

HIGH COURT OF AUSTRALIA

Associated Newspapers Ltd

Vs.

Bancks

(Dixon(1), Williams(1), Webb(1), Fullagar(1) and Kitto(1) JJ.)

11 May 1951

CATCHWORDS

Contract - Artist - Supply of drawings - "Us Fellers" - "Ginger Meggs" - Insertion on specified page of weekly newspaper - Undertaking by newspaper company - Condition - Breach going to root of contract - Rescission of contract by artist.

HEARING

Sydney, 1951, April 30; May 1, 2, 11. 11:5:1951 APPEAL from the Supreme Court of New South Wales.

DECISION

May 11. The Court delivered the following written judgment:-This is an appeal by the plaintiff company from a decretal order made by the Eq.) dismissing its suit with costs. The purpose of the suit is to obtain injunctions enforcing negative covenants in a contract made between the plaintiff and the defendant on 22nd September 1948. The defendant purported to rescind this contract on 26th February 1951, and the question on the threshold of the appeal is whether this rescission was effective, because it is only if it was ineffective that the question of the appropriate relief need be considered. His Honour held that the rescission was effective. (at p333)

2. The facts of the case are in a small compass. The contract in suit is a contract by which the defendant agreed for the term of ten years commencing on 27th March 1949 for a substantial weekly salary to devote the whole of his time and attention to the plaintiff's affairs and business and use his best endeavours to promote and foster the same to the best of his skill and ability. By cl. 5 the defendant agreed in the course of his employment to prepare and furnish to the plaintiff weekly a full-page drawing of "Us Fellers" or such other subject as might be agreed upon from time to time and the plaintiff undertook that each weekly full-page drawing would be presented on the front page of the comic section of the "Sunday Sun and Guardian" (a weekly newspaper published each Sunday by the plaintiff). The contract contains a number of clauses relating to the copyright in "Ginger Meggs", the principal character in "Us Fellers", which remained in the defendant, to the publication of a Sunbeams annual, and to a licence for the company to use the copyright in the event of the death of the defendant &c., which it is unnecessary to set out in any detail. In his letter of 26th February 1951 the defendant stated that as the company had repeatedly, without his consent and in face of his protest, broken its undertaking contained in cl. 5 of the contract, he thereby gave notice that he was no longer bound by the contract. (at p334)

3. Until 11th February 1951 the company had complied with its undertaking contained in the clause. It had printed in colours each week a full-page drawing of "Us Fellers" on the front page of the comic section of the "Sunday Sun and Guardian". The newspaper contained both a colour magazine and a comic section. In the second half of December 1950 or the first half of January 1951, owing to a shortage of newsprint, the company decided that it would be compelled to drop its letterpress comic section printed in newsprint and print the comic section by its rotogravure process, in which newsprint is not used. It decided to print the comic as an inset in the rotogravure section of the colour magazine. The presses used for printing this section only print certain pages of the section in full colour, namely pp. 1, 3, 6, 8, 9, 11, 14 and 16 respectively. To produce the comic as an inset it was necessary, if a front page of the inset in full colour was required, for the reader to reverse-fold the inset as it was taken out of the paper. This would make p. 9 of the colour magazine p. 1 of the comic section when reverse-folded. (at p334)

4. In the "Sunday Sun and Guardian" of 11th February 1951 as it was folded the front page of the comic section was p. 7 and so numbered and on this page there was a comic in sepia. The defendant's comic appeared on p. 9, that is, on the third page of the comic section. This page was headed "Sunday Sun Comics" and became the front page of the comic section only if the reader chose to reverse-fold the inset as it was taken out of the newspaper. The same thing happened in the publications of 18th and 25th February 1951. In the publication of 4th March 1951, following the purported rescission, a change was made. The comic section was used as an envelope for the magazine section and the defendant's comic appeared on the front page of the envelope. It was the practice of the defendant to keep the plaintiff supplied in advance with drawings of his comic for ten weekly publications. The plaintiff did not inform the defendant of its intention to produce the comic section by rotogravure process instead of by print until the magazine and comic sections for eight weekly publications commencing on 11th February had been prepared. (at p335)

5. Before the publication of the newspaper on 11th February a conversation took place between Clinch, the editor, and the defendant. A second conversation took place between them on 14th February. A conversation took place between Kennedy, the chief executive officer of the plaintiff, and the defendant on 22nd February. Affidavits were filed by Kennedy, Clinch and the defendant and they were all cross-examined. His Honour accepted the evidence of the defendant where there was any conflict. After the defendant had purported to rescind the contract he received a letter from Kennedy dated 1st March explaining how the comic section would appear in the next publication on 4th March. Kennedy, however, claimed that there had been no breach of the contract. He said that the company's obligations to present Ginger Meggs on the front page of the comic section of the newspaper had always been faithfully observed. With respect to the change to be made on 4th March he said that he wished it to be clearly understood that this change had been made as a matter of policy and not of obligation. "The company's obligation is . . . to present Ginger Meggs on the front page of the comic section. It is obvious by reference to the title on the page on which Ginger Meggs appears, that this is and always has been the front page of the comic section." (at p335)

6. Before us, as before his Honour, it was contended that the defendant's work was presented on the front page of the comic section in the issues of the "Sunday Sun and Guardian" of 11th, 18th and 25th February. But it is clear that the presentation was not on the front page but on the third page. In his evidence Clinch admitted that he considered that the presentation was a breach of contract. Clinch was urging the defendant to consent because the company was in a fix and the defendant was objecting. In the end the defendant told Clinch he would see Kennedy and Clinch urged him to do so as it would strengthen his hand. The defendant saw Kennedy on 22nd February and Kennedy said that he would see what he could do about it. At the interview with Clinch on 9th February the

defendant said that he did not like the new idea and that he would have a look at it when the newspaper was published on the following Sunday and decide what his attitude would be. If he agreed to the new idea he would want a letter from the company saying that it did not affect his contract to have a front page. At the interview with Clinch on 14th February, after he had seen the publication of 11th February, he said that he was dissatisfied. There is no evidence that the defendant at any stage waived any right he had to rescind the contract. The inquiry is whether this right existed on 26th February. If it did it was effectively exercised. (at p336)

7. The first question is whether the company's undertaking to present the defendant's drawings on the front page of the comic is a condition or essential term of the contract going to its very root, the breach of which would immediately entitle the defendant at his option to rescind the contract and sue for damages for the loss of the contract, or a mere warranty or non-essential and subsidiary term the breach of which would entitle the defendant to damages. Various tests have been advanced by the courts from time to time to determine what is a condition as opposed to a warranty. In *Bettini v. Gye* (1876) 1 QBD, at p 186 Blackburn J. (as he then was) said that to determine this question the court must ascertain the intention of the parties to be collected from the instrument and the circumstances legally admissible with reference to which it is to be construed. Later in the same case his Lordship said that in the absence of any express declaration by the parties, as in the present case, "we think that we are to look at the whole contract and applying the rule stated by Parke B. to be acknowledged in *Graves v. Legg* [1854] EngR 497; (1854) 9 Ex 709, at p 716 [1854] EngR 497; (156 ER 304); 23 LJ (Ex) 228, see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages" (1876) 1 QBD, at p 188. In *Bentsen v. Taylor, Sons & Co. (No. 2)* (1893) 2 QB, at pp 280, 281 Bowen L.J., discussing the distinction between a condition and a warranty, points out that in order to decide this question one of the first things you would look to is, to what extent the truth of what is promised would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out. Perhaps the test is better formulated by C.B. Morison in his *Principles of Rescission of Contracts* (1916), at p. 86. "You look at the stipulation broken from the point of view of its probable effect or importance as an inducement to enter into the contract." As he says, this form is "expressly supported by such cases at law as *Flight v. Booth* [1834] EngR 1087; (1834) 1 Bing (NC) 370 (131 ER 1160), and *Bannerman v. White* [1861] EngR 713; (1861) 10 CB (NS) 844 (142 ER 685) and, implicitly, by such cases as *Hoare v. Rennie* [1859] EngR 983; (1859) 5 H & N 19 (157 ER 1083) and *Bowes v. Shand* (1877) 2 App Cas 455. The test was succinctly stated by Jordan C.J. in *Tramways Advertising Pty. Ltd. v. Luna Park (N.S.W.) Ltd.* (1938) 38 SR (NSW) 632; 55 WN 228. The decision was reversed on appeal [1938] HCA 66; (1938) 61 CLR 286, but his Honour's statement of the law is not affected. He said (1938) 38 SR (NSW), at pp 641, 642; 55 WN 228: "The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor: *Flight v. Booth* (1834) 1 Bing (NC), at p 377 (131 ER, at pp 1162, 1163); *Bettini v. Gye* (1876) 1 QBD, at p 188; *Bentsen v. Taylor, Sons & Co. (No. 2)* (1893) 2 QB 274, at p 281; *Fullers' Theatres Ltd. v. Musgrove* [1923] HCA 12; (1923) 31 CLR 524, at pp 537, 538; *Bowes v. Chaley* [1923] HCA 15; (1923) 32 CLR 159; *Clifton v. Coffey* [1924] HCA 35; (1924) 34 CLR 434, at pp 438, 440. If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as

discharged upon any breach of the promise, however slight." (at p337)

8. At least it is clear that the obligation of the defendant to supply a weekly full-page drawing of "Us Fellers" and the plaintiff's undertaking to present the drawing each week on the front page of the comic section are concurrent and correlative promises. And it would not seem open to doubt that the obligation of the defendant is a condition. He was not an ordinary employee of the plaintiff. He was employed as a comic artist and his true work was to produce this weekly drawing. It was for this production that his substantial weekly salary was principally payable. It was what he was really engaged to do. It would be strange if his obligation was a condition of the contract while the undertaking of the plaintiff was a subsidiary term the breach of which would only sound in damages. The undertaking is really a composite undertaking comprising three ingredients: (1) to present a full-page drawing; (2) to present it weekly; and (3) to present it on the front page of the comic section. It is impossible to attach different values to the defendant's obligation and the plaintiff's undertaking. The plaintiff would not have employed the defendant unless it had been assured that the defendant would perform his promise, and the defendant would not have made the promise unless he was assured that his work would be published in a particular manner. Obviously it was of prime importance to the defendant that there should be continuity of publication so that his work should be kept continuously before the public, that his work should be published as a whole and not mutilated, and that it should be published on the most conspicuous page of the comic section. It is like a contract under which an actor is engaged to act in a theatre. It is not sufficient if the employer pays his salary. He must find work for him to do in the sort of part, principal or subsidiary, for which he is employed. In *Herbert Clayton and Jack Waller Ltd. v. Oliver* ([1930 AC 209](#)), at p 221, Viscount Dunedin said "I think each contract as it arises must be considered by itself in order to see what are the promises which each party is bound to perform. Considered from that point of view I think that in this case the appellants contracted not only to pay the respondent a salary, but to give him the opportunity of appearing before the public in a part which answered to the stipulated description." In *Tolnay v. Criterion Film Production Ltd.* ([1936 2 All ER 1625](#)), at pp 1626, 1627 Goddard J. (as he then was) said:- "All persons who have to make a living by attracting the public to their works, be they artists in the sense of painters or be they literary men who write books or who perform in other branches of the arts, such as pianists and musicians, must live by getting known to the public. An unknown author we all know has a great struggle in the same way as an unknown musician or actor has a great struggle. Mr. Williams in this case is already known in this country, and Mr. Tolnay, I think, is not known as an author in this country. One way in which they can expect remuneration and expect employment is by getting their name before the public." A failure to give an actor a proper part is a breach of contract which goes to its root and justifies the actor in treating the contract as rescinded: *White v. Australia & New Zealand Theatres Ltd.* ([1943 HCA 6](#); [1943 67 CLR 266](#)). (at p338)

9. Reliance was placed by counsel for the appellant on the passage in the speech of Lord Selborne L.C., which appears in *Mersey Steel and Iron Co. Ltd. v. Naylor, Benzon & Co.* (1884) 9 App Cas, at pp 438, 439 : "I am content to take the rule as stated by Lord Coleridge in *Freeth v. Burr* (1874) LR 9 CP 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." That passage has been cited in many subsequent cases and recently by the House of Lords in

T.D. Bailey, Son & Co. v. Ross T. Smyth & Co. Ltd. [\(1940\) 56 TLR 825](#), at p 831 . But his Lordship was not there dealing with a breach of a condition. In a contract for the sale of goods to be delivered by instalments the seller, a company, set up the refusal of the buyer to pay ad diem for one delivery as discharging it from the contractual obligation to make further deliveries. The refusal was based upon the ground that a petition for the winding up of the company had been presented and that it would be unsafe to make the payment. An argument for the seller that payment for every delivery was a condition precedent to the obligation to make subsequent deliveries was rejected and it was plain that the mere failure by the buyer to pay for the one delivery could not of itself go to the root of the contract. The House of Lords were thus concerned with the circumstances which might make a refusal by one party to perform an executory contract in what otherwise would be a non-essential respect a ground for the other party to the contract treating himself as discharged from further performance. This is apparent from the speech of Lord Blackburn. In the present case the undertaking of the plaintiff company that each weekly full-page drawing would be presented on the front page of the comic section formed a condition a substantial failure in the performance of which would enable the defendant to treat the contract as at an end. The plaintiff committed three successive breaches of this condition and thereupon the defendant was certainly entitled to treat the contract as discharged. Such a failure of the plaintiff to perform the condition went to the root of the contract and gave the defendant as the injured party the right immediately to treat the contract as at an end (Luna Park (N.S.W.) Ltd. v. Tramways Advertising Pty. Ltd. [\[1938\] HCA 66](#); [\(1938\) 61 CLR 286](#)). He exercised this right by his letter of 26th February. (at p339)

10. 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 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. (at p340)

11. The appeal should be dismissed with costs. (at p340)

ORDER

Appeal dismissed with costs.

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