SUPREME COURT OF QUEENSLAND

CITATION:	*Mazelow P/L v Herberton Shire Council* [2002] QCA 119
PARTIES:	**MAZELOW PTY LTD** ACN 052 101 229 (respondent/ plaintiff) **v** **HERBERTON SHIRE COUNCIL** (appellant/defendant)
FILE NO/S:	Appeal No 11407 of 2001 SC 495 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	5 April 2002
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2002
JUDGES:	McPherson and Williams JJA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	CONTRACTS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – OTHER CASES – whether rights under general law can be considered excluded - where there is no explicit intention expressed to exclude common law rights CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION – OTHER PARTICULAR CASES – whether the contract is brought to an end after repudiation by one party is accepted by the other - where there is no explicit intention expressed to exclude common law rights. CONTRACTS – BUILDING AND ENGINEERING AND RELATED CONTRACTS – PERFORMANCE OF WORK – REMEDIES FOR BREACH OF CONTRACT – POWER TO SUSPEND OR DETERMINE – whether the right to suspend work is a right or remedy available – where there is no express contractual provision. *Amann Aviation Pty Ltd v Commonwealth* (1991) 100 ALR 267, applied

Amann Aviation Pty Ltd v Commonwealth (1990) 22 FCR 527, distinguished
Heyman v Darwins Ltd [1942] AC 356, applied
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457, applied
Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd [1995] QB 174, considered

COUNSEL: M P Amerena for the appellant
A J Moon for the respondent

SOLICITORS: MacDonnells for the appellant
Connolly Suthers for the respondent

[1] **McPHERSON JA**: On 23 September 1999 the tender of the plaintiff as Contractor was accepted by the defendant Shire Council as Principal for carrying out strengthening work on the Old Wild River Dam. The agreement, which incorporated General Conditions of Contract in the form AS124-1992 together with annexures A and B, was a schedule of rates contract but included specified lump sum items. The work to be done involved the drilling of a number of holes in the dam wall and the design, supply and installing of anchor systems, as well as grouting and testing them. Based on correspondence from the plaintiff, it appears that problems emerged when, in carrying out the drilling, "voids" were encountered in the concrete wall of the dam making it, so the plaintiff claimed, difficult and dangerous to attempt to install anchors in the holes drilled. As a result the contract work came to a halt.

[2] On 17 April 2000 the engineers as Superintendent under the contract wrote a letter to the plaintiff. It referred to a meeting at which the problems had been discussed and informed the plaintiff that it would be advised of the defendant's intentions with regard to the uncompleted works under the contract. The letter gave the plaintiff a direction to carry out certain works including completing the drilling of hole 5; sealing of anchors in holes 10 and 15; and installing strands for the balance of the holes, excluding holes 10 and 15 and possibly some others. "This work scope on all other holes", must, the letter said, "be proceeded with under the contact as soon as environmentally possible". This, it was explained, would allow the plaintiff contractor to implement the majority of the contract works in accordance with the contract terms, with payments to be made at contract rates and times. However, after a reference to possible deletion of cable works for specified holes, the letter went on to say:

> "the balance of the outstanding works will not be proceeded with under your contract."

[3] The plaintiff replied by letter dated 5 May 2000, in which it stated its position in relation to holes 5 and 10, and advised of its concerns about the structural integrity of the dam wall if stressing of cables near voids was attempted. It offered the opinion that doing so would be negligent and, potentially, criminally so in the event of injury or death being caused by failure of the dam. The plaintiff claimed that the Superintendent's letter of 17 April 2000 amounted to a repudiation of the

contract on behalf of the defendant, which the plaintiff elected to accept, and it reserved its right to commence proceedings for damages.

[4] Proceedings followed, in which a statement of claim was delivered by the plaintiff and a defence and counterclaim by the defendant, followed by a reply and answer. The defence as amended denied that there had been a repudiation of the contract, but added in para 5(c) that, if there had been, it was governed, to the exclusion of the plaintiff's common law rights to terminate the contract, by the provisions of cl 44 of the General Conditions of Contract; and that the purported termination of plaintiff's letter of 5 May 2000 was ineffective in that it failed to comply with cl 44 of those General Conditions.

[5] By agreement between the parties, a question was brought before Cullinane J in the Supreme Court at Townsville for determination as a point of law involving construction of the contract. His Honour said the issue he was asked by the parties to determine at that hearing was whether cl 44 of the General Conditions provided an exclusive means of terminating the contract, with the consequence of excluding the plaintiff's right under the general law of notifying its election to accept a repudiation of the contract. For the purposes of these proceedings, his Honour was, and on appeal we are, asked to assume that the letter of 19 April 2000 amounted to a repudiation of the contract by the defendant.

[6] Material provisions in cl 44 of the General Conditions of Contract are as follows:

> "**44. DEFAULT OR INSOLVENCY**
>
> **44.1 Preservation of Other Rights**
>
> If a party breaches or repudiates the Contract, nothing in Clause 44 shall prejudice the right of the other party to receive damages or exercise any other right.
>
> …
>
> **44.7 Default of the Principal**
>
> If the Principal commits a substantial breach of contract and the Contractor considers that damages may not be an adequate remedy, the Contractor may give the Principal a written notice to show cause.
>
> Substantial breaches include but are not limited to -
>
> (a) failing to make a payment, in breach of Clause 42.1;
> (b) failure by the Superintendent to either issue a Certificate of Practical Completion or give the Contractor, in writing, the reasons for not issuing the Certificate within 14 days of receipt of a request by the Contractor to issue the Certificate, in breach of Clause 42.5;
> (c) failing to produce evidence of insurance, in breach of Clause 21.1;
> (d) failing to give the Contractor possession of sufficient of the Site, in breach of Clause 27.1, but only if the failure continues for longer than the period stated in the Annexure; and/or
> (e) failing to lodge security in breach of Clause 5.
>
> **44.8 Requirements of a Notice by the Contractor to Show Cause**
>
> A notice under Clause 44.7 shall -

(a) state that it is a notice under Clause 44 of the General Conditions of Contract;
(b) specify the alleged substantial breach;
(c) require the Principal to show cause in writing why the Contractor should not exercise a right referred to in Clause 44.9;
(d) specify the time and date by which the Principal must show cause (which shall not be less than 7 clear days after the notice is given to the Principal); and
(e) specify the place at which the cause must be shown.

44.9 Rights of the Contractor

If by the time specified in a notice under Clause 44.7 the Principal fails to show reasonable cause why the Contractor should not exercise a right referred to in Clause 44.9, the Contractor may by notice to the Principal suspend the whole or any part of the work under the Contract.

The Contractor shall lift the suspension if the Principal remedies the breach but if within 28 days after the date of suspension under Clause 44.9, the Principal fails to remedy the breach or, if the breach is not capable of remedy, fails to make other arrangements to the reasonable satisfaction of the Contractor, the Contractor may by notice in writing to the Principal terminate the Contract.

The Contractor shall be entitled to recover from the Principal any damages incurred by the Contractor by reason of the suspension.

44.10 Rights of the Parties to Termination

If the Contract is terminated under Clause 44.4(b) or Clause 44.9 the rights and liabilities of the parties shall be the same as they would have been at common law had the defaulting party repudiated the Contract and the other party elected to treat the Contract as at an end and recover damages."

In addition, it is necessary to set out the provisions of cl 47.1 and cl 47.4 of the General Conditions:

"**47.1 Notice of Dispute**

If a dispute between the Contractor and the Principal arises out of or in connection with the Contract, including a dispute concerning a direction given by the Superintendent, then either party shall deliver by hand or send by certified mail to the other party and to the Superintendent a notice of dispute in writing adequately identifying and providing details of the dispute.

Notwithstanding the existence of a dispute the Principal and the Contractor shall continue to perform the Contract, and subject to Clause 44, the Contractor shall continue with the work under the Contract and the Principal and the Contractor shall continue to comply with Clause 42.1.

A claim in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration, may be included in an arbitration.

…

47.4 Summary or Urgent Relief
Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under Clause 42 or to seek urgent injunctive or declaratory relief in respect of a dispute under Clause 47 or any matter arising under the Contract".

[7] It was said to be common ground on appeal, as it was in the court below, that rights under the general law are not to be regarded as excluded unless the contract manifests an explicit intention of doing so: cf *Amann Aviation Pty Ltd v Commonwealth* (1991) 100 ALR 267, 300. For the plaintiff it was submitted that, far from demonstrating any such intention, cl 44.1 expressly preserved the plaintiff's contractual right to accept a repudiation and so terminate the contract. For the defendant, it was contended that cl 44 required a particular procedure to be followed in order to achieve that result; and, if that procedure was not followed, the rights of the parties were regulated by cl 47, which was inconsistent with any right to bring the contract to an end by electing to accept the repudiation.

[8] Repudiation of a contract if accepted by the other party brings the contract to an end and discharges both parties from further performance. It is, however, established law that its effect is to discharge them only from further performance of obligations under the contract and not to relieve them of those that have already arisen or accrued before breach: *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457. In addition, ever since the decision in *Heyman v Darwins Ltd* [1942] AC 356, it has been settled that a contractual provision for arbitration of disputes survives termination or discharge of the contract on breach. It does so because it is collateral or ancillary to, and not part of, the unperformed primary obligations undertaken by the contracting parties that are discharged. See the analysis in *Yasuda Fire & Marine Insurance Co v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174, 188-190. From this it follows that, considered apart from the particular contractual provisions on which the parties rely in the present case, and treating the letter of 17 April 2000 as a repudiation of the contract, the plaintiff would have been entitled to accept that repudiation as it did and bring the contract to an end. By doing so, it would be relieved from further performance of its obligations under the contract. The contract would have been terminated even if the ancillary provision for arbitration in cl 47 continued to operate.

[9] The question is whether there is anything in the General Conditions to displace these principles of the general law. Clause 44 seems clearly enough not to have that effect. On the contrary, cl 44.1 expressly provides that, if a party repudiates the contract, nothing in cl 44, which includes cl 44.1 itself, is to prejudice the right of the other party to receive damages or to "exercise any other right". There is no reason why "any other right" should not include the right of election to terminate the contract. Together with damages, rescission as it is sometimes called is the primary remedy for breach of contract. It is sometimes, but not always, possible to obtain specific performance or an injunction to restrain the breach; but, in the case of an engineering contract like this, such remedies are not often sought or obtained. If "other right" does not include the right to terminate the contract, it is not easy to identify what s 44.1 is intended to refer to. I do not understand Mr Amerena of counsel for the defendant to have been contesting this.

[10] It is true that, in the event of a substantial breach of contract by the Principal, later provisions of cl 44 prescribe in some detail the procedure to be followed for giving a written notice to show cause (cl 44.7). The expression "substantial breach" is widely and not exhaustively defined. By cl 44.7, it includes various acts or omissions some of which might in some circumstances amount to repudiatory conduct by the Principal. However, none of those defined acts or omissions extends to a final and definitive refusal to perform the contract any further, which is what, for the purpose of this appeal, the letter of 17 April 2000 is to be taken as evincing. In any event, cll 44.7 and 44.9 have as their primary object not the termination of the contract but the suspension in whole or part of the work under the contract: see cl 44.9. In the absence of express contractual provision to that effect, suspension of work is not a right or remedy that is available to a contractor under a building or engineering contract, which is no doubt why a detailed procedure, which includes the giving of notice specifying the breach, is incorporated in the contract by those subclauses.

[11] It is only if, after notice, the Principal fails to justify or to remedy the breach so specified that a power to terminate arises under cl 44.9. Once the contract is terminated in that way, cl 44.10 provides in effect that the rights and liabilities of the parties are to be the same as at common law on discharge following repudiation; but none of the preceding provisions would be capable of applying at all if the contract had already been brought to an end under the general law by electing to accept the repudiation. There could be no question of suspending work under the contract if the Contractor had been discharged from the duty of completing it. Clause 44 does nothing to displace the plaintiff's right to accept a repudiation of the kind that is acknowledged or predicated as having taken place here. By cl 44.7, it simply prescribes an alternative procedure that may in some circumstances lead to that result. It neither expressly nor by implication excludes the right of the Contractor to exercise its common law power to terminate the contract in the event of repudiation by the Principal.

[12] The remaining question is whether cl 47 headed **Dispute Resolution** has the effect of displacing the plaintiff's right under the general law to do what it did here; that is, to accept the repudiation and treat the contract as at an end. Cause 47.1 is one of a series of provisions leading to arbitration of disputes under cl 47.3. It is directed to the mechanics of setting that procedure in motion, which is conditioned on an initial attempt at dispute resolution. In prescribing the procedure, the first paragraph of cl 47 provides that, if "a dispute between the Contractor and the Principal arises out of … the contract", a written notice of dispute may be given. Having so provided, the second paragraph of cl 47.1 goes on to say:

> "Notwithstanding the existence of a dispute, the Principal and the Contractor shall continue to perform the contract, and subject to clause 44, the Contractor shall continue with the work under the contract and the Principal and the Contractor shall continue to comply with clause 42.1."

[13] The paragraph is nothing more than a version of a familiar provision found in most contracts of this kind, which is designed to ensure that the contract continues to be performed during the currency of disputes, dispute resolution, and arbitration of those disputes. It says nothing to the effect that work under the contract must be continued even though the contract has been brought to an end by an election by one party to accept a repudiation by the other. Indeed, it is quite inconsistent with

such a notion; for, as we have seen, termination of a contract following repudiation has the consequence that the parties are relieved of their unperformed primary obligations, which in the case of the contractor is to carry out the work under the contract, without affecting an ancillary provision like cl 47 aimed at resolving or determining disputes between them.

[14] The defendant nevertheless submits that there was, in this instance, a "dispute" within the meaning of cl 47.1 and, that being so, the second paragraph of cl 47.1 required the plaintiff to continue to perform the contract during the pendency of efforts to resolve or arbitrate that dispute. To interpret the paragraph in that way would be to impute to it the function of resurrecting the primary unperformed contractual obligations which the plaintiff's acceptance of the defendant's repudiatory action had brought to an end. Such an interpretation of the paragraph is unsustainable; but, in any event, the operation of the provision in that way would depend at the very least on the existence of a "dispute" about the repudiation and its acceptance. Here, there was and is no such dispute. Repudiation by the defendant is, for the purpose of these proceedings, a matter that is admitted by the defendant. It is not the subject of any dispute. Nor is there any dispute about the plaintiff's act of accepting that repudiation. The only question is whether, on its proper construction, the contract has been bought to an end, which is the question that was, by agreement of the parties, submitted for determination by the Court. In response to this difficulty, it was argued that, if the surrounding material is looked at, it becomes evident that there was an antecedent dispute between the parties that led to the Superintendent's letter of 17 April 2000, which embodied the acknowledged repudiation. So there may have been; and no doubt it is a dispute that may be submitted to the process of dispute resolution and arbitration pursuant to cl 47. Requiring that process to be undertaken cannot, however, revive the primary unperformed obligations of the plaintiff if they have already been terminated. That is not the function of cl 47.1 or, in particular, of the second paragraph of cl 47.1 beginning with the words "Notwithstanding the existence of the dispute …". Its function is to ensure that, despite the existence of a dispute, the work will continue under the contract if it still exists.

[15] On one view of cl 47.1, this state of affairs is expressly recognised by that paragraph. It provides that "*subject to clause 44*" the Contractor shall continue with the work, and that the Principal and Contractor shall continue to comply with cl 42.1 (which provides for the delivery by the Contractor of claims for payment, and for the payment of those claims by the Principal). Some passing reliance was placed by Cullinane J on the italicised words quoted in reaching his conclusion in this matter. The defendant objects that, if this were correct, the words "subject to clause 44" would have been located in the second paragraph of cl 47.1 before "the Contractor shall continue to perform the contract", and not, as they are, before the words "the Contractor shall continue with the work under the contract". In a world of perfect drafting, that might well be so; but the intention seems clearly enough to be that the provisions in cl 44 relating to suspension of the work and termination of the contract should be excepted from the operation of the second paragraph of cl 47.1. Even if this is not literally so, that paragraph still does not impose on the plaintiff as Contractor the obligation of performing the work from which it has been relieved by termination of the contract whether under cl 44.9 or by the operation of general principles of contract law.

[16] In the result, I consider that there is nothing in either cl 44 or cl 47.1 to deprive the plaintiff here of its right to terminate the contract by accepting the defendant's amended act of repudiation constituted by the letter of 17 April 2000. It is perhaps somewhat surprising that counsel were not able to refer the Court to any decision directly in point, especially having regard to the length of time during which contracts and provisions like cll 44 and 47.1 have been in use. Presumably the question has never been raised before. For the plaintiff, Mr Moon of counsel mentioned *Amann Aviation Pty Limited v Commonwealth* (1990) 22 FCR 527, 532-533, in the reasons of Davies J, where it was accepted that the right to terminate by electing to accept a repudiation existed independently of an express clause providing for cancellation of the contract upon breach; but the clause in question there was so different in its terms as to make the observations of Davies J on the subject of only the most indirect authority on the matter in issue here.

[17] In my opinion the result in the case of this contract is clear. The decision given below was correct, and the appeal should be dismissed with costs.

[18] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment prepared by McPherson JA and I agree with all that he has said therein.

[19] I would merely add that counsel for the appellant relied on the decision of the High Court in *PMT Partners Pty Ltd v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 in support of his argument that cl 47 of this contract precluded the respondent contractor from electing to accept the appellant's repudiation. It is true that the term "dispute" has a wide meaning; Debelle J has usefully collected relevant authorities in *Santos Ltd v Pipelines Authority of SA* (1996) 66 SASR 38 at 44. But as McPherson JA has pointed out there is no dispute here with respect to the appellant's repudiation and the respondent's acceptance of it. If on the proper construction of clauses 44 and 47 the contractor was entitled to accept the principal's repudiation and thereby bring the contract to an end there was no dispute to which cl 47 could apply.

[20] That is sufficient to distinguish *PMT Partners*. That case essentially establishes no more than that if there is a dispute which is properly the subject of the arbitration clause, then the wording of the arbitration clause may preclude recourse to other remedies through the courts. In the circumstances of this case *PMT Partners* does not assist the appellant's case.

[21] I agree with the orders proposed by McPherson JA.

[22] **MUIR J:** I have had the advantage of reading the reasons for judgment of McPherson JA and agree with all that he has said and with the orders proposed.