IN THE SUPREME COURT OF QUEENSLAND No. 24 of 1984

FULL COURT

BEFORE:

Mr. Justice Connolly

Mr. Justice Thomas

Mr. Justice Derrington

BRISBANE, 31 AUGUST 1984

BETWEEN:

HUDSON CRUSHED METALS PTY. LTD. Appellant

- and -

JAMES HENRY, ETHEL HENRY and ROBERT HENRY Respondents

JUDGMENT

MR. JUSTICE CONNOLLY: In my opinion this appeal should be dismissed with costs. I publish my reasons.

MR. JUSTICE THOMAS: In my opinion this appeal should be dismissed with costs, and I publish my reasons.

MR. JUSTICE DERRINGTON: I agree.

MR. JUSTICE CONNOLLY: The order of the court will be appeal dismissed with costs.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 24 of 1984

BETWEEN:

HUDSON CRUSHED METALS PTY. LTD. (Plaintiff) Appellant

AND:

JAMES HENRY, ETHEL HENRY and ROBERT HENRY (Defendant) Respondents

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CONNOLLY J.

THOMAS J.

DERRINGTON J.

Judgment delivered by Connolly J. and Thomas J. on 31st August, 1984. Derrington J. concurring.

"APPEAL DISMISSED WITH COSTS".

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 24 of 1984

BETWEEN:

HUDSON CRUSHED METALS PTY. LTD. (Plaintiff) Appellant

-and-

JAMES HENRY, ETHEL HENRY and ROBERT HENRY (Defendants) Respondents

JUDGMENT - CONNOLLY J.

Delivered the day of , 1984.

By virtue of a deed entered into in 1980, the appellant was entitled, for two years from 1st April 1980 to extract and remove what is described as “certain materials” from land owned by the respondents and said to be identified on a diagram attached to the deed. Operations began on 1st September 1980. On 2nd April 1981 the respondents treated the appellant as having repudiated the contract and accepted their repudiation, excluding the appellant thereafter from the land. The appellant brought this action for damages for breach of the contract. The respondents justified by pleading and proving extensive breaches of the contract by the appellant. The learned trial judge found numerous such breaches and held that the respondents were entitled to treat the appellant as having repudiated.. Essentially the question in this appeal is whether that conclusion was correct.

It will be convenient to set court in order the provisions in question and the breaches there of as found by the learned trial judge. They are:—

(a) Clause 3 reads -

“3. From time to time the Contractor will report to the owners as to the size and depth of the excavation work carried out by it and the said excavation work shall not proceed other than with the consent of the owners.”

His Honour found failure to report size and depth but was of the view that this was not of any practical consequence because two of the respondents frequently passed by the site and could well see what was going on. He also found, in relation to the respondents' consent to the excavation work that that work was started at places and proceeded in directions dictated by the respondents. His Honour found that there was a change at one stage of the

operations which though reasonable was nonetheless a breach of contract.

(b) clause 4 reads -

"4. The Contractor shall at all times carry out all conditions imposed by the Johnstone Shire Council under any permit issued by it with regard to extraction of materials from the owners' land."

On 29th February 1980 Johnstone Shire Council approved an application for extractive industry by the appellant for a period of two years reserving the right to cancel the approval at the end of the two year period, or extend the approval subject to a review of conditions. The approval was subject to a number of conditions. It is obvious that it was of importance not only to the appellant but to the respondents that nothing occur which might lead the local authority to cancel the agreement or refuse to renew it. However a number of breaches of the conditions occurred and these are the subject of findings by the learned trial judge which may be summarised as follows:

Condition (i)

$1,500 per annum was payable, half yearly in advance for maintenance of the existing road system. None of these instalments had been paid by 1st April 1981 when $2,250 was owed by the appellant to the local authority.

Condition (ii)

"Visibility widening" was to be performed at the proposed point of access and egress and signs erected advising the travelling public that trucks turned at that location. There is room for uncertainty as to what was intended in relation to the visibility widening. Some clearing of bamboo occurred but no signs were erected. The learned judge has found that these things were not done, the appellant's witness having conceded breaches in this respect.

Condition (iii)

A culvert easterly of the proposed access was required to be widened to the satisfaction of the shire engineer at the appellant's cost. This was never done.

Condition (v)

The hours of work were to be 7 a.m. to 7 p.m. Monday to Saturday. Work on Sundays and Public Holidays required council approval. The learned judge has found breaches of this condition in relation to Sundays and public holidays.

Before I leave the matter of clause 4 it is convenient to mention that the appellant's witness had said that the shire engineer was satisfied with the appellant's performance. The learned judge was of the view that this, if true, was irrelevant as the views of the shire engineer would not be binding on the council and say nothing to whether the contract between the parties was broken. The appellant complains of this finding but it seems to me to be plainly correct.

(c) Clause 8 calls, amongst other things, for the construction of a cattle grid at the boundary gate. It was never constructed. His Honour has found that this was a matter of some importance to the respondents who were running cattle in the relevant paddock and his Honour was satisfied that the gate was frequently left open without supervision by the appellant's servants.

(d) Clause 11 reads as follows -

“11. The Contractor shall each week supply the owners with a copy of the tally sheets of all truck drivers removing materials from the said land and shall provide a monthly statement of all materials removed.”

Neither the obligation to supply the tally sheets weekly, nor to provide a monthly statement of materials removed was complied with. The reason given was that it

would be too costly. The appellant's system involved the loader making out invoices, as they were called, in quadruplicate - one for himself, one for the driver, one for the consignee and one for the appellant's records. The appellant's attitude was that the respondents could check for themselves whatever happened to be on the site. The necessary documentation was not always there and in any case the respondents, instead of having the documents to peruse at their leisure and with the assurance of clause 11 that they could be regarded as complete, had to do what they could with whatever happened to be on the site. As the royalty payable by the appellant was directly related to the quantities removed this clause was obviously important and the attitude of the appellant's principal witness, Mr. Subloo, was not without its influence on his Honour's ultimate conclusion.

In the last week of March 1981 Mr. R.R. Henry, one of the respondents, had a conversation with Mr. Subloo in which he pointed out that the appellant was getting behind in its payments and pressed for the daily tally sheets according to the contract. An attempt was made during the argument of the appeal to suggest that the respondents were pressing for something which was not provided for in the contract in their reference to daily tally sheets. In my view there is no substance in this. The respondents were entitled to the tally sheets each week but they would reveal, if properly prepared and handed over, the amounts extracted daily. It is not a case of the appellant complying with clause 11 and having an additional requirement put on it by the respondents. There was in fact no attempt at compliance. Mr. Henry said that Mr. Subloo continued to say that giving the daily tally sheet would cost him too much money. Mr. Henry then agreed to accept a foolscap page with a daily sheet signed by each driver which he could collect each day. The next day he asked the plant foreman for the daily tally sheet on the sheet of foolscap which, he said, Mr. Subloo had promised would be available every day and was told that the foreman had not heard of any such piece of paper to be made out at all.

This would seem to have led to the decision to treat the contract as repudiated and to bring it to an end. That night Mr. Henry locked the gate and the operations were brought to an end. The learned trial judge's overall conclusions were that there had been breaches of 11 different obligations imposed on the appellant by the contract and that some had continued for considerable periods. His Honour found that complaints to Mr. Subloo affected nothing and that the respondents would have had no reason to believe that the situation would improve. There is ample evidence to support this conclusion. His Honour then passed to a consideration of the principles involved in determining whether there had been a repudiation and expressed the view, a view which is not. An attempt was made during the argument of the appeal to suggest that the respondents were pressing for something which was not provided for in the contract in their reference to daily tally sheets. In my view there is no substance in this. The respondents were entitled to the tally sheets each week but they would reveal, if properly prepared and handed over, the amounts extracted daily. It is not a case of the appellant complying with clause 11 and having an additional requirement put on it by the respondents. There was in fact no attempt at compliance. Mr. Henry said that Mr. Subloo continued to say that giving the daily tally sheet would cost him too much money. Mr. Henry then agreed to accept a foolscap page with a daily sheet signed by each driver which he could collect each day. The next day he asked the plant foreman for the daily tally sheet on the sheet of foolscap which, he said, Mr. Subloo had promised would be available every day and was told that the foreman had not heard of any such piece of paper to be made out at all. This would seem to have led to the decision to treat the contract as repudiated and to bring it to an end. That night Mr. Henry locked the gate and the operations were brought to an end. The learned trial judge's overall conclusions were that there had been breaches of 11 different obligations imposed on the appellant by the contract and that some had continued for considerable periods. His Honour found that complaints to Mr. Subloo

affected nothing and that the respondents would have had no reason to believe that the situation would improve. There is ample evidence to support this conclusion. His Honour then passed to a consideration of the principles involved in determining whether there had been a repudiation and expressed the view, a view which is not disputed by the respondents, that none of the breaches in itself was sufficiently serious to be regarded as amounting to a repudiation but that, if it were permissible to consider them as a whole, the conduct of the appellant ought to be characterised in that way. His Honour was of the view that that was permissible. He expressed himself in this way -

> "In my view, the conduct of the plaintiff by its servant, Mr. Subloo, taken as a whole, was so serious as to entitle the defendants to treat it as a repudiation of the contract."

In relation to Mr. Subloo his Honour had earlier expressed the view that, while he did not deliberately intend to be dishonest, he was quite irresponsible as a witness and that no reliance could be placed on anything he said where he was in conflict with a witness who commended himself to the learned judge as responsible. His Honour said specifically -

> "His irresponsibility, as will be seen, extended to his dealings with the defendants in relation to the contract."

There is, in my opinion no reason to doubt that the court may look to the appellant's breaches of the contract as a whole in determining whether it has repudiated. In Associated Newspapers Ltd. v. Bancks (1951) 83 C.L.R. 322 at p. 339 the court said:—

> "The defendant had not to prove, as in the case of a breach or breaches of non-essential terms of a contract, that the conduct of the plaintiff was such as to amount to a refusal to be bound by the contract. But when the circumstances are considered they would appear to constitute such conduct. The plaintiff made the original change (scil. taking the defendant's comic drawing off

> the front page) without consulting the defendant. It maintained that it was entitled to do so despite his protests. On 26th February there had been three publications in breach of the contract and several more were intended. Kennedy's promise to see what he could do was vague, and it was accompanied by an intimation that if anything was done it would be done as a matter of grace and not of right. This evidence all points and points only to a refusal by the plaintiff to perform cl. 5 of the contract and satisfies the test laid down by Lord Selborne."

The test in question is taken from the speech of Lord Selborne L.C. in Mersey Steel and Iron Co. Ltd. v. Naylor, Benzon & Co. (1884) 9 App. Cas. at pp. 438-9:—

> "'I am content to take the rule as stated by Lord Coleridge in Freeth v. Burr (1874) L.R. 9 C.P. 208, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here.'"

In Shevill v. Builders Licensing Board (1982) 149 C.L.R. 620 at p. 625 Gibbs C.J., with whom Murphy and Brennan JJ. agreed said:—

> "We are of course concerned only with a case in which it is admitted that there was a valid and binding contract. Such a contract may be repudiated if one party renounces his liabilities under it - if he evinces an intention no longer to be bound by the contract (Freeth v. Burr (1874) L.R. 9 C.P. 208, at p. 213) or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way (Ross T. Smyth & Co. Ltd. v. T.D. Bailey, Son & Co. [1940] 3 All E.R. 60, at p. 72; Carr v. J.A. Berriman

> Pty. Ltd. (1953) 89 C.L.R. 327, at p. 351). In such a case the innocent party is entitled to accept the repudiation, thereby discharging himself from further performance, and sue for damages: Heyman v. Darwins Ltd. [1942] A.C., at p. 399."

In Carr v. J.A. Berriman Pty. Ltd. (1953) 89 C.L.R. 327, Fullagar J. at p. 351 said, of a situation in which the innocent party had taken no action on the first breach of contract -

> "An election not to rescind for failure to deliver the excavated site on the due date could not deprive that failure of all significance. When a second breach occurs, the two combined may have a significance which might not be legitimate to attach to the first alone."

And later his Honour said:—

> "A reasonable man could hardly draw any other inference than that the building owner does not intend to take the contract seriously, that he is prepared to carry out his part of the contract only if and when it suits him."

This was a case not of two breaches but of 11 and his Honour was amply entitled to conclude that the appellant was prepared to carry out its part of the contract only if and as it suited it.

We were of course pressed with the proposition that repudiation of a contract is a serious matter not to be lightly found or inferred and that it must appear clearly and without ambiguity: Ross T. Smyth v. Bailey [1940] 3 All E.R. 60 at p. 71. It was submitted that the conduct of the appellant fell far short of an absolute or total or categorical refusal to perform and reliance was placed on the passage from the speech of Lord Selborne in the Mersy Steel & Iron case referred to earlier. It must however be remembered that absolute refusal to perform the contract means an absolute refusal to perform the party's own obligations. The court cannot deny that description to the conduct of a party who, while ready and even anxious to enjoy the benefits of the contract, reveals an almost

complete disregard of his obligations under the same contract. The requirement is satisfied, to adopt the succinct statement of Gibbs C.J. in Shevill's case (supra) if the guilty party shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way. The conclusion that that was the attitude of the appellant in this case is in my judgment irresistible. In my opinion the learned trial judge was correct in the conclusion to which he came and this appeal should be dismissed with costs.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 24 of 1984

BETWEEN:

HUDSON CRUSHED METALS PTY. LTD. (Plaintiff) Appellant

AND:

JAMES HENRY, ETHEL HENRY and ROBERT HENRY (Defendants) Respondents

JUDGMENT - THOMAS J.

Delivered the 31st day of Aug 1984.

This appeal concerns the termination of a contract where under the owners of a cane-farm ("the owner") granted certain rights to a quarrying company ("the contractor") to extract materials from the farm property.

I have the advantage of having received the reasons proposed to be delivered by my brother Connolly and I respectfully agree with those reasons. It will not be necessary for me to restate the facts.

The most important breaches were those concerning cl. 11 which states -

> "The contractor shall each week supply the owners with a copy of the tally sheets of all truck drivers removing

> materials from the said land and shall provide a monthly statement of all materials removed”.

In a short commercial contract such as the present one where an owner permits a quarrier to remove materials from his land, where the payment is to be in accordance with the amount of materials removed, and where the only contractual right afforded to the owner upon which he can check his entitlement is cl. 11, I think it is clearly a promise that tally sheets will be kept. Now it is common ground that tally sheets, as such, were never kept. However it was a regular part of the contractors system to make trucking slips which contained the sort of information which one would expect to find on a tally sheet. They show the type of product, quantity, the carter and customer. Discussions between the parties show that such documents were treated by them as the only documents that could fulfil the purpose of tally sheets, and were treated in discussions as the equivalent of tally sheets although of course they were not supplied as required. The cynicism of the company's standard reply that “it cost too much” to provide copies to the owner can be seen from the net profits of more than $160,000.00 per year that the contractor now seeks to recover from the owner for alleged wrongful termination.

The evidence shows constant and almost total breach of this important obligation, and eventually a breach of a substituted arrangement which the owner, after considerable frustration, was prepared to allow the quarrying company to provide. It was when the quarrying company demonstrated that it had as much intention of observing the substituted arrangement as the provisions of the contract itself that the owner elected to treat the contract as at an end.

It is unnecessary for me to reiterate the contractor's breaches in most other areas of the contract in which it owed any obligation to the owner. In assessing whether conduct amounts to a repudiation, the effect of multiple breaches may be different from that of the individual breaches. Indeed, multiple breaches of the same clause may show an intention not to be bound by a contract whilst a

single breach may fail to do so. If any authority is needed for the above proposition it may be found in Forslind v. Bechely-Crundall (1922) S.C. (H.L.) 173; and Carr v. Berriman Pty. Ltd. (1953) 89 C.L.R. 327 at 351. It is apparent that all conduct relevant to the performance of a contract can be taken into account in answering the final question whether the adverse party evinced an intention no longer to be bound by the contract.

Viewed as a whole over the first year of the contract, by which time half of the period contemplated by the contract had expired, the most appropriate description of the contractor's attitude can be found in Fullagar J.'s words in Carr v. Berriman (supra) (p. 349) 37; “I am not going to do the thing” (perform my obligations) “at all unless and until I find it convenient to do it” (perform them). I see no reason at all to differ from the learned trial judge's view on this question of fact.

In my opinion the appeal should be dismissed with costs.