[HIGH COURT OF AUSTRALIA.]

BOUCAUT BAY COMPANY LIMITED (IN LIQUIDATION) . . . . . } APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1927.

MELBOURNE, *May* 24-27; *June* 1, 2, 23.

Starke J.

*Oct.* 25, 26.

Isaacs A.C.J., Gavan Duffy, Powers and Rich JJ.

*Contract—Determination—Contract with Commonwealth—Power to determine "if the Minister shall have reason to believe"—Audi alteram partem—Forfeiture of sum of money on determination of contract—Penalty or liquidated damages.*

An agreement between the Commonwealth and the appellant whereby the appellant agreed to provide and maintain an efficient coastal shipping service in the Northern Territory contained a provision (clause 15) that, if at any time the Minister for Home and Territories should "have reason to believe" that the agreement was not being carried out by the appellant in accordance with the agreement, the Minister might determine the contract. The agreement also contained a provision (clause 19) that if the agreement was determined by the Minister under clause 15, the Minister might declare that a sum of £250, which had been lodged with him by the appellant as security for the due performance of the agreement, was forfeited to the Commonwealth, and that the sum should thereupon become the property of the Commonwealth.

*Held*, (1) that in exercising the power conferred by clause 15 the Minister's function was administrative and not quasi-judicial, and therefore he might determine the contract without giving the appellant an opportunity of being heard; and (2) that, under clause 19, upon the determination of the contract the sum of £250 might lawfully be forfeited, the sum being liquidated damages and not a penalty.

Decision of *Starke* J. affirmed.

APPEAL from *Starke* J.

An action was brought in the High Court by Boucaut Bay Co. Ltd. (In Liquidation) against the Commonwealth by which the plaintiff sought to recover damages for the wrongful determination by the defendant of a contract made between the plaintiff and the defendant on 2nd June 1924; to recover a sum of £250 paid by the plaintiff to the defendant upon the making of the contract and pursuant to its terms as security for the due performance of the contract; and to recover certain other sums alleged to be payable by the defendant to the plaintiff. The action was heard by *Starke* J., in whose judgment hereunder the material facts are stated.

*Eager* and *Campton*, for the plaintiff.

*Owen Dixon* K.C. and *O'Bryan*, for the defendant.

*Cur. adv. vult.*

June 23.

STARKE J. By an agreement dated 2nd June 1924 between the Boucaut Bay Co. Ltd. (hereinafter called the "contractor") and the Commonwealth, the contractor agreed to provide and maintain an efficient coastal shipping service in the Northern Territory, in manner and on terms more particularly set forth in the agreement for a period of three years from 21st April 1924. For and in consideration of the services agreed to be rendered, the Commonwealth agreed to pay a subsidy at the rate of £6,000 per annum, payable quarterly. The contractor lodged with the Minister of State for Home and Territories the sum of £250 for the due and faithful performance of the service hereinbefore mentioned pursuant to clause 19 of the agreement. Clause 15 of the agreement provided: "If at any time the Minister shall have reason to believe that this agreement is not being carried out by the contractor in accordance with the terms and true intent and meaning of this agreement then and in any of the said cases the Minister may by one calendar month's notice in writing to the contractor determine this agreement" and "upon the expiration of such one calendar month's notice this agreement shall absolutely cease and determine."

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Clause 19 provided further " If this agreement is determined by the Minister under clause 15 of this agreement the Minister may . . . by notice in writing declare that the said amount of £250 . . . is forfeited to the Commonwealth and thereupon the said sum of £250 . . . shall be the property of the Commonwealth absolutely." On 27th February the Minister gave the following notice in writing determining the agreement and forfeiting the sum of £250 :—" To Boucaut Bay Company Limited, 440 Little Collins Street, Melbourne.—Take notice :—Whereas I, George Foster Pearce, the Minister of State for Home and Territories of the Commonwealth of Australia, have reason to believe that the agreement made the second day of June 1924 between the Commonwealth of Australia and Boucaut Bay Company Limited, having its registered office at 440 Little Collins Street, Melbourne, in the State of Victoria, with respect to the provision and maintenance by the said Company of an efficient coastal shipping service in the Northern Territory is not being carried out by the said Company in accordance with the terms and true intent and meaning of the said agreement : Now therefore I, the said Minister, do hereby pursuant to the powers conferred on me by clause 15 of the said agreement determine the said agreement as from the expiration of one calendar month after the date upon which this notice is served upon the said Company And I do hereby pursuant to the powers conferred on me by clause 19 of the said agreement declare that the sum of two hundred and fifty pounds (£250) which has been lodged with me by the said Company as security for the due and faithful performance of the said shipping service is forfeited to the Commonwealth.—Dated this twenty-seventh day of February 1925.—(Sgd.) G. F. Pearce, Minister of State for Home and Territories."

The contractor in this action sues the Commonwealth for damages for unlawfully determining the agreement and for the recovery of the sum of £250 on the ground that it has not been rightfully forfeited to the Commonwealth or is a penalty merely, the Commonwealth being entitled only to the damages actually sustained by reason of any breach of the agreement on the contractor's part.

The main question in this case is, of course, the true meaning of the words in clause 15 " if at any time the Minister shall have *reason*

*to believe.*" The argument submitted to me was that the Minister's power to determine the agreement was dependent upon some *reason justifying a belief* that the agreement was not being carried out in accordance with the terms and true intent and meaning of the agreement. It followed, according to the argument, that the Court must determine for itself whether facts exist which would reasonably lead to the belief that the agreement was not being so carried out. This view of the clause I cannot adopt. In my opinion, the belief of the Minister is " the sole condition of his authority " ; " he is the sole judge of the sufficiency of the materials on which he forms it " (*Lloyd* v. *Wallach* (1)). If a man is to form a belief and his belief is to govern, he must form it himself on such reasons and grounds as seem good to him (*Allcroft* v. *Lord Bishop of London* (2)). He must not act dishonestly, capriciously or arbitrarily: that would be contrary to the implication of the agreement and so establish a want of the belief stipulated for as a condition of the exercise of the power of determination. So long, however, as the Minister acts upon circumstances appearing to him to bear upon the case and giving him a rational ground for the belief entertained, then, in my opinion, the Courts of law cannot and ought not to interfere with his discretion. Upon the facts the Minister had ample materials on which to found his belief set forth in the notice of 27th February 1925, and I find as a fact that the Minister bona fide and honestly formed and held that belief.

It was then contended that the Minister was not entitled to act upon clause 15 without giving the contractor an opportunity of being heard and of meeting allegations to its prejudice (*Gillen* v. *Laffer* (3)). Some dissatisfaction had been expressed by the Home and Territories Department and, apparently, in Parliament and in the Press, as to the suitability of the *Huddersfield*, one of the contractor's vessels employed in the Northern Territory shipping service; and in January 1925 two of the directors of the contractor interviewed the Minister. They lodged with him a statement of their views and sought to justify the various charges that had been made in connection with a search expedition upon which the

(1) (1915) 20 C.L.R. 299, at p. 304. (2) (1891) A.C. 666, at p. 678.
(3) (1925) 37 C.L.R. 210.

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*Huddersfield* had been employed. I accept, substantially, the accounts of Messrs. Fogarty and Fripp of this interview. I do not think the Minister was at that time considering the question of cancelling the agreement nor do I think any such possibility was brought home to the directors of the contractor. No doubt the statement lodged by the contractor with the Minister covered a good deal of the ground which the Minister afterwards considered in arriving at his decision to determine the agreement, but the question of determining the agreement only arose, in my opinion, after the Minister saw the Administrator, Mr. Urquhart, about February 1925. His decision to determine the agreement was then based upon the inefficiency of the vessels employed by the contractor in the Northern Territory shipping service and the disorganization of the contractor's business arrangements at Darwin. The contractor had no fair or sufficient notice of the extent of the grounds upon which the Minister proceeded and no opportunity of answering them, if the Minister was bound to give it any such notice. In my opinion, however, the Minister was not, in point of law, bound to give any such notice. Again the question turns upon the true meaning of clause 15. If the clause places the Minister in a judicial or quasi-judicial position then no doubt the rule *Audi alteram partem* applies (*Wood* v. *Woad* (1) ); if, however, the clause gives the Minister absolute power to determine the agreement without anything in the nature of a judicial inquiry, the rule has no application. Whether the authority is judicial or absolute must turn upon the terms of the particular agreement. *Gillen* v. *Laffer* (2), by which I am bound, is an illustration of the former class; this case, in my opinion, belongs to the latter. The Minister is empowered to act on his own belief or opinion uncontrolled by the Courts, if that belief is honestly entertained. It is, in truth, a power given for the protection of the Commonwealth and as a convenient and decisive test of non-performance of the agreement. No words are introduced as in *Gillen* v. *Laffer* suggesting evidence or any quasi-judicial inquiry, and there is nothing in the agreement suggesting an obligation upon the Minister " to act as a tribunal, or to state the grounds on which he decides for himself " (cf.

(1) (1874) L.R. 9 Ex. 190.

(2) (1925) 37 C.L.R. 210.

*Russell* v. *Russell* (1) ). In my opinion, therefore, the agreement dated 2nd June 1924 was lawfully determined by the notice of February 1925.

These views also dispose of the claim for the sum of £250 deposited by the contractor for the due and faithful performance of the service, unless the contention can be sustained that the provision for its forfeiture is merely a penalty. Such cases as *Pye* v. *British Automobile Commercial Syndicate Ltd.* (2), *Sprague* v. *Booth* (3) and *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (4) show that the contention is untenable.

[The learned Judge then dealt with other claims by the plaintiff. One he found in favour of the plaintiff for £460, but as to all other claims by the plaintiff, he found against the plaintiff. The judgment then continued :—]

In result, the defendant has substantially succeeded and must have the general costs of the action, except in so far as any such costs have been increased by the plaintiff's claim alleged in pars. 7, 8 and 9 of the amended statement of claim and the defence of the Commonwealth thereto (cf. *Jenkins* v. *Jackson* (5) ). On the claim so excepted the parties will abide their own costs, for neither has wholly succeeded. The amount awarded to the contractor and the costs will be set off one against the other (see *Pringle* v. *Gloag* (6) ).

Judgment for the plaintiff for £460 in respect of the plaintiff's claim for " standing by " of the auxiliary schooner *Huddersfield* in par. 7 of the amended statement of claim alleged. Judgment for the defendant upon all other claims made by the plaintiff in this action. The plaintiff to pay the defendant the general costs of this action including shorthand notes and discovery except in so far as such costs have been increased by the plaintiff's claim alleged in pars. 7, 8 and 9 of the amended statement of claim and the defence of the Commonwealth thereto. Each party to abide its own costs of the claim raised by the said paragraphs and the defence thereto. Order that the defendant's costs of the action aforesaid be set off against the said sum of £460 and the Principal Registrar shall certify

(1) (1880) 14 Ch. D. 471, at p. 480.
(2) (1906) 1 K.B. 425, at p. 430.
(3) (1909) A.C. 576.
(4) (1915) A.C. 79, at pp. 92-93.
(5) (1891) 1 Ch. 89, at p. 92.
(6) (1879) 10 Ch. D. 676.

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to whom after such set off the balance is due. Order that such balance be paid by the party from whom to the party to whom the same shall be certified to be due.

*Order accordingly.*

From that decision the plaintiff now appealed to the Full Court of the High Court. The defendant served a notice of cross-appeal but that appeal was not pressed.

*Ham* K.C. (with him *Eager*), for the appellant. The words "shall have reason to believe" in clause 15 of the agreement mean "shall reasonably believe," and, in order that the Minister may exercise the power to determine, facts must exist which afford a sufficient reason for his belief. The Minister in determining the contract under clause 15 was performing a quasi-judicial and not an administrative function, for the determination had the effect of depriving the appellant of valuable property. Where one party to an agreement has power to determine the agreement and there is enough in the contract to show that the determination must not be arbitrary or capricious, then an opportunity must be given to the other party to be heard. [Counsel referred to *Laffer* v. *Gillen* (1); *Gillen* v. *Laffer* (2); *Russell* v. *Russell* (3); *Lloyd* v. *Wallach* (4); *R.* v. *Lloyd*; *Ex parte Wallach* (5); *Moreau* v. *Federal Commissioner of Taxation* (6); *R.* v. *Arndel* (7); *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montréal* (8); *Green* v. *Howell* (9); *Australian Trading Co. Pty. Ltd.* v. *Jones* (10); *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (11); *De Verteuil* v. *Knaggs* (12).] On the evidence there was no reasonable ground for believing that the contract was not being carried out in accordance with its terms. The sum of £200 mentioned in clause 19 is a penalty, and not a genuine pre-estimate of the loss sustained by the respondent (*Commissioner of Public Works* v. *Hill* (13)). Where under a

(1) *Ante*, 86.
(2) (1925) 37 C.L.R., at pp. 220, 225, 229, 230.
(3) (1880) 14 Ch. D., at pp. 480, 481.
(4) (1915) 20 C.L.R. 299.
(5) (1915) V.L.R. 476, at p. 492; 37 A.L.T. 75, at p. 81.
(6) (1926) 39 C.L.R. 65, at p. 68.
(7) (1906) 3 C.L.R. 557, at pp. 571, 576.
(8) (1906) A.C. 535, at p. 540.
(9) (1910) 1 Ch. 495, at p. 504.
(10) (1925) V.L.R. 273, at p. 280; 47 A.L.T. 5, at p. 8.
(11) (1922) 1 A.C. 202, at pp. 211-214.
(12) (1918) A.C. 557, at p. 560.
(13) (1906) A.C. 368.

contract a sum of money is payable on the happening of one or all of several events of varying degrees of importance, it is a penalty and not liquidated damages (see *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (1); *Pye* v. *British Automobile Commercial Syndicate Ltd.* (2)).

*Owen Dixon* K.C. and *O'Bryan*, for the respondent, were not called upon.

Oct. 26.

ISAACS A.C.J. In this case three points only have been argued. The first is whether the Minister could under clause 15 of the contract terminate it for the cause assigned without a prior opportunity being given to the appellant to satisfy his mind on the subject. The second point is whether the Minister had in fact a reason for believing as he did. The third is whether the sum of £250, which was held as security, had been lawfully forfeited.

As to the first point I can see no doubt that the Minister had power to determine the contract without giving the appellant an opportunity of being heard if in fact he had reason to believe and did believe as he stated in his notice. The Minister was the official representative of the Commonwealth with regard to the contract, the Commonwealth being a party to the contract; and he therefore stood in the position of a party and not of a person unconnected with the contract. It was one of the terms of the contract itself that the Minister should have power to terminate the contract in any of the events enumerated in clause 15. Now, in interpreting that clause, the surrounding circumstances have to be considered. The services contracted for had to be performed in a part of the Commonwealth remote from the Seat of Government, sparsely settled and with poor means of communication, and with not improbable necessity for emergent action. The Minister, as was well known, would be dependent in most cases on departmental officers. He would call for inquiries and they would send him their reports. He could be trusted to act impartially and honourably, and therefore there is nothing improbable in giving to the powers of the Minister under clause 15 the practically unchallengeable

(1) (1915) A.C., at pp. 86, 97. (2) (1906) 1 K.B. 425.

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character contended for on behalf of the respondent. I personally cannot assent to the implication Mr. *Ham* suggests—an implication that the Minister's function was not purely administrative but was of a quasi-judicial nature which required an inquiry. In my opinion, if at any time the Minister in the natural and ordinary course of his official duties acted on information of his trusted officers and formed a belief in the general terms mentioned in the latter part of the first paragraph of clause 15 that the contract was not being fairly carried out, he had power to terminate the contract without the formality of an inquiry. The one condition of his action is that he had reason to believe, and that implies actual belief. I would add that the provision at the end of that first paragraph providing for one calendar month's notice determining the contract aids in the construction of the clause as containing no such implied further notice as is contended for.

The second point is as to whether the necessary reason to believe existed. Without doing more than refer generally to the evidence of Sir George Pearce and Mr. Urquhart and the written communications between the appellant and its agent Green, I agree thoroughly with what my brother *Starke* has said, namely, that there was ample reason for the Minister to believe that the contract was not being carried out in accordance with its terms.

Then there is the last point as to the £250. The ground upon which this portion of the appeal rests is the contention that clause 19 of the contract makes the £250 a penalty and not liquidated damages, and therefore that as no liquidated damages were proved the whole of that sum should be repaid to thea ppellant. Now, there is no doubt from the cases cited that a distinction is made by the Court between penalty and liquidated damages. So far as this case is concerned I think the distinction may be stated in these terms: To recover in an action for breach of contract damages more than nominal, those damages must be proved unless they are admitted. If they are admitted there is an end of it. But they may be admitted by a pre-assessment; and if a contract is produced in which a sum is named and that is relied on as a pre-assessment or pre-estimation of damages, the contract is looked at to see whether it really is so

in order to satisfy the rule that damages must be admitted or proved. The mere fact that the sum is stated to be forfeitable on the happening of various events is not conclusive as to its being a penalty; nor is it conclusive even if it is stated to be liquidated damages, because what the Court has to do is to determine whether the intention of the parties was that it should constitute liquidated damages. Therefore all the elements and circumstances are looked at. As the case of *Pye* v. *British Automobile Commercial Syndicate Ltd.* (1) shows, even if a sum is lodged as a deposit and there is a provision enabling the party to declare it forfeited, that is not conclusive, although it is an element in determining the intention. In this case, looking at all the circumstances, I am satisfied that the £250 was not a penalty but was treated by the parties as liquidated damages *pro tanto*. There is, first of all, the smallness of the sum lodged as security, and then we have to regard the nature of the events to which par. 2 of clause 19 applies. Those events include the opinion of the Minister as to a breach. His opinion may be that the breach is very large or very small. And then there is the provision, under which this case arises, that the Minister may terminate the contract if he has reason to believe, not that there has been a specific breach, but that there has been a general want of conformity with the spirit of the agreement. That is not measurable or at least is not easily measurable. It might be very hard to prove if that were taken as the breach upon which the respondent's liability was to depend. Having regard to these considerations and to the further consideration of the express words of par. 2 of clause 19, I have come to the conclusion, without doubt, that the parties intended that the £250, at all events *pro tanto*, was to be liquidated damages. I say "at all events" because the paragraph says that the declaration of forfeiture is to be without prejudice to any other right of action for damages under the agreement, so that the rights of the Commonwealth to recover damages for breach of the contract were preserved even if the power of forfeiting the £250 had been exercised. For these reasons I think the third point fails also.

In my opinion the appeal should be dismissed.

(1) (1906) 1 K.B., at p. 430.

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GAVAN DUFFY J. In my opinion the judgment appealed against is right and the appeal should be dismissed.

POWERS J. I agree.

RICH J. I agree.

*Appeal dismissed with costs.*

Solicitors for the appellant, *McLaughlin, Eaves & Johnston.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

B. L.

Not Foll *W & A McArthur Ltd v FCT* (1930) 45 CLR 1

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[HIGH COURT OF AUSTRALIA.]

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY LIMITED . . . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

H. C. OF A. 1927.

SYDNEY, *April* 12, 20.

KNOX C.J.

*War-time Profits Tax—Assessment—Objection to assessment—Allowance of objection and cancellation of assessment—Right of Commissioner afterwards to add to or alter assessment—War-time Profits Tax Assessment Act* 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *secs.* 23, 28.

Where an objection has been taken by a taxpayer to an assessment for war-time profits tax and the Commissioner either allows the objection and cancels the assessment, or, having disallowed the objection and having been requested to treat the objection as an appeal and to refer it to the High Court, withdraws his disallowance, allows the objection and cancels the assessment, he is not entitled afterwards to revive the question of liability to tax which has