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IN THE HIGH COURT OF AUSTRALIA

THE COMMONWEALTH OF AUSTRALIA

V.

A.E. GOODWIN LIMITED

REASONS FOR JUDGMENT

ORIGINAL

Judgment delivered at MELBOURNE

on MONDAY, 15TH MARCH, 1965.

A. C. Brooks, Government Printer, Melbourne
C.7639/60

THE COMMONWEALTH OF AUSTRALIA

v.

A. E. GOODWIN LIMITED

ORDER

Judgment for the plaintiff for £26,726 11s. 0d. and costs.

THE COMMONWEALTH OF AUSTRALIA

v.

A. E. GOODWIN LIMITED

JUDGMENT MENZIES J.

THE COMMONWEALTH OF AUSTRALIA

v.

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When the trial of this action began, it appeared that there were three issues: (1) whether there was a contract between the parties for the manufacture by the defendant of 154 railway goods wagon bogies at the price of £698 each; (2) whether the defendant had repudiated that contract; and (3) if so, whether the Commonwealth's claim for £26,726 11s. 0d. damages was excessive. In the course of the trial, counsel for the defendant, in the face of the strength of the plaintiff's case, abandoned the first and third matters, leaving for decision the one question whether it had been shown that the defendant had repudiated the contract.

Whether there was repudiation may be considered (i) having regard to clause 23(1)(C) of the General Conditions of Tender and Contract - a document forming part of the contract - and (ii) independently of that provision.

It was argued for the defendant that no regard can be had to clause 23(1)(C) because it constitutes an unlawful attempt to oust the jurisdiction of the courts. That argument I reject. My reason for doing so will become apparent from my statement of my understanding of the effect of the provision itself.

Not every breach of a contract amounts to the repudiation of that contract. A breach, to be so regarded, must be one going to the root of the contract. But the parties to a contract may, if they wish, stipulate that a particular breach should be regarded as amounting to the repudiation of the whole contract. See the statement of law by Jordan C.J. in Tramways Advertising Pty. Ltd. v. Luna Park (N.S.W.) Ltd.

38 S.R. (N.S.W.) 632, at pp. 641 and 642. Such a purpose clause 23(1)(C) was intended to serve and, as I read that provision, it makes a failure to make progress with, or carry out, a contract to the satisfaction of the Contract Board constituted pursuant to the Supply and Development Act 1939-1948 (hereinafter called "the Board"), inter alia, a breach going to the root of the contract and amounting to its repudiation unless the contractor shows cause, to the satisfaction of the Board, why it should not have that effect. So much of this provision as is relevant here is obviously not concerned in any way with ousting the jurisdiction of the Court. Indeed, it recognizes that the Commonwealth must go to the Court if it desires to establish repudiation and recover damages therefor. Accordingly, if the Commonwealth has shown two things - (1) that the defendant failed to make progress with, or carry out, the contract to the satisfaction of the Board; and (2) that the defendant did not account for that failure to the satisfaction of the Board - then there was a breach of contract which amounted to its repudiation by the defendant.

As to the first of these matters, the letter from the Secretary, Contract Board, to the defendant dated 28th January 1959 and the notice enclosed - sent as they were under the authority of the Board's decision recorded in its minutes of 14th January 1959 - satisfies me that the Board was very much dissatisfied with the defendant's progress with, and carrying out of, the contract. The principal contention on behalf of the defendant was, however, that upon the evidence I should not find that the defendant had failed, to the satisfaction of the Board, to show cause as required by the notice. This I will now consider.

By the statement of claim it was alleged that "The defendant failed to show cause to the satisfaction of the

said Board why the said contract should not be treated as having been repudiated by the defendant". This allegation was not put in issue; what the defendant did was to refrain from admitting that the truth of the allegation would entitle the plaintiff to rescind the contract or treat it as having been repudiated by the defendant. It was proved that on 18th February the Contract Board considered the substance of the defendant's letter of 10th February 1959, written in reply to the notice that had been sent to it, and recommended approval to forwarding to the defendant a letter drafted by the Assistant Crown Solicitor and informing it as follows: "The Contract Board has considered the representations contained in your Company's letter but is not satisfied that the Company has shown cause, as required by the Notice of the 28th January, 1959, why the Contract should not be treated as having been repudiated by your Company". Mr. Stephen's contention that the Contract Board did not exercise the discretion which it had, but automatically adopted the opinion of the Assistant Crown Solicitor that the company had failed to show cause, hardly does justice to the Board which was, of course, entitled to professional advice. Having regard to the matters to which I have already referred, I am satisfied that the proper finding is that the Board did consider the matter and concluded that the defendant had failed to show cause as required.

Looking at the evidence, however, independently of the special provisions of clause 23(1)(C), I am still satisfied that the defendant did repudiate the contract because it was unable to fit the bogies with the "Athermos" axle boxes, which the contract required, except by purchasing them from the sole Australian manufacturer, Bradford Kendall Ltd., at what it regarded as an extortionate price. Mr. Stephen argued that the defendant could, and was ready to, carry out its contract by fitting "Athermos" axle boxes supplied from abroad. Assuming,

without deciding, that the contract did allow the use of imported boxes, I am nevertheless satisfied that the defendant, having been refused an import licence, was not in a position to import them and, furthermore, if they could have been imported, they could not have reached Australia in time for the completion of the contract by the due date. Accordingly, the defendant's only practicable way of carrying out its contract was to use Australian-made boxes, and this it had firmly determined not to do. In the circumstances, not being able to carry out its contract except at a substantial loss, it refused to do so and repudiated the contract. I therefore find the only issue left to me in favour of the plaintiff.

Accordingly, there will be judgment for the plaintiff for £26,726 11s. 0d. and costs.

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