(6)

IN THE HIGH COURT OF AUSTRALIA

ORIGINAL

SCHRIENER

V.

CANBERRA WHOLESALERS PTY. LIMITED

REASONS FOR JUDGMENT

Judgment delivered at Brisbane

on 26th June, 1958.

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

SCHREINER

v.

CANBERRA WHOLESALERS PTY. LIMITED

Appeal allowed. Order of the Supreme Court of the Australian Capital Territory set aside. Remit suit to the Supreme Court:

(1) to assess the damages recoverable by the appellant by reason of the failure of the respondent to perform its obligations under the contract between the parties;

(2) to assess the amount payable to the respondent for materials supplied and work done under the contract; and

(3) to enter judgment for the appropriate party for the balance due.

Costs of the trial, including those already incurred, to abide the event. Respondent to pay the appellant's costs of the appeal.

SCHREINER

v.

CANBERRA WHOLESALERS PTY. LIMITED.

JUDGMENT

DIXON C.J.
FULLAGAR J.
TAYLOR J.

SCHREINER

v.

CANBERRA WHOLESALERS PTY. LIMITED

This is an appeal from a judgment of the Supreme Court of the Australian Capital Territory by which it was adjudged that the respondent should recover from the appellant the sum of £4,900. Judgment for this sum was obtained by the respondent in proceedings in which, as plaintiff, it sought damages from the appellant for the wrongful repudiation of a sub-contract by which it undertook to supply and erect for the appellant certain specified steel work necessary in the erection of the John Curtin School of Medical Research at Canberra.

By its statement of claim the respondent alleged that during the course of the work the appellant wrongfully terminated the contract whilst the appellant, in answer, denied the breach and alleged that, because of specified breaches on the part of the respondent, he became entitled to treat the contract as at an end. The breaches alleged in the statement of defence raise issues concerning both the quality of the work performed under the sub-contract and delays in its execution. In relation to the latter complaint it was alleged "that the supply of materials and performance of work in accordance with the defendant's requirements from time to time within the time specified by the defendant was a condition of the said contract" and, further, "that the plaintiff failed to supply and erect certain parts of the structural steel work agreed to be supplied and erected by the plaintiff pursuant to the said contract within the time specified by the defendant pursuant to the said contract". It was then claimed that, as a result of the breaches alleged, the appellant became entitled to terminate the contract. Further, by way of cross-action, the appellant sought to recover damages for these breaches.

No alternative allegation was made that the respondent had failed to perform the specified work, or any part of it, within a reasonable time and, in order to establish this branch of his defence, it was incumbent upon the appellant to show, firstly, that the contract required the respondent to perform the various items of work within the times specified by him and, secondly, that this, the respondent failed to do.

So far no reference has been made to the terms of the sub-contract. But it is necessary to mention at this stage that the statement of claim alleged that it was made on or about the 15th February 1955 and that it bound the respondent to "supply and erect certain structural steel in and about the John Curtin School of Medical Research being built by the defendant for the Australian National University". These allegations were the subject of a general denial in the statement of defence which then in terms proceeded to allege "that by a contract in writing bearing date the fifteenth day of February One thousand nine hundred and fifty-five the plaintiff agreed with the defendant, inter alia, that it would complete certain work specified and drawn in certain plans and specifications prepared for the Australian National University for the erection of the John Curtin Medical School of Research and that the materials to be supplied and the work to be done pursuant to such contract would be supplied and done in accordance with the said plans and specifications in a workmanlike manner and within times to be specified by the defendant in accordance with the defendant's requirements from time to time". As will be seen, however, the events upon which the appellant relied to establish that the respondent's work was not completed within the times specified occurred, in the main, before the 15th February 1955. This is apparent from the evidence in the case and, indeed, it readily appears from the terms of the notice by which, on the 20th April 1955, the appellant purported to

terminate the sub-contract. This notice is in the following terms:-

"To: Canberra Wholesalers Pty. Ltd.,
Mort Street,
BRADDON ... A.C.T.

TAKE NOTICE that because of your breaches in performance of contract for supply and erection of Structural Steel at the John Curtin Medical School of Research Building and in particular for your breaches in performance relating to supply and erection of:-

1. Roof trusses for Wing C and Spine north requested on 13.1.1955 to be delivered on 1.3.1955.
2. Stair No. 8 asked for 8.2.1955 to be delivered 1.3.55, not yet delivered.
3. All internal stairs to A, B, C, D and Spine asked for 1.3.1955 to be delivered 22.3.1955 and not yet delivered.

I am forced to terminate your Contract and Notice is hereby given that your contract is determined as from to-day.

Karl Schreiner

Dated at Canberra this 20th day of April one thousand nine hundred and fifty-five. "

One other matter remains to be mentioned before reference is made to the manner in which the parties subsequently elected to proceed to trial. It is that on the 15th February 1955 a document in the form of a letter was prepared and thereafter signed by the respondent and "accepted" by the subscription of the / appellant. The letter was as follows:-

"K. Schreiner, Esq., 15th February, 1955
Lonsdale Street,
BRADDON. A.C.T.

Dear Sir,

Re. Structural Steel, Medical School

We undertake to complete all work specified and drawn, and to set out in the Bill of Quantities, all items on pages 39 to 57, and items A. to E inclusive

page 58, for a fixed price of £17,880.3.0.

Time of Completion:

We are aware that the job must be completed on 31.1.56, and our time of work will fall within this time, and will be compatible with your requirements as the job demands delivery and erection of the various parts.

Canberra Wholesalers accept full responsibility for obtaining in good time all information they require, and ensure that the set of drawings they hold is up to date. Mrs Schreiner agrees to co-operate to the best of her ability.

Penalty:

Penalty for non delivery of goods as requested in writing with 3 weeks notice £15. 0. 0 per week.

Payment:

14 days on progress certificates checked by the Quantity Surveyor and Architects, including materials on the site.

Variations:

All variations to be agreed to by the Architects and Quantity Surveyors as regard lump sum prices, rates and quantities within 14 days.

Extension of time on approval of the Architects only.

Trusting this meets with your approval,

Yours faithfully,

Canberra Wholesalers Pty. Ltd. "

It was this document which the pleadings appear to treat as the contract between the parties but the fact is they had made an oral contract at a much earlier stage and the letter appears to have been intended as being but a confirmation of the earlier oral contract. Indeed, by the 15th February 1955 a considerable amount of the contract work had already

been performed and two progress or interim payments had already been made to the respondent. In the circumstances, it would seem that this instrument was intended to define the rights and obligations of the parties with respect to the whole of the necessary work and the evidence shows that after it had been prepared and signed the parties so regarded it.

It has been necessary to refer to these matters for they form the background against which the parties stated an issue for the determination of the trial judge. Apparently they considered that it was desirable to avoid a long judicial inquiry as to the damages alleged by each party and thought that the issue of liability might readily be determined by considering whether the notice of the 20th April 1955 had operated to terminate the contract. Upon the pleadings this may very well have been so but, unfortunately, they did not formulate an appropriate issue of fact for the consideration of the trial judge. What was agreed upon was that his Honour should decide "whether the notice of the 20th April 1955 was valid". No doubt they wished him to decide whether, in the circumstances, the appellant was, on that date, entitled to terminate the contract but in view of the pleadings it may be thought that the formulation of this issue could not, even on the most liberal construction, have extended his Honour's inquiry beyond the grounds relied upon in the statement of defence. But upon the trial the pleadings seem to have been disregarded and evidence was given which necessitates the following conclusions:-

(1) That as early as the beginning of November 1954 the respondent and the appellant entered into an oral agreement in almost precisely the same terms as those appearing in the letter of the 15th February 1955. The only matter of difference appears to be that the letter contained a stipulation concerning penalties;

(2) That a considerable part of the delays upon which the appellant relied at the trial took place at times between

the middle of December 1954 and the 15th February 1955. This was, in some measure, true of the first item specified in the notice of the 20th April 1955 for the request for this work to be performed was said to have been made on the 13th January 1955. To a lesser extent the same was true of the second item and was, to a much greater extent, true of many of the items set out in the appellant's letter of the 12th April 1955 in which complaints were made concerning the delays that had taken place;

(3) That by the 20th April 1955 the respondent had performed work pursuant to the contract to the value of £4,555.19. 6 and that a great part of this work had been performed prior to the 15th February 1955; and

(4) That by the 8th December 1954 the appellant had paid to the respondent the sum of £1,045 in two progress or interim payments.

Upon the evidence in the case the appellant then contended that on the 20th April 1955 he was entitled to treat the contract as at an end. Primarily, it was contended, in some way which it is not entirely easy to understand, that time was of the essence of the contract and that there had been a failure on the part of the respondent to execute particular parts of the work within specified times. Alternatively, it was asserted by the appellant that the magnitude and character of the delays had been such as to entitle him to regard the respondent's conduct as a repudiation of its contractual obligations. The parties seem to have treated as implicit in the findings of the trial judge that the respondent had been guilty of delays which constituted breaches of the contract but he rejected the appellant's primary contention and also the alternative contention that the breaches were of such a character as to entitle the appellant to terminate the contract. Then, after the parties had reached agreement upon the appropriate

amounts to be awarded by way of damages he adjudged the respondent to be entitled to the sum of £4,900. As appears from his Honour's order this amount represents the difference between a verdict for £5,850 for the respondent and a verdict for the appellant upon his cross-action for £950. The amount of the verdict for the plaintiff includes, in addition to an agreed amount for work which had then been performed and for work in progress, two items aggregating £1,750 for loss of profits and interest.

Before us the question of whether time was of the essence of the contract was again solemnly debated but as an answer to the respondent's claim it was doomed to failure for more than one reason. Not the least of these was the fact that the contract does not contain any term which is capable of being understood as a stipulation concerning the time within which any separate part, or parts, of the work should be completed. It is true that the letter of the 15th February contains a paragraph, headed "Time of Completion", which runs as follows:

> "We are aware that the job must be completed on 31.1.56, and our time of work will fall within this time, and will be compatible with your requirements as the job demands delivery and erection of the various parts".

Further, the penalty provision, then introduced for the first time, stipulated "Penalty for non-delivery of goods as requested in writing with three weeks' notice Fifteen pounds per week". But neither the reference to the 31st January 1956 and the statement that "our time of work will fall within this time" nor the addition that (our work) "will be compatible with your requirements as the job demands delivery and erection of the various parts" required the performance of individual items of the work to be completed within any specified time. Nor did the latter provision entitle the appellant to fix inflexible limits of time within which individual items of work should be performed by the respondent. No doubt the penalty provision contemplated that requisitions upon three weeks' notice would be

fulfilled but there is nothing in this clause to indicate that the parties intended that unless requisitions were executed within that period the appellant should be at liberty to terminate the contract. These are not, however, the only considerations which tell against the appellant on this line of defence for, even if it were possible to reach the conclusion that the appellant was entitled, by his "requirements", to make time of the essence for the purpose of individual items, it is quite clear from the evidence in the case that any purported requirements of this character were waived. On this aspect one may take as a starting point the appellant's letter of the 12th April 1955 in which he complained of the respondent's delays and conveniently summarised his matters of complaint. More particular reference will be made to this letter at a later stage but for present purposes it may be accepted as accurate since it purports to state the full extent of the delays of which the appellant, at that time, complained. In all, it deals with some thirteen items of work said to have been requisitioned at times between the 23rd November 1954 and the 11th March 1955. The due dates for the delivery to the job of the appropriate materials are specified as falling between the 14th December 1954 and the 1st April 1955 and, from the dates specified, it appears that a number of items were requisitioned after seven earlier requisitions were already overdue. In respect of three of these seven the respondent was said to have been in default since dates in December 1954, in respect of one, since the 7th February 1955 and, in respect of the other three, since the 1st March and the 10th March 1955. The later six requisitions, four of which were given after the 10th March 1955, should have been executed, it is said, at times between the 15th March 1955 and the 1st April. The summary is, it appears, compiled on the basis that the respondent was bound to execute each requisition within three weeks though this basis

was not justified by the contract nor, in every case, could it have been justified by the terms of the individual order. In addition to these matters, it appears that in the month of March, and at a time when the bulk of the work mentioned in the letter of 12th April 1955 was said to be overdue for completion, the appellant had insisted upon the respondent completing that work. In particular, on the 30th March 1955, which was only one day before the last four items specified in the letter of the 12th April were said to be due for delivery, the appellant wrote to the respondent in terms which clearly showed that, at that time, he regarded the contract as still on foot. Again, on the 7th April 1955 the respondent supplied and the appellant accepted on the job some twenty-six steel roof trusses. These were comprised in the third item in the letter of the 12th April 1955 and their acceptance at that time clearly shows that, even if the failure of the respondent to execute all or any of the outstanding orders by the times specified in that letter had constituted a ground upon which the appellant might have terminated the contract, he had elected not to do so.

At this stage it should be said that there was no evidence capable of sustaining the appellant's contention, as alleged in his statement of defence, that he became entitled to terminate the contract on the ground that the respondent's work was defective and, accordingly, it is apparent that the appellant could not succeed upon the issues tendered by the statement of defence.

In these circumstances, the question arises whether we should treat the matter as one in which the appropriate issue on the score of the respondent's delay was really raised for decision and fairly and squarely litigated. It is true that in argument at the trial the alternative submission was made "that delay, where time is not of the essence of the contract, does not amount to repudiation by the plaintiff so as to permit the defendant to renounce the contract,

unless the delay is such as to show that the other party cannot or will not carry out the contract" and, further, that the trial judge purported to make a finding on this issue. His view was expressed briefly by saying that "the evidence fell far short of proving that the plaintiff could not or would not carry out the contract", and there may be some reason for thinking that, in the somewhat confused circumstances of the trial, this issue, which was the real issue between the parties, assumed a somewhat diminished importance. But upon a consideration of the evidence it seems that, in spite of the pleadings, it is impossible to say that the parties did not, by common consent, devote a considerable amount of attention to this issue. In some respects the evidence may be thought deficient in that it fails to reveal the full significance of the delays in relation to the general work of construction and does not furnish a very ample background against which the delayed work may be seen in perspective against the work already done and that which remained to be done. These deficiencies, however, do not appear to have resulted from the fact that the parties considered that the general question of delay was not in issue; on the contrary they believed that it was and shaped their cases accordingly. In these circumstances the fact that the appropriate issue was not formally raised should not be taken as a ground for sending the case for a general new trial if that course can properly be avoided. After careful consideration of the evidence, including the documents in the case, it is possible to say that this course should not be adopted and that we should accede to the submission of the parties and review the evidence for ourselves in the light of the decision of the trial judge. But the brief observation of the trial judge that "the evidence fell far short of proving that the plaintiff could not or would not carry out the contract" is of little assistance in appreciating the reasons which led to his conclusion though it

does seem that questions of credibility played no substantial part. The extent of the delays appears to be beyond dispute as also is the fact, disclosed by the documents in evidence, that complaints on this score were made on many occasions. Yet the difficulty remains of saying whether, in all the circumstances, the respondent's breaches of contract were not only answerable in damages but also revealed such an indifference to, or inability to perform, its contractual obligations as to constitute a virtual repudiation of them.

In approaching this problem it should be said that the circumstances already related make it proper to take into consideration all of the delays which occurred after the parties made their oral agreement in November 1954 and that it is necessary to examine the evidence in relation to the respondent's undertaking that its work would be "compatible with your (the appellant's) requirements as the job demands delivery and erection of the various parts". This could, of course, mean no more, and, indeed, no less, than that the respondent should execute the appellant's requisitions within a reasonable time. The findings of the learned trial judge involve the conclusion that there were breaches of this obligation and we have not been asked to review the award of damages based upon that consideration. But it is said that the breaches were not of such a character or quality that, in the circumstances, the appellant was, on 20th April 1955, entitled to determine the contract.

Reference to the letter of 12th April 1955 may again be made to see just what it was of which the appellant was then complaining. As already appears there had been more or less substantial delays in respect of some thirteen items but of these the roof trusses were delivered on 7th April 1955 although on 20th April 1955 they had not been erected by the respondent. The remaining items, which were said to represent some 60 to 70 per cent in value of all the items which had been requisitioned under the contract,

were never brought to the job. Some of the specified items had been requisitioned as early as November 1954, some in January 1955 and the others in February and early March and were still not forthcoming on 20th April. Constant complaints had been made by the appellant some of which were made orally and others in the letters tendered in evidence. It is unnecessary to refer to the substance of all of these complaints but on the 1st March 1955 the appellant drew the respondent's attention to the items previously requisitioned and which had not been then delivered. By his letter of that date he complained that material requisitioned in November and December and again in January was still outstanding and he made a further requisition for specified internal steel work. In the final paragraph of the letter he pointed out that steel work which had been promised "some time ago" was "still not on the job" and intimated that this circumstance was not only delaying the progress of the work but also involved a considerable amount of expense because of the necessity of leaving scaffolding in position. A further written request was made on 11th March that the material then overdue should be supplied within three weeks. Then about a week before giving the notice of the 20th April 1955 the appellant consulted his solicitor and thereafter "warned" the respondent.

It is quite clear that the respondent had failed in a substantial measure to fulfil its contractual obligations and it is of importance to inquire why this had occurred. One suggested reason was that variations in the contract work had resulted in delay. Another was that steel was difficult to obtain. But there was no evidence capable of establishing that the first factor was of such a character as to produce any substantial delays whilst, even if the second factor is a material matter for our consideration, the evidence indicates that after the notice of the 20th April 1955 supplies were readily forthcoming from an alternative source. In his

evidence Mr. Elliman, the managing director of the respondent, sought to justify the non-delivery of quantities of material by asserting that requisitions were made too early and that the respondent was under no obligation to execute requisitions until the job had reached the appropriate stage. He claimed that the internal steel stairs for a number of the wings of the building were not supplied because "the job was not ready for them". Again, he claimed that other steel work was not delivered or erected because "the job was not ready". But the evidence on this point is to the contrary and the plain fact seems to have been, as he subsequently admitted, that the respondent was unable to supply this material at any time prior to the 20th April. It rather seems that the prompt execution of the appellant's requisitions was beyond the capacity of the respondent which was attempting to execute its share of the work with inadequate man-power. When asked in cross-examination whether he would agree that "never at any stage up to the time of rescission did (the respondent) have an adequate number for handling the steel" he replied "not under the conditions we had to handle it". When asked what the conditions were he said he would prefer to leave the answer to that question to his foreman. But the foreman on the job was not called to give evidence concerning any of these matters and there is not the slightest reason for thinking that the respondent was required by the appellant to work under conditions which could in any way be responsible for the delays which, in fact, occurred. Again, when asked about his attitude to the appellant's requisitions and whether he was concerned about the complaints which had been made he said "To me it seemed like measles, they were coming that regularly". On the whole it seems reasonable to conclude that the respondent was somewhat overwhelmed by the quantity of materials and work required of it with the result that there were substantial delays during a period which extended over nearly six months and, further,

that there was every reason for the appellant's apprehension that the same conditions would prevail during the currency of the contract if it remained on foot. Indeed, there was no reason for thinking otherwise and this could not have failed to be matter of grave concern to the appellant to whom the co-ordination of the work of constructing the building was a matter of prime importance. His constant complaints and his requests to the respondent to execute the work required of it were, in our view, completely justified and, when the notice of the 20th April was given, he was entitled to conclude that there was no prospect of the respondent standing up to its contractual obligations. That being so, he was at that date entitled to terminate the contract.

Accordingly, the judgment of the Supreme Court should be set aside and there should be a new trial on two issues, the first as to the damages sustained by the appellant and the, second, as to the amount due to the respondent for work done under the contract. The latter inquiry is necessary because the contract, in our view, was not an entire contract, but one under which the respondent was entitled to payments from time to time for the work executed by it.