the possible effect of that clause, and it seems to me that it is on that basis that we must deal with these appeals.

It is necessary to refer to two provisions in the specifications. Under the heading "A. Excavator", it is provided that the general excavation over the site will be carried out by the proprietor with his own plant. The contractor is to assume that the building site will be handed over to him with a level of 44′ 0″ throughout in respect to datum 40′ 3″ at kerb where shown on the site plan. This provision assumes great importance in the cases. So also does a provision under the head of "E. Steelwork". This part of the specification provides that all steel will be supplied by the proprietor and is to be manufactured by the contractor to engineer's and architect's details. This refers to the fabricating of all structural steel. It further refers to the bending and placing of all reinforcement bars. The structural steel is to be delivered by the proprietor to the contractor's or sub-contractor's yard provided such yard is

(1) (1948) 1 K.B. 11.

within twenty miles of the Sydney G.P.O. It is to be noted that the specifications provided in a number of other cases for the provision of material and the doing of work by the proprietor himself.

The erection of the building was never, in fact, commenced. On 31st July 1950 the company's solicitor wrote to the architect, Mr. Oser, in the following terms: "I am instructed to inform you that the site has not been excavated in accordance with the provisions of clause A 1 of the specifications and that my client immediately upon execution of the contract arranged with a company for fabrication of the steel pursuant to clause E 1 of the specifications. My client regards the proprietor's failure to prepare the site and his arrangements with Arcos Products Pty. Ltd. contrary to clause E 1 of the specifications as two distinct breaches of the building agreement. I therefore give you notice of cancellation of the contract in accordance with the provisions of clause 20 (1) thereof and of my client's intention to institute immediate action for recovery of damages against the proprietor in accordance with the provisions of clauses 20 (3) (ii) and (v) of the said agreement". A similar notice of cancellation and claim for damages was given on the same day to Mr. Carr. It is to be noted that cl. 20 of the conditions, to which the letter refers, contains nothing which could justify the cancellation of the contract. It has not been suggested in argument that any of the events mentioned in cl. 20 actually occurred. If, however, a right to rescind at common law had accrued to the builder on 31st July, the letter of that date will operate as an effective rescission, leaving the builder with a right to recover damages for loss of the contract. If, on the other hand, no such right had accrued to the builder, that letter is itself a repudiation of the building contract by the builder and entitles the building owner to sue forthwith to recover the damages, if any, which he suffers by loss of the contract. The central question in both cases, therefore, is whether a right in the builder to rescind had arisen on 31st July: see generally *Tramways Advertising Pty. Ltd.* v. *Luna Park (N.S.W.) Ltd.* (1) and *Associated Newspapers Pty. Ltd.* v. *Bancks* (2).

The letter of 31st July alleges two breaches of contract by the building owner as entitling the builder to rescind. The first is a "failure to prepare the site", and the second is the "making of an arrangement" with a company named Arcos Products Pty. Ltd.

With regard to the "preparation of the site" the matter stood thus. The site was a piece of land having a frontage of about

(1) (1938) 38 S.R. (N.S.W.) 632, at pp. 641 et seq; 55 W.N. 228.

(2) (1951) 83 C.L.R. 322.

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100 feet by a depth of about 200 feet. Clause E 1 of the specifications provided, as has been seen, that the proprietor should excavate the land to a given level and "hand it over" to the builder at that level, and cl. 16 of the contract, read with the "Appendix", provided that complete possession of the site should be given to the builder on or before 29th May 1950. It is thus clear that the proprietor was required by the contract (1) to excavate the site to the prescribed level and (2) to give possession of it duly excavated to the builder on or before 29th May. With regard to what (if anything) had been done by way of excavation before 31st July, there was a conflict between Mr. Oser and Mr. Berriman, the managing director of the company. The evidence of the former, however, was very vague, and *Owen* J. accepted the whole of Mr. Berriman's evidence without any qualification. His Honour also accepted the evidence of the company's foreman, Morthen. (It is worthy of note that Mr. Carr was not called as a witness.) From this evidence it appears that Berriman and Oser and Morthen and Carr's foreman went to the site about 15th or 18th May. There was then "heavy machinery all over it". From this and other evidence I gather that the site was practically covered by heavy material which would appear to have been purchased by Carr from the Commonwealth Disposals Commission. Oser said: "Good God, nothing has been done here", and asked Carr's foreman when they were going to get the material off the site. The foreman said that he had nowhere to put it. Oser pointed to vacant land adjoining the site and told him to "get it shifted over there". Oser also asked Carr's foreman if they could have the site cleared in three weeks, to which the reply was "yes". The 29th May was, of course, at that time about a fortnight ahead. Both Berriman and Morthen visited the site again both before and after 29th May, the former frequently, and both say that nothing whatever appeared to have been done. Not only did the material on the site remain there, but a quantity of additional heavy material, described as pontoons, was deposited on the adjacent land to which Oser had directed or suggested that the material on the site should be removed.

The material on the site and the material on the adjacent land was of such a nature that it could only be moved by mechanical means. It is common ground that the soil on the site was a heavy clay soil, and June and July were very wet months. Serious difficulties may well have attended the moving of the material during those months, but Morthen said that the weather up to the end of May would not have prevented the clearing and excavation of the site. From the time of the inspection about 18th May up to

the middle of July, Berriman telephoned Oser "at least once a week" complaining that nothing was being done. Oser said that he would "get in touch with Carr to see if he could not get the thing hurried up", and later that he (Oser) was "doing all he could". During August, Oser and Carr were insisting that the contract had not been effectively determined but was still subsisting, but on 21st September 1950 Carr entered into a new contract with another builder. This contract did not fix a date for excavation and delivery of site. Berriman said that in the middle of September the land was still covered with heavy material. It was not until about Christmas that the land was in fact cleared of material and excavated to the required level.

With regard to the other breach of contract alleged in the letter written by the company's solicitor on 31st July, the matter stood thus. Clause E of the specification provided, as has been seen, that all steel should be supplied by the proprietor, and that all structural steel should be delivered by the proprietor to contractor's or sub-contractor's yard. The builder was to allow for the fabricating and erecting of all structural steel work. This means, of course, that the structural steel is to be supplied by the proprietor, but is to be fabricated by the contractor or by a sub-contractor to him. Before the making of the contract Mr. Berriman had obtained a tender from a company named Hurll & Douglas Pty. Ltd. for the fabricating of this steel. The price quoted was £3,948. On 7th June 1950 the company wrote to Hurll & Douglas, advising that this quotation was accepted. It was a term of the rise and fall clause of the contract that the builder should enter into all necessary sub-contracts within eight weeks of the signing of the contract. That period expired on 28th June. Oser was informed of the acceptance of the tender of Hurll & Douglas shortly after 7th June. On 19th July Oser wrote a letter to the company in the following terms: "I have been instructed to inform you that my clients, Messrs. T. Carr & Co., have made arrangements with Arcos Products Pty. Ltd. of Parramatta Road, Lidcombe, to supply *and fabricate* the structural steel work for the above job, and that the respective order has been placed with this firm. In explanation I would like to add that this arrangement was made necessary by the peculiar steel supply position of to-day. I shall be glad if you would kindly inform me at the earliest of your allowance for the fabrication of the steel, which thus becomes a deduction post (*sic*) from your contract". It is not only fair to Mr. Oser, but it is of very considerable importance, to point out that he was in no way responsible for the making of this contract between Carr and Arcos Products for the fabrication of the structural steel. He knew, as

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has been said, of the contract between Berriman and Hurll & Douglas, and he said that he was surprised when he heard that Carr had let the fabrication of the steel to Arcos. He said that it occurred to him that Berriman "might be a bit annoyed about it". Mr. Berriman was in fact much more than "a bit annoyed". To use his own words, he was "very upset"—as he well might be, seeing that he not only lost a profit which he estimated at about £450, but, being unable to carry out his contract with Hurll & Douglas, became liable in damages to that company. The fabrication of the structural steel represented, of course, a very substantial part of the contract. Mr. Berriman immediately consulted his solicitor, who wrote on 20th July to Mr. Oser, asking for a copy of the contract. Having obtained and considered the contract, he wrote the letter of 31st July which is set out above. On 20th July Mr. Berriman had dismissed the company's foreman, Morthen.

The sequence of events leaves little room for doubt that it was the receipt of Mr. Oser's letter of 19th July that operated decisively to lead to the cancellation, or purported cancellation, of the contract. There is no reason to doubt that Mr. Berriman was extremely anxious to obtain possession of the building site, but up to 20th July he had done nothing but telephone Mr. Oser and press that steps should be taken. On that date he received Mr. Oser's letter, and the only reasonable inference from his immediate actions is, I think, that he made up his mind to cancel the contract if he were advised that he might lawfully do so.

It seems to have been assumed both before *Owen* J. and before the Full Court that no breach of his contract with Berriman was involved when Mr. Carr made the contract with Arcos Products for the fabrication of the structural steel for the building. Mr. *Ferguson*, however, argued before us that the making of this contract with Arcos Products constituted a very serious breach of Carr's contract with Berriman, and the assumption to the contrary is not, in my opinion, well founded. It was doubtless based on the view that Mr. Oser's letter of 19th July represented an exercise of the discretion conferred upon the architect by cl. 1 of the building contract, so that the effect of that letter was simply to eliminate from that contract the provisions relating to the supply and fabrication of the structural steel. But I cannot think that this is a correct view.

The relevant part of cl. 1 of the conditions (which has been set out above) is contained in the words: "The Architect may in his absolute discretion and from time to time issue . . . written instructions or written directions . . . in regard to the . . . omission . . . of any work . . . The Builder shall forthwith

comply with all Architect's Instructions". Clause 1 is part of a printed form, and the powers conferred upon the architect extend to the giving of directions on a great variety of matters in addition to the "omission of any work". The clause is a common and useful clause, the obvious purpose of which—so far as it is relevant to the present case—is to enable the architect to direct additions to, or substitutions in, or omissions from, the building as planned, which may turn out, in his opinion, to be desirable in the course of the performance of the contract. The words quoted from it would authorize the architect (doubtless within certain limits, which were discussed in *R.* v. *Peto* (1)) to direct that particular items of work included in the plans and specifications shall not be carried out. But they do not, in my opinion, authorize him to say that particular items so included shall be carried out not by the builder with whom the contract is made but by some other builder or contractor. The words used do not, in their natural meaning, extend so far, and a power in the architect to hand over at will any part of the contract to another contractor would be a most unreasonable power, which very clear words would be required to confer.

But in any case it is impossible to bring what was actually done in this case within the terms of cl. 1 of the conditions. Let it be conceded, for the sake of argument, that the power given to the architect by that clause is wider than I think it is. Yet Mr. Oser did not, in the exercise of his discretion, give any direction or instruction such as is contemplated by that clause. Mr. Oser was never asked to exercise his discretion. On 12th July Arcos Products gave to Carr a quotation for the supply and fabrication of the structural steel. This offer appears to have been accepted in writing by Carr on 21st July, but the witness Kuner, the manager of Arcos Products, said that they had received an assurance from Carr some time earlier that they would receive the work. Carr then apparently informed Mr. Oser that he had let the fabrication of the steel to Arcos Products. Mr. Oser, as has been said, was "surprised" at this news. He knew that Berriman had long since made a contract with Hurll & Douglas for the fabrication of the steel. The position was that Carr was obliged by his contract to supply steel for fabrication to Berriman or to a sub-contractor nominated by Berriman. After Berriman had informed Oser that he had made his contract with Hurll & Douglas, he (Carr) was under a contractual duty to supply the structural steel required for the factory to Hurll & Douglas. He informed Oser that he intended to break his contract in this respect. Mr. Oser was no doubt placed

(1) (1826) 1 Y. & J. 37 [48 E.R. 577].

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in a difficult position by the proprietor's arbitrary action. It seems to me that nothing that he could do at that stage could possibly alter the fact that Carr had repudiated his contract with Berriman as to a substantial part of it. His somewhat remarkable letter of 19th July to Berriman does not even purport to be a discretionary direction by an architect to omit work from a building contract. It simply informs Berriman that Carr has repudiated a part of the contract. It " explains " that this breach of contract was " necessary ". It asks to be informed of the allowance made for the fabrication of the steel, which, it indicates, is to be deducted from the contract price. A mere deduction from the contract price was, of course, quite inappropriate to the situation which Carr had created. It is impossible, to my mind, to regard this letter as either more or less than a communication by architect to builder of a repudiation of part of the contract by the building owner.

For these reasons I am of opinion that the company's solicitor was fully justified in asserting, as he did in his letter of 31st July, that two breaches of contract had been committed by Carr. He had not given possession of the building site, duly excavated or at all, on the date required by the contract or thereafter. And he had repudiated his obligation to deliver the structural steel for fabrication. As soon as this position is realized, the case becomes, in my opinion, a reasonably clear one.

Both *Owen* J. and the Full Court appear, as I have said, to have approached the matter on the assumption that the only breach committed by Carr before 31st July lay in his failure to excavate and deliver the site. It was held by *Owen* J. and the majority of the Full Court that that breach did justify rescission. But there are difficulties about this view, and there is much force in the answer made to it by counsel for Carr. Where a contract contains a promise to do a particular thing on or before a specified day, time may or may not be of the essence of the promise. If time *is* of the essence, and the promise is not performed on the day, the promisee is entitled to rescind the contract, but he may elect not to exercise this right, and an election will be inferred from any conduct which is consistent only with the continued existence of the contract. If time is *not* of the essence of the promise, the promisee is not entitled to rescind for non-performance on the day. If either (a) time is not originally of the essence, or (b) time being originally of the essence, the right to rescind for non-performance on the day is lost by election, the promisee can, generally speaking, only rescind after he has given a notice requiring performance within a specified reasonable time and after non-compliance with

that notice : see, e.g., *Taylor* v. *Brown* (1) ; *Stickney* v. *Keeble* (2) ; *Panoutsos* v. *Raymond Hadley Corporation of New York* (3).

In the present case it is not necessary to determine whether time was of the essence of the building owner's promise to excavate and deliver the site on or before 29th May. For the company after 29th May did acts which seem consistent only with the continued existence of the contract after that date. It is sufficient to say that its contract with Hurll & Douglas was made after that date, and that up to the middle of July it continued to press for the commencement of the necessary work on the site. And no notice was ever given specifying a time within which performance of the promise to excavate and deliver was required. It cannot, in my opinion, be maintained that the right to rescind for breach of that promise *as such* had not been lost. *Owen* J. was of opinion that there was a " continuing breach " of that promise : in other words he seems to have held that a fresh right to rescind accrued from day to day. But, as *Dixon* J. pointed out in *Larking* v. *Great Western* (*Nepean*) *Gravel Ltd.* (4) " If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant " (5).

On the other hand, the effect of the builder's election not to rescind was to leave it open to the building owner to remedy his breach. If he did remedy it, the builder would be bound to accept the late performance, though entitled, of course, to sue for any damage suffered by him through the delay. The position thus remaining open, it is correct, in my opinion, to say, as Mr. *Ferguson* said, that a failure to remedy the breach might continue so long and in such circumstances as to evince an intention on the part of the building owner no longer to be bound by the contract. In other words, the only legitimate inference might be that he is saying : " Not only have I broken my contract by not doing the thing on the due day, but I am not going to do the thing at all ", or " I am not going to do the thing at all unless and until I find it convenient to do it ". In this way a right to rescind might arise which is not based on breach of the particular promise as such. That promise, even if essential to begin with, has become non-essential by reason of the election of the promisee, but the promisee may nevertheless be able to establish that the conduct of the promisor with respect to his promise amounts to a refusal to be bound by the contract :

(1) (1839) 2 Beav. 180 [48 E.R. 1149].
(2) (1915) A.C. 386.
(3) (1917) 2 K.B. 473.
(4) (1940) 64 C.L.R. 221.
(5) (1940) 64 C.L.R., at p. 236.

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cf. *Associated Newspapers Ltd.* v. *Bancks* (1). It was on this view of the present case that the majority of the Full Court dismissed the appeal. Their Honours thought that the failure to do anything at all towards performance of the contractual duty, the failure to make any attempt even to move any of the machinery from the site, the placing of further machinery on the adjoining land, the absence of any explanation or any assurance that any steps at all would be taken in the immediate future—that all these things showed that the building owner intended to take steps towards the performance of his duty if and when it suited him and not before. In other words, they showed that he did not intend to be bound by the contract within the meaning of the authorities. This view of the case rests on a sound legal foundation : the only question is whether it is warranted by the facts. The chief difficulty about accepting it lies in the fact that much heavy rain fell during the whole of June and July, and, although evidence accepted by the learned trial judge indicates that what was required could have been done between 3rd and 29th May, other evidence strongly suggests that the weather in June and July presented serious difficulties in connection with the removal of the machinery and the excavation of the site. And, as Mr. *Barwick* rightly said, while the state of the weather is quite irrelevant on the question whether a breach of contract has been committed, it is very relevant on the question of the intention of the building owner with reference to the performance of the particular promise in question.

But the judgment under appeal leaves out of account the second breach of contract on the part of the building owner. And, when that second breach is brought into account, the difficulties of the case seem to me to disappear. This second breach went, as I have said, to a very substantial part of the contract. The estimated profit to the builder on the fabrication of the steel was £450, which was about one-fourth of the total estimated profit on the contract. The building owner's breach of contract meant that it lost that profit, and meant also, as the building owner must be taken to have known, that it became liable in damages under its own contract with Hurll & Douglas. Those damages were not likely to be less than £450. It is true that at a later date, on 21st August, the building owner's solicitors offered " to allow full and just allowances arising from " the placing of the fabrication of the steel in other hands. But this could not alter the position created by the breach of contract and by Mr. Oser's letter of 19th July, which had announced that the amount allowed for the fabrication would simply be deducted from the contract price.

(1) (1951) 83 C.L.R., at p. 339.

One would be disposed to think that this second breach alone amounted to such repudiation as justified rescission. It is to be remembered that Carr's action in placing the fabrication of the steel in other hands was deliberate. Mr. *Barwick* cited the case of *James Shaffer Ltd.* v. *Findlay Durham & Brodie* (1), but that case seems to present a marked contrast with this case. In that case the defendants were desirous of doing, and were in fact doing, their very utmost to perform their contract. It is possible that Carr believed that the architect had power under the conditions of the contract to "omit" therefrom the fabrication of the steel and so leave him at liberty to make other arrangements for the doing of that work. But he had, in the words of *Latham* C.J. in *Luna Park (N.S.W.) Ltd.* v. *Tramways Advertising Pty. Ltd.* (2) "given" Berriman "the right to believe that the contract would not be performed according to its true construction". Moreover, the step was taken without inviting the exercise of any discretion on the part of the architect. Mr. Oser seems simply to have been presented with a *fait accompli* and to have tried to make the best he could of it.

But, when this second breach is viewed alongside the existing position with regard to the site, the case does not seem to admit of doubt. An election not to rescind for failure to deliver the excavated site on the due date could not deprive that failure of all significance. When a second breach occurs, the two combined may have a significance which it might not be legitimate to attach to the first alone. The position when Mr. Oser's letter was received was this. The site had not been delivered on the due day. It was covered with heavy material. Nothing had been done towards putting it into the state required for delivery, further material had been placed on adjoining land on which it had been proposed to place the material then on the site itself, and repeated requests to the building owner had failed to produce any assurance that anything would be done within a reasonable time. Possession of the site was, of course, a vitally important matter. It is in this state of affairs that the building owner announces that he has engaged another contractor to carry out a large part of the work comprised in the contract. A reasonable man could hardly draw any other inference than that the building owner does not intend to take the contract seriously, that he is prepared to carry out his part of the contract only if and when it suits him. The intention must be judged from acts: *Robert A. Munro & Co., Ltd.* v. *Meyer* (3). The intention "evinced" here is an intention not to be bound by

(1) (1953) 1 W.L.R. 106.
(2) (1938) 61 C.L.R., at p. 304.
(3) (1930) 2 K.B. 312, at p. 331.

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the contract. When such an intention is shown, the other party is entitled to rescind the contract. Mr. Berriman thought that such an intention had been shown, and he acted accordingly. In my opinion, he was justified in the view which he took, and acted as he was legally entitled to act.

From this conclusion two things follow. On the one hand, the builder's solicitor's letter of 31st July effected not a repudiation but a lawful rescission of the contract. It affords, therefore, no cause of action to the building owner. It is not suggested that, apart from that letter, the builder had committed any breach of contract. On the other hand, the builder, having lawfully rescinded the contract, is entitled to recover damages for loss of the contract and for any particular loss suffered by it through any breach of contract committed by the building owner before rescission. The building owner's action, therefore, rightly failed, while that of the builder rightly succeeded.

The builder's damages were assessed by *Owen* J. under three heads. In the first place, he awarded £1,824 for loss of profit on the contract. No question seems to arise as to this. In the next place, he allowed a sum of £300 as an approximate estimate of expenditure incurred and wasted in "keeping a team of men together in anticipation of being able to start work on the job." Expenditure so incurred and wasted would be recoverable by way of damages, and the amount awarded under this head was not challenged. In the third place, his Honour awarded a sum of £868 as representing damages recoverable by Hurll & Douglas from the builder. How this sum was arrived at is by no means clear. The notice of appeal asserted, as one of the grounds of appeal, that no sum should have been awarded under this head. This ground of appeal, however, was not argued, and no attack was made on the amount awarded. It would appear to have been right to allow a substantial amount under this head, and, the amount actually awarded not being challenged, it seems to me that it should be allowed to stand.

Both appeals should be dismissed with costs.

The Chief Justice has authorized me to say that he agrees with this judgment.

KITTO J. I entirely agree with the opinion of my brother *Fullagar* and with his reasons.

Both appeals dismissed with costs.

Solicitors for the appellant, *Wm. Lieberman and Tobias.*

Solicitor for the respondent, *N. G. Rudd.*

G. D. N.