[HIGH COURT OF AUSTRALIA.]

LARKING . . . . . APPELLANT;
DEFENDANT,

AND

GREAT WESTERN (NEPEAN) GRAVEL LIMITED (IN LIQUIDATION) . . } RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1940.

SYDNEY, *Aug.* 21-23; *Dec.* 5.

Rich A.C.J., Starke and Dixon JJ.

Contract—Continuing breach—Breach once for all—Waiver.

A licence was granted by the appellant to the respondent to remove sand and gravel from the bed of a river where the bed formed portion of or adjoined the appellant's land. The grant was made upon the conditions that royalty should be paid quarterly, that for the purpose of preventing the appellant's stock straying the respondent should at its own expense erect and maintain in repair certain fences and a gate, and that if default in the performance of any of the conditions were made by the respondent and it continued for thirty days after any quarter day the appellant could determine the licence. The period within which the fences and gate should be erected was not specified. The respondent commenced operations under the licence about June 1937. From time to time the appellant complained of the non-erection of the fences and gate and in October 1939, by letter to the respondent, required that they be erected within fourteen days. This requirement was not complied with, but at the end of November the appellant accepted payment of royalty then due. In December the respondent went into liquidation, and a few days later the appellant gave notice to the liquidator purporting to determine the licence and claiming possession of the premises.

Held that in the circumstances the respondent should have erected the fences and gate within a reasonable time of the commencement by it of operations under the licence; that the non-erection thereof within such time was not a continuing breach but was a breach "once for all"; and that, by allowing the respondent thereafter to continue operations under the licence and accepting royalty therefor, the appellant had waived his right to determine the licence on account of the breach.

Decision of the Supreme Court of New South Wales (*Roper* J.), affirmed.

H. C. OF A. 1940.

LARKING v. GREAT WESTERN (NEPEAN) GRAVEL LTD.

APPEAL from the Supreme Court of New South Wales.

On 9th September 1936, Great Western (Nepean) Gravel Ltd. and Alexander Larking entered into an agreement under seal whereby Larking granted to the company an exclusive right for a term of fifty years from and including 1st May 1936 to remove sand and gravel from the bed of the Nepean river where the bed formed part of or adjoined land owned by Larking. The consideration for the grant was the payment by the company of the sum of £250 and the covenant by it to pay a royalty of two and one-half pence per ton on all materials removed from the bed, or, with a certain exception, brought upon or over any of the lands the subject of the agreement, the minimum royalty payable to be not less than £300 in any one year. It was provided that the royalty should be paid quarterly on the last day of July, October, January and April in each and every year during the term, the first of such payments to be made on 31st July 1936. Certain rights of user of Larking's land were also granted to the company. The agreement was expressed to be a licence granted to the company. Among other conditions of the agreement it was provided that if default should be made by the licensee, the company, in the payment of any royalty at the times and in the manner provided or in the observance or performance by the licensee of any of the terms and conditions and such default should continue for thirty days after any of the quarter days provided for payment thereof, the licensor, Larking, should be at liberty forthwith to determine the agreement and the licence thereby given without notice to the licensee and thereupon to eject the licensee from the premises (clause 7); that the licensee should at its own expense fence a particular area, called the "dumping site," and a passage-way, particularized in the agreement by reference to the annexed sketch, for the purpose of giving the licensor's stock access from the said land to the Nepean river, that such fence should be stock-proof and of specified quality and construction, and should during the term maintain that fencing in good order and condition (clause 12); that the licensee should place and keep in thorough repair portion of an existing fence between Larking's land and that of a neighbour (clause 13); that the licensee should at its own expense erect in a good and workmanlike manner and to the satisfaction of the licensor, a gate as an extension of one of the fences mentioned in clause 12 and should at its own expense during the term keep and maintain the said gate in thorough repair and condition and should at all times, except when opened for the passage of the company's vehicles, keep the gate securely shut and closed so as to prevent Larking's live stock passing through the entrance (clause 15); that

the licensee should at all times erect and keep suitable rails across an existing cutting so as to prevent stock coming up from the river (clause 16).

The company commenced to take material under this agreement in May or June 1937. Its operations were continued until about October 1939. On 26th October 1939 Larking wrote to the company expressing dissatisfaction with the manner in which the company had carried out its part under the agreement. He complained that royalties had not been punctually paid, that particulars of the materials taken away had not been supplied, that the fences referred to in clause 12 had not been erected, that the gate and rails referred to in clauses 15 and 16 had not been provided, and that the repairing of the fence referred to in clause 13 had not been attended to. He required the company to erect the fences, gates and rails, and to repair the existing fence within fourteen days. The company did not reply to this letter or do anything because of it. Royalty due under the agreement on 31st October 1939 was paid, and accepted by Larking, on 27th November 1939. On 1st December 1939 Larking sent a formal notice to the company asserting that it had broken a number of its covenants, and requiring it to remedy the breaches in a manner specified in the words of the agreement. The covenants referred to were those contained in clauses 12, 13, 15 and 16. No reply was sent to this notice, nor was anything done by the company because of it.

On 4th December 1939 the company was put into voluntary liquidation, the resolution reciting that it had been proved to the satisfaction of the meetings of its shareholders that the company could not by reason of its liabilities continue its business, and a liquidator was then duly appointed. On 12th December 1939 Larking sent to the liquidator a notice purporting to determine the agreement under clause 7 thereof, and claiming the possession of the premises. Thereafter he prevented the company's servants from having access to the works which they had previously been operating.

Larking, on 29th November 1939 and 4th December 1939, lodged applications under the *Mining Act* 1906 (N.S.W.) with the Mining Warden at Penrith for authorities to enter and prospect for certain minerals, which substantially amounted to sand and gravel, on, *inter alia*, the land in respect of which he had granted the licence to the company.

A suit by way of statement of claim was commenced by the company in the equitable jurisdiction of the Supreme Court of New South Wales, on 28th December 1939, for injunctions to restrain Larking from interfering with the company in the conduct of its

H. C. OF A. 1940.

LARKING v. GREAT WESTERN (NEPEAN) GRAVEL LTD.

business on the land subject to the licence, and to restrain him from proceeding with his applications under the *Mining Act*. After an ex-parte injunction had been granted the parties arranged a *modus vivendi* pending the hearing of the suit, one term of the arrangement being that the motion to continue the injunction should by consent become a motion for decree.

At the hearing of the motion the real question between the parties was whether Larking had on 12th December 1939 a present right to determine the licence granted by him. The right was claimed as arising under clause 7 of the agreement, and the defaults made by the company bringing that clause into operation were claimed to be breaches of the terms or conditions contained in clauses 12, 13, 15 and 16.

As to clause 16 *Roper* J. found that the company did erect suitable rails across the cutting referred to so as to prevent stock coming up from the river, and on the evidence his Honour was satisfied that they were kept there for that purpose and that the company did not break this provision.

The other alleged defaults fell under two heads only, as the facts as to the gate referred to in clause 15 and the fence referred to in clause 12 were precisely the same. It was admitted that neither the gate nor the fence was erected, so that the requirements of these clauses had not been carried out. Evidence was given of a conversation between the managing director of the company and Larking, in which Larking is said to have expressly relieved the company of the necessity of erecting the fence and gate. The judge was satisfied that some conversation such as had been deposed to took place, but he was not satisfied that Larking intended to or did relieve the company of these obligations. It was, even on the account of the company's witnesses, an informal and inconclusive conversation and his Honour thought that at most Larking allowed the matter to stand for the time being instead of insisting on the immediate construction of the works. The erecting of the fence and gate was only a small job; Larking himself offered in December 1936 to do it at a cost of £21.

His Honour held that the work under clauses 12 and 15 should have been done within a reasonable time of the commencement of the company's operations in May or June 1937, and not having been so done a breach of those clauses was effected. The breach was not a continuing breach nor did the obligation to repair give rise to a continuing breach. His Honour found that notwithstanding his complaints, which were principally directed to his stock straying, Larking continued to treat the agreement as subsisting, and by so

doing elected not to exercise the right to determine it, consequently he waived his right to determine the agreement. But, apart altogether from waiver, Larking lost the right in respect of those breaches because of the length of time which had elapsed between the breach and the reported exercise of the right.

By the decree of the court it was declared (*a*) that Larking had waived his rights under the deed to determine the agreement on the grounds that the company had made default in the observance or performance of the terms and conditions of clauses 12 and 15 thereof, and (*b*) that the agreement was a subsisting agreement between the company and Larking at the commencement of the suit, and it was ordered that Larking be restrained from exercising any rights he might get as a result of his applications under the *Mining Act* in any manner inconsistent with the rights of the company under the deed.

From that decision Larking appealed to the High Court.

Further facts appear in the judgments hereunder.

Mason K.C. (with him *C. M. Collins*), for the appellant. By the agreement a licence was granted to the respondent (*Woodfall* on *Landlord and Tenant*, 24th ed. (1939), p. 8); it does not confer on the respondent a lease for its term of all or any of the lands to which it relates. The law of landlord and tenant does not apply. The non-erection of the fence and of the gate and the maintaining of same in good order and condition are continuing breaches. The obligation imposed upon the respondent by the use of the word maintain was that not only should it erect the fence and gate, but that it should, throughout the term, keep them erected and in good order and condition. The matter depends upon the proper construction of the document under consideration and little, if any, assistance can be obtained from decided cases. The decision in *Stephens* v. *Junior Army and Navy Stores Ltd.* (1) was based upon an express covenant to erect on or before a specified date buildings precisely described and is, therefore, distinguishable from this case. There was not any waiver, by conduct or otherwise, on the part of the appellant; alternatively, there was not any waiver on his part of the breach or breaches of the covenant to maintain (*Bennett* v. *Herring* (2)). The facts that the appellant accepted royalty and permitted a continuance of operations under the licence are outweighed by the facts that he persistently and continuously complained to the respondent of the non-erection of the fence and gate, and that the respondent on such occasions promised to attend to

(1) (1914) 2 Ch. 516.

(2) (1857) 3 C.B.N.S. 370 [140 E.R. 784].

H. C. OF A. 1940. LARKING v. GREAT WESTERN (NEPEAN) GRAVEL LTD.

the matter. A waiver must be an intentional act with knowledge; the appellant has not taken up two inconsistent positions (*Craine* v. *Colonial Mutual Fire Insurance Co. Ltd.* (1); affirmed, *sub nom. Yorkshire Insurance Co. Ltd.* v. *Craine* (2)). The facts proved do not, as in *Hunter* v. *Daniel* (3), amount to a waiver on the part of the appellant. The proposition which the judge of first instance should have propounded for his consideration is as set forth in *Bentsen* v. *Taylor, Sons & Co.* [*No.* 2] (4). The appellant was entitled to refrain from exercising his right to rescind the agreement on account of a breach by the respondent upon receiving a promise or promises from the respondent that it would carry out the obligation within a reasonable time. The date of the payment of royalty is not important, but it is important to consider in respect of what period of time the royalty was paid. The respondent did not as required by the agreement place and keep in repair the existing fences; they were not made stock-proof.

Weston K.C. (with him *O'Sullivan*), for the respondent. The judge of first instance correctly dealt with the matter of the repair of the existing fences. His finding that there was not any breach of the covenant to place and keep the fences in good repair is abundantly supported by the evidence.

[He was stopped on this point.]

The appellant waived his right to rescind the agreement. There is not any evidence that the appellant did anything in the way of granting an extension of time to the respondent. Implicit in the trial judge's finding that there was a breach in 1937 is a rejection of the contention that there had been an extension of time. Although he desired the erection of the fence and the gate the appellant preferred for his own purposes and advantage not to rescind the agreement. Where there is an obligation to do a thing it must, in the absence of a time for performance being specified, be done within a reasonable time.

[DIXON J. referred to *Morris* v. *Kennedy* (5).]

The criteria there shown should have been applied in this case: See also *Halsbury's Laws of England*, 2nd ed., vol. 7, p. 204, par. 285. The question in this case is not waiver of the obligation to erect a fence but that, there being a breach, the appellant waived his right to rescind for that breach; the condition sank to the level of a warranty. A precise and authoritative statement of the law

(1) (1920) 28 C.L.R. 305, at p. 326.
(2) (1922) 2 A.C. 541.
(3) (1845) 4 Ha. 420 [67 E.R. 712].
(4) (1893) 2 Q.B. 274, at pp. 283, 284.
(5) (1896) 2 I.R. 247.

applicable to this case is to be found in *Stephens* v. *Junior Army and Navy Stores Ltd.* (1).

[DIXON J. referred to *Coward* v. *Gregory* (2).]

When he accepted payment of the royalty in November 1939 the appellant elected not to rescind the agreement; he is now estopped: *Spencer Bower* on *Estoppel by Representation* (1923), p. 251, art. 257.

[DIXON J. referred to *Wendt* v. *Bruce* (3) and *Mulcahy* v. *Hoyne* (4).]

The principles are the same in the different departments of the law (*Clough* v. *London and North Western Railway Co.* (5); *Hunter* v. *Daniel* (6)). If there be a condition precedent to a contract which has not been performed and the party not in default has substantially enjoyed the benefit of the contract by mere law he ceases to be enabled to treat the condition as a condition entitling him to rescind (*Ellen* v. *Topp* (7); *Marsden* v. *Sambell* (8)). What constitutes a reasonable time must be gathered from the circumstances of the case (*Carlton Steamship Co. Ltd.* v. *Castle Mail Packets Co. Ltd.* (9); *Halsbury's Laws of England*, 2nd ed., vol. 7, p. 190).

Mason K.C., in reply.

Cur. adv. vult.

Dec. 5.

The following written judgments were delivered:—

RICH A.C.J. This is an appeal from the judgment of *Roper* J. His Honour decided that an agreement the subject of the proceedings before him had not been determined because the appellant had waived his right to do so. The facts are sufficiently set out in the judgment of the primary judge and I need not repeat them in detail. The agreement in question constituted a licence to the respondent and not a lease or a grant of a *profit à prendre* for years. Clause 7 of the agreement provides that if the respondent made default *inter alia* in the observance or performance of any of the terms and conditions and such default should continue for thirty days after any of the quarter days provided for payment thereof, the appellant was to be at liberty forthwith to determine the agreement and the licence. At the hearing before us the conditions which became material were clauses 12 and 15. We considered that the finding of *Roper* J. as to clause 13 should be affirmed.

(1) (1914) 2 Ch. 516.
(2) (1866) L.R. 2 C.P. 153, at p. 171.
(3) (1931) 45 C.L.R. 245.
(4) (1925) 36 C.L.R. 41.
(5) (1871) L.R. 7 Ex. 26, at pp. 34, 35.
(6) (1845) 4 Ha., at p. 432 [67 E.R. at p. 717].
(7) (1851) 6 Ex. 424, at p. 441; [155 E.R. 609, at p. 616].
(8) (1880) 43 L.T. 120.
(9) (1898) A.C. 486, at p. 491.

H. C. OF A. 1940.

LARKING v. GREAT WESTERN (NEPEAN) GRAVEL LTD.

Rich A.C.J.

Clauses 12 and 15 are as follows :—" 12. The licensee shall at its own expense fence the subject land (marked ' dumping site ') and shall also fence in the passage-way twenty feet (20′) wide leading from the lane shown in the sketch annexed hereto between the points B, E, F, G and C, D, I, H shown in the annexed sketch for the purpose of giving the said licensor's stock access from the said land to the Nepean river and such fencing shall be stock-proof and shall be constructed of posts twelve feet (12′) apart sunk two feet six inches (2′ 6″) in the ground and standing four feet (4′) out of the ground with three strands of barbed wire of good quality attached and properly strained and shall be erected in a good and workmanlike manner and to the satisfaction of the said licensor and shall during the said term at its own cost and expense maintain the said fences in good order and condition. . . . 15. The licensee shall also at its own expense erect in a good and workmanlike manner and to the satisfaction of the said licensor a gate across the said lane between the points B and J and shall at the like expense during the said term keep and maintain the said gate in thorough repair and condition and will keep the said gate at all times (except when opened for the purpose of the passage of the licensee's vehicles) securely shut and closed so as to prevent the said licensor's live stock passing through the entrance."

It was admitted that there had been breaches of these terms on the part of the respondent and the questions for determination are whether the breaches were continuing or whether the conduct of the appellant was such as to amount to an election on his part not to avoid the licence. The facts relating to the erection of the fence mentioned in clause 12 and the gate mentioned in clause 15 are the same. The obligation to erect the fence was an obligation " to do an act of solitary performance " and to do it within a reasonable time. It is not a continuing covenant and breaches of it are not continuing breaches so that a right of action accrues *toties quoties* when and as often as damage actually arises from breach of it (*Kingdon* v. *Nottle* (1)). When a reasonable time elapses the rights and obligations of the parties are crystallized and set for all time. The obligation to maintain the fence and the gate attaches only to the fence and gate when erected. *Roper* J. considered that it might not have been unreasonable to leave the erection of the fencing until the company commenced its operations on the land in May or June 1937. " The work should, however, have been effected at the latest within a short time of that commencement." The company had not erected the fence or gate before the suit was brought.

(1) (1815) 4 M. & S. 53, at p. 57 [105 E.R. 755, at p. 756].

I agree with the learned judge in thinking that there was no express waiver nor was time given within which to carry out the work. I am of opinion that the conduct of the appellant showed that he was not "adhering to and insisting upon the agreement" (*Lamare* v. *Dixon* (1)). His acceptance of royalties under the agreement for the period subsequent to the lapse of reasonable time was an "unequivocal act" (*Abram Steamship Co. Ltd.* v. *Westville Shipping Co. Ltd.* (2)), and he thus elected not to avoid the agreement (*James* v. *Young* (3) ; *Croft* v. *Lumley* (4)).

The appeal should be dismissed.

STARKE J. Appeal from a decree of the Supreme Court of New South Wales in Equity whereby it was declared that the appellant had waived his right under an agreement under seal dated 9th September 1936 to determine the agreement on the grounds that the respondent had made default in the observance and performance of the terms and conditions of clauses 12 and 15 thereof. The appellant also justified his determination of the agreement under clauses 13 and 16 thereof, but the trial judge held that no default had been established under either of these clauses, and it is enough to say that this conclusion ought not to be disturbed.

By the agreement referred to, the appellant (called the licensor) granted to the respondent (called the licensee) the exclusive right for a period of fifty years to remove sand and/or gravel from the bed of the Nepean river where the bed of the river formed portion of or adjoined the land of the licensor as shown on a sketch annexed to the agreement. The licensee was to pay the licensor certain royalties mentioned in the agreement. The 12th clause of the agreement provided that the licensee would at its own expense fence what was referred to as the "dumping site" and also a passage-way twenty feet wide mentioned in the agreement for the purpose of giving the licensor's stock access from the appellant's land to the Nepean river, and would, during the term of the licence, at its own cost and expense, maintain the said fences in good order and condition. The fifteenth clause of the agreement provided that the licensee would at its own expense erect in a good and workmanlike manner and to the satisfaction of the licensor a gate across a lane between certain defined points and at the like expense during the said term keep and maintain the gate in thorough repair and condition and would keep the gate at all times (except when opened

(1) (1873) L.R. 6 H.L. 414, at p. 422.
(2) (1923) A.C. 773, at p. 779.
(3) (1884) 27 Ch. D 652, at p. 663.
(4) (1858) 6 H.L.C. 672, at p. 705 [10 E.R. 1459, at p. 1472].

H. C. OF A. 1940.

LARKING v. GREAT WESTERN (NEPEAN) GRAVEL LTD.

Starke J.

for the purpose of the passage of the licensee's vehicles) securely shut and closed so as to prevent the licensor's live stock passing through the entrance.

The licensee commenced to take gravel and sand under this agreement in May or June 1937. Neither the fence nor the gate required by clauses 12 and 15 respectively was ever erected. The seventh clause of the agreement provided that if default should be made by the licensee in payment of royalties or in the observance or performance of any of the terms and conditions on the licensee's part therein contained, and such default should "continue for the space of thirty days after any of the quarter days provided for payment thereof," the licensor should be at liberty forthwith to determine the agreement and the licence thereby given without notice to the licensee and thereupon to eject the licensee from the premises in the agreement described.

Towards the end of 1939, the appellant expressed dissatisfaction with the manner in which the respondent had carried out its part of the agreement and required it to erect the fences and gates according to the agreement. But the respondent did nothing, and in December 1939 the appellant sent a formal notice to the respondent asserting that it had broken a number of its covenants (including those contained in clauses 12 and 15) and requiring it to remedy the breaches. Again nothing was done. The respondent company went into liquidation in December 1939, and on the twelfth of that month notice was given to the liquidator purporting to determine the agreement under clause 7 thereof and claiming possession of the premises. Royalty payable under the agreement was paid up to 31st October 1939, and no other payment fell due until the next quarter day, namely, 31st January 1940. Operations on the part of the respondent under the agreement continued until about October 1939, and after the notice of 12th December 1939 the appellant prevented the respondent and its servants having access to the premises the subject of the agreement.

The main question for consideration is whether the covenants to erect fences contained in clause 12 and to erect a gate contained in clause 15 were such that each covenant could only be broken "once for all" or whether the covenants were such that a breach of each covenant was of a continuing nature. In the latter case, an act which affirmed the existence of a tenancy or an agreement would only waive a forfeiture down to the time of such affirmance. That question depends upon the proper construction of the agreement. The learned judge was of opinion that the breach of the covenants to erect fences and a gate were not of a continuing nature and that

each was completely and effectively broken "once for all" when the time for doing the work in accordance with the agreement lapsed, which, as no time was mentioned, was a reasonable time from the commencement of the agreement. For example, there can only be one breach of a covenant to put premises in good and tenantable repair (See *Coward* v. *Gregory* (1); *Morris* v. *Kennedy* (2); *Stephens* v. *Junior Army and Navy Stores Ltd.* (3)); whilst in covenants to repair and keep in repair, to insure, or to cultivate, the breach is of a continuing nature (*Doe d. Baker* v. *Jones* (4); *Doe d. Muston* v. *Gladwin* (5); *Coatsworth* v. *Johnson* (6)). Moreover, the case of *Stephens* v. *Junior Army and Navy Stores Ltd.* (3) makes it clear that the covenants in the agreement to maintain the fences and gate in good repair and condition imported no obligation to erect them and had no effect upon the waiver of a forfeiture for not building or erecting pursuant to the express terms of an agreement.

In my judgment, the learned judge was right in his construction of the present agreement. It required a definite act, namely, the erection of the fences and the gate at specified points and, in the case of the fences, of a particular construction. It also required the erection for particular purposes, namely, the access of the appellant's stock to the river and to prevent them straying. All this points to an obligation that should be performed completely and effectively within a limited time, which, as the agreement is silent, is within a reasonable time having regard to all the circumstances of the case. "It was not necessary," said the learned judge, "to decide with any exactness when default under these clauses" (12 and 15) "occurred, because it is obvious that there had clearly been such default by the end of the year 1937." That is a conclusion of fact which cannot be disturbed. But then waiver of the right under clause 7 thereof is plainly established. The appellant knew that the fences and the gate had not been erected, yet he allowed operations under the agreement to proceed until October 1939 and accepted royalties up to 31st October 1939. The appellant stood to the agreement and received benefits under it. He thereby affirmed the agreement and waived his right to determine it for the breach by the respondent of clauses 12 and 15 thereof.

The appeal should be dismissed.

DIXON J. The question in this appeal is whether a licence granted by the appellant to the respondent company for the use of his premises has been determined for breach of condition or, on the

(1) (1866) L.R. 2 C.P. 153
(2) (1896) 2 I.R. 247.
(3) (1914) 2 Ch. 516.
(4) (1850) 5 Ex. 498 [155 E.R. 218].
(5) (1845) 6 Q.B. 953 [115 E.R. 359].
(6) (1886) 54 L.T. 520.

H. C. OF A. 1940.

LARKING v. GREAT WESTERN (NEPEAN) GRAVEL LTD.

Dixon J.

other hand, he has waived his right to determine the licence for such breach.

The appellant is the owner of grazing land at Penrith, which adjoins the bed of the Nepean river. His boundary is the high bank, which forms the edge of his land. Below the bank is the bed of the river containing quantities of sand and gravel. The respondent company desired to have access to the bed of the river for the purpose of winning gravel and sand, and also of establishing a crushing plant close by, and obtaining a dumping site. An agreement under seal was entered into between the appellant, who was called the licensor, and the respondent company, which was called the licensee. The agreement witnessed that, in consideration of £250 paid to the appellant by the respondent company, it had been agreed that the former should grant to the latter the exclusive right for a period of fifty years to remove sand and gravel from the bed of the Nepean river where the bed of the river forms part of or adjoins the land of the appellant as shown in a sketch plan. In fact none of the appellant's land forms part of the bed of the river whence the material is to be taken.

The agreement goes on to provide that the respondent company shall have the following rights :—(1) A right, in common with the appellant, of access from the public highway to the river bank by means of a defined way or passage over his land. (2) A right to maintain a crushing plant on part of the appellant's land consisting of a strip about 100 feet wide along the high bank overhanging the bed of the river. (3) A right to use the strip of land for storing and transporting metal and for other purposes connected with winning it.

Next he provided that the respondent company should pay a royalty of $2\frac{1}{2}$d. per ton upon gravel, metal or sand taken from the river bed fronting the appellant's land and upon materials taken over his land ; a minimum of £300 per annum is fixed, and the royalty is made payable quarterly.

As the appellant used his land for grazing live stock, which watered at the river, it was necessary to provide a means by which his beasts could reach the water and return. Accordingly the agreement reserves to the appellant the right to use the strip of land for grazing and to obtain access to the river across that strip. The access is to be along a lane or passage twenty feet wide shown on the sketch plan. The plan shows on part of the strip on the high bank a dumping site, of which the agreement gives the respondent company the sole right of user for the purpose of storing sand, gravel and metal. The lane goes round two sides of the dumping site to the edge of the bank and there the respondent company was required

to make a cutting so that the stock could descend to the bed of the river. The lane passes between the dumping site and the common boundary of the appellant and his neighbour, where a fence stood. From the public road an old private lane came right down the centre of the appellant's property to the river bank, and this lane passed apparently on the other side of the place set apart for the dumping site. The arrangement was that a gate should be put across it at the dumping site, which would be fenced off, so that the cattle would turn and go round the dumping site between it and the neighbouring property, down the cutting to the bed of the river, and thence to the stream. To give effect to this arrangement, the agreement made provision for the respondent company's constructing and maintaining the cutting. It also contained a condition that, if default should be made by the respondent company in payment of the royalty or in the observance or performance of any of the terms and conditions on the part of the respondent company and such default should continue for thirty days after any of the quarter days provided for payment thereof, the appellant should be at liberty forthwith to determine the agreement and the licence thereby given without notice and thereupon to eject the respondent company from the premises thereinbefore described.

The material "terms and conditions" are these:—Clause 12 provides that the respondent company should at its own expense fence the subject land (marked "dumping site") and should also fence in the passage-way twenty feet wide leading from the lane, shown in the sketch annexed to the agreement, between points marked thereon, for the purpose of giving the appellant's stock access from the land to the Nepean river and that such fencing should be stock-proof and should be constructed in a specified way and that the respondent company should, during the term, at its own cost and expense maintain the said fences in good order and condition; clause 13 provided that the respondent company should also place and keep in thorough repair the existing fences bounding the proposed passage and the adjoining land of the appellant's neighbour between certain points; clause 14 required the respondent company to make the cutting at the end of the proposed passage in order to permit the appellant's stock to go down to the edge of the river; clause 15 provided that the respondent company should at its own expense erect in a good and workmanlike manner and to the satisfaction of the appellant a gate across the lane already mentioned at a point shown in the sketch as the opposite corner of the dumping site. The clause required the respondent company to keep and maintain the gate in thorough repair and condition and to

H. C. OF A. 1940.

LARKING v. GREAT WESTERN (NEPEAN) GRAVEL LTD.

Dixon J.

keep the gate shut so as to prevent the appellant's live stock from passing through the entrance.

The respondent company made the cutting but never constructed the gate nor fenced the lane or passage round the dumping site to the cutting. Some repairs were done to the fence between the appellant's land and his neighbour's, and *Roper* J., from whose decree the appeal is brought, held that clause 13 had been fulfilled. During the hearing of this appeal this court intimated its opinion that the finding or conclusion ought not to be disturbed.

But the breach by the respondent company of clauses 12 and 15 is undisputed. The question is whether the appellant can rely on it as a breach of condition for which the agreement or licence is forfeited, or, on the contrary, has waived the breach or breaches as a ground of forfeiting the licence or terminating the agreement. The facts affecting this question were investigated in some detail at the hearing of the suit but they can now be stated briefly.

The licence or agreement took effect on 1st May 1936. The respondent company began operations about a year later and exercised the licence without interruption until, on 4th December 1939, a voluntary winding up commenced. The agreement appears to be a valuable asset. It cannot be assigned without the appellant's consent, but he cannot withhold his consent to an assignment to a "respectable responsible financial person or company." The liquidator accordingly claims that the agreement subsists and has not been determined and is not liable to forfeiture. From the beginning the respondent company does not seem to have won enough gravel, sand or metal to take the amount of royalty payable to the appellant beyond the minimum sum of £75 per quarter. The quarterly payments were not made punctually, but on 23rd November 1939 a payment of £75 was made in respect of the quarter ending on 31st October 1939, and there were no other arrears. The next payment would fall due on 31st January 1940, but in the meantime the suit was brought. On 26th October 1939 the appellant made a request in writing that clauses 12, 13, 15 and 16 of the agreement should be performed within fourteen days, on pain of his exercising his rights under the agreement. On 1st December the appellant gave the respondent company a formal notice requiring it to remedy breaches which he specified. On 12th December he gave notice of determination of the agreement, and he then locked the gates and denied the company's servants any further access to the river bed through his land.

The respondent company says that he was not in a position to take this course because, by the acceptance of payments of royalty

and by a long course of conduct, he had elected to affirm the agreement notwithstanding the company's failure to perform the conditions of the licence.

To this the appellant replies (1) that the covenants in question are not capable of a breach "once for all" but involve a continuing duty to fence and therefore that the continuing breach extended beyond 31st October 1939, after which date there was clearly no further waiver; (2) that in any case upon a proper understanding of the conduct of the parties, the period for performance, for which the agreement specified no definite time, was kept open, so that no definitive breach occurred until after 31st October 1939; (3) that, unlike the forfeiture of a lease, waiver of a right to bring to an end an agreement such as the present requires an actual intention to affirm; that acceptance of the royalties with knowledge of the breach is not conclusive and the appellant never did intend to affirm the contract or waive his right to determine the licence.

From a comparison of the findings made by *Roper* J. with a body of conflicting evidence, it seems that we ought to take the facts to be that, before the company actually began working under the licence, the appellant offered to do the fencing at a price he named, that from time to time he complained of the absence of the fences because his stock wandered, that at the end of 1938 he complained to the manager, "in an informal and inconclusive conversation," but, instead of insisting upon the immediate construction of the fence and gates, he allowed the matter to stand for the time being.

There was no reason for constructing the gate and fences until the respondent began actually to work in the river bed and upon the strip on the high bank. The purpose of the fences was to provide for the appellant's cattle while operations were going on; and to exclude his beasts needlessly from the site before work began would have been a disadvantage to the appellant. It appears that the company's use of the place for actual work began about May or June 1937. From that time until December 1939 is about two and one-half years. During the period the appellant clearly had a right to complain of the respondent company's delay in performing its covenants. It is not easy to be sure what actually passed between the appellant and the respondent company, but, upon the findings of the learned judge, the best interpretation of the discordant evidence adduced appears to be that on one side there were requests for the performance of the covenants and on the other delay, but no refusal to perform, and statements that the absence of the particular fences was not the cause of the cattle wandering.

H. C. OF A. 1940.

LARKING v. GREAT WESTERN (NEPEAN) GRAVEL LTD.

DIXON J.

Upon these facts, the first question for consideration is whether the covenants contained in clauses 12 and 15 operated to impose a continuing duty upon the respondent company so that a failure to fence involved new breaches for every day of default, thus including the period after 31st October 1939. 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. His duty is not considered as persisting and, so to speak, being for ever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a further breach arises in every successive moment of time during which the state or condition is not as promised, during which, to pursue the examples, the building is out of repair, the life uninsured, or the particular support unprovided.

The distinction may be difficult of application in a given case, but it must be regarded as one depending upon the meaning of the covenant. It is well illustrated by the construction given to the ordinary covenant that premises will be insured and kept insured against fire. Such a covenant is interpreted as imposing a continuing obligation to see that the premises are insured, so that the covenant cannot be broken once for all, but, on the contrary, failure to insure involves a continuing breach until the omission is made good. But in *Doe d. Flower* v. *Peck* (1), speaking of such a covenant in a lease that had been assigned with the covenant unperformed, *Parke* B. said :—" If this could be construed to be a covenant by the lessee to effect one policy of assurance immediately, and afterwards that he and his assigns should keep that particular policy on foot, by continuing to pay the annual premiums on that policy, the assignee would not have been guilty of any breach of covenant, if the lessee had never insured, for the policy never could have existed, which the assignee was to continue ; and the distress for rent would have been a waiver of the breach by the original lessee. In such a case the lessor of the plaintiff could not have recovered. But if the covenant mean that the lessee and his assigns shall always keep the premises insured by some policy or another, then it is broken if they are uninsured at any one time ; there is a continuing breach for any portion of time that they remain uninsured ; and we are of opinion that this

(1) (1830) 1 B. & Ad. 428 [109 E.R. 847].

is the true construction of the covenant: it is that which would have been put upon it if an action of covenant had been brought; and it makes no difference that the consequence of the breach of it is a forfeiture" (1).

The same learned judge gave a like construction to a covenant by a debtor to insure or cause to be insured his life in one or other of the respectable offices in London or Westminster and to continue to keep the life so insured. He said: "We agree in the construction . . . that the defendant's covenant was not to keep alive the original policy, which covenant would have been broken once for all by neglecting to insure forthwith, but that there is a continuing covenant to keep insured by some policy in some office" (*Hyde* v. *Watts* (2)).

A covenant by a lessor to put the demised premises in repair is broken once for all if a reasonable time for putting the premises in repair elapses without his doing so (*Coward* v. *Gregory* (3), per *Willes* J.). But a lessee's covenant to keep them in repair is continuing.

If the covenant names a time for the doing or completion of a definite act, it is clear that failure to do the act within the time involves a breach once for all, and, as appears from the foregoing statement of *Willes* J., the same conclusion will follow where no time is limited but a specified thing is to be done and a reasonable time elapses for the performance of the covenant: Cp., further, *Doe d. Baker* v. *Jones* (4). In *Morris* v. *Kennedy* (5), where the principle was applied to a covenant in a building lease to construct within a specified time a new street bounding the demised land, *Holmes* J., in a very clear explanation of the reasons for holding that a final breach had occurred, referred to covenants depending on an implication that the obligation should be fulfilled within a reasonable time. He said:—"I am of opinion, that the case before us depends upon whether the covenant sued on was broken finally and once for all before the assignment of the leasehold premises to the plaintiff. The covenantor undertakes by it that he will within one year from the date of the lease at his own cost and charges, make and construct and completely finish the street referred to. It would be difficult to suggest how finality could be more exhaustively expressed than by the three verbs, and the adverb, that occur in the portion of the covenant I have read. Then consider the limit of time. Even if

(1) (1830) 1 B. & Ad., at p. 438 [109 E.R., at p. 850].
(2) (1843) 12 M. & W. 254, at p. 270 [152 E.R. 1193, at p. 1200].
(3) (1866) L.R. 2 C.P., at p. 171.
(4) (1850) 5 Ex., at p. 504 [155 E.R. at p. 220].
(5) (1896) 2 I.R. 247.

H. C. OF A. 1940.

LARKING v. GREAT WESTERN (NEPEAN) GRAVEL LTD.

Dixon J.

this were absent, it would occur to me that the language would imply that upon the expiration of a reasonable time the rights and liabilities of the parties were to be ascertained once for all; but the fixing of the definite period of a year strengthens the argument for this construction. What is there to suggest that if the lessor had, in the words of the covenant, made, constructed, and completely finished the street within the time mentioned, he would have been under any further obligation? or if he failed to do so, is there anything to prevent the covenantee from recovering damages on the basis that the leasehold premises were to lose entirely the advantages of the proposed street? " (1).

In covenants to build and then to keep the building in repair, the obligation of the latter part of the covenant arises for performance only when the former is fulfilled and accordingly the continuing nature of a covenant to repair cannot be used to avoid any of the consequences of the fact that the covenant to build is capable only of a breach once for all (*Stephens* v. *Junior Army and Navy Stores Ltd.* (2)).

The distinction between a covenant to do a definite act capable only of a breach once for all and a continuing covenant has consequences not only in relation to waiver but also in the measure of damage, in the effect of lapse of time under statutes of limitation, and, where the covenant runs with the land, in the liability of an assignee to sue or be sued for further breaches.

It remains to apply these considerations to the interpretation of the covenants contained in clauses 12 and 15 of the agreement. Under clause 12, the licensee, that is the respondent company, must " fence the land ": such fence must be stock-proof and erected in a form specified and to the satisfaction of the licensor, the appellant. All this reads like an immediate obligation to perform a definite act or series of acts. The covenant goes on to say that, during the term, the company must at its own cost and expense maintain the said fences in good order and condition. Again, this form of expression looks as if a further duty, one of maintenance, is to attach when the fence is erected. It may be that, under this latter part of the covenant, once a fence is erected the obligation to keep it in good order and condition is so absolute that even if it were completely destroyed by fire it must be restored: See *Foa, Landlord and Tenant*, 6th ed. (1924), at pp. 251, 252, and note at pp. 909, 910. But, even so, it does not mean that the duty to fence in the first instance continues indefinitely until actually fulfilled. It means that every time the fence falls into disrepair or is destroyed, then, within a

(1) (1896) 2 I. R., at pp. 252, 253. (2) (1914) 2 Ch. 516.

reasonable time, it must be restored. It still remains true that under the earlier part of the clause a fence must be erected before the latter part has anything upon which to operate. The erection of the fence is a definite act which must be done within a reasonable time, and failure to do it is a breach once for all. The failure to fence within a reasonable time would entitle the licensor, the appellant, not simply to damages for delay, on the footing that the duty remained and might or would be performed by the company. It would entitle the appellant to damages measured by the loss arising from his being deprived of a fence, and the damages would or might include the cost to him of placing the fence there himself.

Clause 15 appears to me to bear the same interpretation. The failure to erect a gate within a reasonable time involved a breach once for all. If, therefore, a reasonable time elapsed and there was no arrangement or request by which performance was postponed or kept open, a definitive breach arose, and any unequivocal act recognizing the existence of the agreement after that time would amount to a waiver. On the facts, I am unable to agree that time for performance was given so that the obligation of the covenant was kept open and unbroken. No doubt the appellant renewed his requests for performance and expected that in the end fences would be constructed by the company. But he never meant to enlarge the time for performance of the covenant. The situation was that of unexcused delay on the side of the company and, on the appellant's side, toleration accompanied by recurrent complaints. After May 1937 there was an immediate duty on the part of the respondent company to fence and a reasonable time for performance expired long before the end of that year.

The only remaining question is whether the appellant's acts amounted to waiver. In considering this question it must be remembered that we are not dealing with a lease. There is no estate or interest in land. The sole user of the dumping site does not, as I understand the agreement, mean exclusive possession on the part of the company for all purposes of a defined area of land. It therefore does not amount to a demise of the dumping site. There is not a grant of a *profit à prendre* for a term of years. For the sand, gravel and stone are to be taken from the bed of the river, and none of the bed is parcel of the appellant's land. It is a licence to transport sand, gravel and stone over the appellant's land and to use part of the land for crushing and as a dumping site. The distinction has some importance in two respects. If there had been a lease of a corporeal or incorporeal interest in land, it would have been necessary for the appellant, before he re-entered, to give notice to

H. C. OF A. 1940.

LARKING v. GREAT WESTERN (NEPEAN) GRAVEL LTD.

Dixon J.

the company specifying the breaches complained of and requiring the company to remedy such breaches: See sec. 129 of the *Conveyancing Act* 1919-1932 (N.S.W.).

In the second place, acceptance of the royalty as rent accruing due after breach of condition would have been necessarily fatal as a waiver of the forfeiture. Rent issues out of the land demised and is an incident of the tenure. To receive rent in respect of a period later than the breach of condition, with notice of the breach, is necessarily a waiver of the forfeiture because it recognizes that the tenure subsisted notwithstanding the liability to forfeiture. If the money is received in respect of the tenant's use of the land but not in its quality as rent, the forfeiture is not waived, as, for instance, when it is paid and received as compensation to the landlord.

A tonnage rate payable under an agreement like the present may stand in an analagous position, but it is not the same thing. However, I do not think that the appellant can escape from the position that, by allowing the respondent company to go on for over two years and by receiving royalties in respect of that period, he unequivocally intimated an intention that the agreement should be considered as subsisting after the reasonable time had elapsed within which the company was bound to fulfil clauses 12 and 15 and notwithstanding that to his knowledge the company had not done so. That amounted to a waiver of the right to determine the agreement: See *Wendt* v. *Bruce* (1).

I am therefore of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Harold T. Morgan & Sons.*
Solicitor for the respondent, *Arthur J. P. Hall.*

J. B.

(1) (1931) 45 C.L.R. 245.