IN THE HIGH COURT OF AUSTRALIA

ATLAS STEELS (AUSTRALIA) PROPRIETARY LIMITED.

V.

ATLAS STEELS LIMITED.

ORAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY.

on Tuesday, 10th August, 1948.

H. E. Daw, Gov. Print., Melb.

C.12280/45

IN THE HIGH COURT OF AUSTRALIA)
)
NEW SOUTH WALES REGISTRY)

ATLAS STEELS (AUSTRALIA) PROPRIETARY LIMITED

v.

ATLAS STEELS LIMITED.

Tuesday, 10th August 1948.

JUDGMENT.

LATHAM C.J. The determination of this appeal depends upon first, the construction of an agreement made between the plaintiff, Atlas Steels (Australia) Pty. Ltd., an Australian Company, and the defendant Company, a Canadian Company, Atlas Steels Ltd., and secondly, upon the true significance of the conduct of the parties in relation to the agreement. The agreement is in writing and is dated 24th December 1940. The agreement provides that the Canadian Company (described as "the Manufacturer") appoints the Australian Company (described as "the Distributor") to be its sole distributor for and its sole agent in the Commonwealth of Australia and neighbouring territories of the Manufacturer's complete line of steels, which are specified. That is clause 1. Clause 2 provides that the Distributor shall diligently and faithfully endeavour to extend the sale of the Manufacturer's goods; clause 4 excludes the Distributor from dealing in similar goods made by other Manufacturers. The clause sought to be enforced in the suit is clause 6 which provides that "The Manufacturer will not, during the continuance of this agreement, sell any of the said goods to any person resident in the territory or to any person with a view to such goods being exported to the territory, but will carry on its trade with the territory through the Distributor only.....". There are other incidental provisions, and provision for commission and so forth.

Clause 18 is the clause which is particularly important. Clause 18 is in the following terms:-

> "This agreement shall be binding on the parties for a period of five years from the date hereof, but may be determined at any time for breach of any of the covenants on either party giving ninety (90) days' notice in writing of the breach complained of and intention to cancel, and if the breach complained of is not remedied within ninety days then this agreement shall be deemed to have been determined".

It is upon the next sentence in this clause that the determination of the main matter in the appeal depends. These words are "If the parties

continue to act as Manufacturer and Distributor after five years, then this agreement shall be deemed to be renewed as a yearly agreement but determinable as herein provided". The last words, "as herein provided" refer - and refer only - to the antecedent provision with respect to breach. Accordingly, the relevant words which have to be interpreted are "If the parties continue to act as Manufacturer and Distributor after five years, then this agreement shall be deemed to be renewed as a yearly agreement".

The plaintiff contends that the evidence shows that the parties did continue to act as Manufacturer and Distributor after the period of five years, with the result that the agreement is deemed to be renewed as a yearly agreement. If this were so, it would continue in operation from year to year until terminated by reasonable notice.

It is not necessary to determine what would be reasonable notice because there is no doubt that no notice which could be regarded as reasonable was given in this case. It is common ground that if the agreement was renewed by virtue of clause 18 it has not been finally determined.

It has been found as a fact that the parties continued, after the expiry of five years, in business relations; the Australian Company obtained orders for the defendant's products and the Australian Company was paid commission by the defendant.

These facts are said by the plaintiff to be decisive of the case. The defendant however relies on further facts which, it is contended, are material.

In the year 1945 the parties in correspondence adverted to the expiry of the agreement; there was correspondence in which both parties referred to the fact that the agreement was due to expire on the 24th. Decr. 1945 and there are several references to the making of a new agreement. It was proposed that Mr. Booth, on behalf of the Australian Company, should go to Canada to discuss the terms of a new agreement but he found himself unable to go. In July 1945 he sent a cable and a letter to Canada stating that he would be unable to go to Canada until the early part of 1946. Immediately a letter was written from Canada by the Canadian Company dated 2nd. August 1945 in these terms: "Please consider this letter as formal notice that it is not our intention to renew our contract with you of the 24th. December 1940 on its expiration on 24th.

December 1945. It is the writer's hope that with the arrival of your Mr. Booth here early in 1946 we may be able to negotiate a new contract". The reply to that from the Australian Company dated 22nd. August was in these terms:- "I note from your letter of 2nd. August that you wish the contract now in existence to expire without further extension but that a new contract might be discussed during my visit in the early part of 1946". The letter concludes with an expression of the hope that "We will be able to make a fresh contract based upon conditions then in existence". Further correspondence refers to setting up a new period for a contract and to carrying on without what is called an "official contract".

As already stated, further orders were obtained by the Australian Company on behalf of the Canadian Company and commission was paid. In July 1947 there was an agreement in operation under which the Canadian Company purported to allow - and did allow - the Australian Company to use the word "Atlas" as part of its corporate name. In July 1947 a letter was sent by the Solicitor for the Canadian Company to the Australian Company which included this statement:- "I have before me your file in the above matter, 'Agency Contract', and I am advised that your contract was not renewed. I am instructed to take the necessary steps to terminate the licence agreement for the use of the word 'Atlas' as part of your name".

The defendant contends that on these facts, which are placed before the Court on affidavit evidence, there is now no agreement between the plaintiff and itself.

It was held by Mr. Justice Sugerman that this particular contention of the defendant was right and His Honour refused to grant an injunction. His Honour held that the question which arose was not a question of the cancellation of the contract and that the clearly expressed common intention and understanding between the parties was that the contract should not be renewed and that this common intention could not be ignored.

Clause 18 operates only where the parties continue to act as Manufacturer and Distributor after five years. These words do not mean "if the Canadian Company continues to manufacture some goods or the Australian Company continues to distribute some goods". They refer to acting as Manufacturer and Distributor in accordance with and subject to the terms of the agreement. If the parties do this, then the clause applies and the agreement is renewed as a yearly agreement.

Either party was at liberty on the expiry of the five-year period to cease to act as Manufacturer or Distributor, as the case may be, and the agreement would then have terminated. But, further, it was open to the parties to agree to carry on upon a basis which did not provide any term for the period for the contract. If there were such an agreement then the operation of clause 18 in creating a yearly agreement would be excluded. In my opinion, the evidence shows that this is what happened. The parties concurred in deciding that the agreement should not be renewed: they hoped to negotiate a new contract but did not do this. The letters of August 1945 show that they so agreed.

This agreement, in my opinion, displaces the operation of clause 18. Accordingly, the plaintiff does not establish the existence of the contract to enforce which the suit was brought, and the suit was in my opinion rightly dismissed.

In my opinion, therefore, the appeal should be dismissed with costs.
ORDER: Appeal dismissed with costs including costs reserved upon the earlier appeal to this Court.

RICH J: I agree.

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JUDGMENT

WILLIAMS J.

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WILLIAMS J. The contract in suit was in the first instance for a definite period of five years. But it also contemplated that the parties might continue to carry on business after the expiry of this period and in this event provided for the making of a new contract on the same terms and conditions as the expiring contract except that the new contract should be from year to year instead of for five years.

But the new contract, like any other contract, could only come into existence by the agreement of the parties. By clause 18 the parties agreed that if they continued to carry on as Manufacturer and Distributor after December 1945, which is a compendious way of saying carrying on business on the same terms and conditions as before, this course of conduct would create a new contract from year to year but otherwise on the previous terms and conditions. But either party was at liberty to refuse to enter into this new contract and the letter of 2nd August 1945 was, I think, a clear statement that the respondent would not do so. Further, I think that the reply of 22nd August was an equally clear statement that the appellant acquiesced in this position. That this was so is, I think, shown by the subsequent correspondence.

Therefore I agree with the Chief Justice that the appellant has failed to prove the contract sued upon and that His Honour rightly dismissed the suit with costs. It follows that, in my opinion, this appeal should be dismissed with costs.