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IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 62/89

BETWEEN CONSTRUCTION FASTENERS LIMITED a duly incorporated company having its registered office at Auckland, Retailer

Appellant

AND OMARK (AUSTRALIA) LIMITED a duly incorporated company having its registered office at Waddikee Road, Lonsdale, South Australia, Manufacturer

Respondent

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13 OCT 1989
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Coram: Cooke P.
Richardson J.
Casey J.

Hearing: 19 September 1989

Counsel: G.M. Harrison for Appellant
N.S. Gedye for Respondent

Judgment: 19 September 1989

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This is an appeal from a judgment of Robertson J. on a claim for damages for alleged repudiation of a contract. The issue of damages does not arise if, as the Judge held, there was no repudiation. For the reasons about to be given, we agree with the Judge that there was indeed no repudiation and having reached that clear conclusion it will be unnecessary to deal with any further point.

The contract in question is dated 1 June 1982 and is made between Omark (Australia) Limited, a South Australian company, and Construction Fasteners Limited, an Auckland company. Omark is described in the agreement as a manufacturer and marketer of industrial products and as desirous of appointing a distributor within New Zealand for the sale here of certain products. Construction Fasteners Limited competed in Auckland with a company called Ramset New Zealand Limited. Early in 1985 the Omark business in Australia was purchased by Ramset Fasteners (Australia) Pty Limited, of which Ramset New Zealand is a wholly owned subsidiary. The situation thus created of conflict of interest between Construction Fasteners Limited and its Australian supplier was one of manifest difficulty for both parties.

The letter on which the case turns is dated 14 March 1985 and is as follows:

> Ramset Fasteners (Aust.) Pty. Limited
> (Incorporated in Victoria)
>
> 14 March 1985
>
> Mr J. Waterson,
> Construction Fasteners Limited,
> P.O. Box 36.170,
> Northcote, Auckland,
> New Zealand
>
> Dear Mr Waterson,
>
> Re: New Zealand Distribution - Omark Products
>
> Thank you for your letter dated 28 February 1985. I noted the telex from Omark dated 12 February 1985 and sincerely apologise for not having communicated with

you sooner. However, I am sure you will understand the complexity of such business matters and the time it takes to resolve each individual issue.

I have carefully considered the continued distribution of Omark products in various countries and, as far as New Zealand is concerned, I have to inform you that it is in our Group's interests not to pursue the Memorandum of Agreement between Omark Australia Ltd and Construction Fasteners Ltd dated 1 June 1982. I note particularly that Clause 38 of the Agreement provides for such termination which is effective forthwith.

To assist you in this termination I will request our New Zealand company to purchase Omark stock from you at the landed cost price into your store. If you so desire, please contact Mr Rodgers at our Poland Road office.

Yours faithfully,
Ramset Fasteners (Aust.) Pty. Ltd

M.K. Heath
Managing Director

To that letter the appellant, through its solicitors, replied by a letter marked 'without prejudice' dated 3 April 1985, inter alia purporting to accept Ramset's wrongful repudiation of the agreement. On 24 April 1985 solicitors for the Australian company wrote intimating that their client wished to withdraw the notice of 14 March 1985 and to treat the agreement on the basis that the purported notice in that letter had never been given. Nevertheless the appellant continued to insist that the contract had come to an end as a result of its acceptance of wrongful repudiation and launched its claim for substantial damages accordingly.

Everything turns on whether the letter of 14 March 1985 amounted, in the words of s.7(2) of the Contractual

Remedies Act 1979, to a communication making it clear that the Australian company did not intend to perform its obligations under the contract or to complete such performance. The law is not in doubt; there is a well-known line of authorities establishing that to purport to rescind merely on the ground of a bona fide misinterpretation of a clause in the contract is not a wrongful repudiation. The leading New Zealand case in the line is probably Starlight Enterprises Ltd v. Lapco Enterprises Ltd [1979] 2 N.Z.L.R. 744, a decision of Woodhouse, Richardson and McMullin JJ. in this Court, and since then the most important case has probably been Woodar Investment Development Ltd v. Wimpey Construction UK Ltd [1980] 1 All E.R. 571 in the House of Lords. Their Lordships were divided in opinion as to the result of that case, but for a statement of principle, confirming the tenor of the Starlight judgments, it is sufficient for the purposes of the present case to refer to the speech of Lord Wilberforce at 575-6 of the report:

> My Lords, in my opinion, it follows, as a clear conclusion of fact, that Wimpey manifested no intention to abandon, or to refuse future performance of, or to repudiate the contract. And the issue being one of fact, citation of other decided cases on other facts is hardly necessary. I shall simply state that the proposition that a party who takes action relying simply on the terms of the contract and not manifesting by his conduct an ulterior intention to abandon it is not to be treated as repudiating it, is supported by James Shaffer Ltd v. Findlay Durham & Brodie [1953] 1 W.L.R. 106 and Sweet & Maxwell Ltd v. Universal News Services Ltd [1964] 3 All E.R. 30.

In contrast to these is the case in this House of Federal Commerce and Navigation Co. Ltd v. Molena Alpha Inc. [1979] 1 All E.R. 307. Of that I said at 315:

> The two cases relied on by the owners (James Shaffer Ltd v. Findley Durham & Brodie [1953] 1 W.L.R. 106 and Sweet & Maxwell Ltd v. Universal News Services Ltd [1964] 3 All E.R. 30) ... would only be relevant here if the owners' action had been confined to asserting their own view, possibly erroneous, as to the effect of the contract. They went, in fact, far beyond this when they threatened a breach of contract with serious consequences.

Spettabile Consorzio Veneziano di Armamento e Navigazione v. Northumberland Shipbuilding Co. Ltd (1919) 121 L.T. 628, though in some factual respects distinguishable from the present, is nevertheless, in my opinion, clear support for Wimpey.

In my opinion, therefore, Wimpey are entitled to succeed on the repudiation issue, and I would only add that it would be a regrettable development of the law of contract to hold that a party who bona fide relies on an express stipulation in a contract in order to rescind or terminate a contract should, by that fact alone, be treated as having repudiated his contractual obligations if he turns out to be mistaken as to his rights. Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of a contract, to perform contractual obligations. To uphold Woodar's contentions in this case would represent an undesirable extension of the doctrine.

That case was decided at common law but for present purposes the test under the Contractual Remedies Act is substantially the same. It is important to note that it is a question of fact and the impact of the communication relied on as evincing an intention not to perform obligations on a reasonable person in the position of the recipient is an important consideration.

In the instant case the letter in its first part indicates, and evidently with every justification, that the Australian company did not regard is as in their group's interests to pursue the agreement. There is then a reference to the effect of clause 38 as being to bring about termination forthwith. The only remaining part of the letter relates to machinery arrangements following termination. What is especially significant is that the letter is clearly expressed on the footing that clause 38 either entitled the Australian company to terminate or in some other way operated to bring about termination. There is nothing in the letter to evince an intention to resile from the agreement irrespective of the interpretation of clause 38 suggested in the letter.

The Judge thought that the letter had been written on a mistaken interpretation of clause 38. It may well be that the interpretation was mistaken. The clause is itself a rather puzzling one. It reads:

> 38. It is further agreed that neither party shall be liable to the other for damages of any kind on account of termination of this Agreement with or without notice as provided herein whether damages result from the loss through committments on obligations or from loss of investment or of present or prospective profits or from inability to meet obligations or from any other cause.

Elsewhere in the agreement in clauses 33 and 34 there are some provisions for termination: one on the expiry of six months written notice, the other for termination

immediately of the agreement by its own force without notice upon certain events. These provisions themselves could give rise to some problems of interpretation. It may be that the true interpretation of clause 38 is that the reference to 'with or without notice as provided herein' refers back to clauses 33 and 34. On that interpretation, however, clause 38 would apparently be providing that no damages should be payable in the event of a termination lawful under the preceding clauses of the agreement. Such a precautionary provision is possible, but not necessarily the only tenable interpretation. Another view which could be taken understandably by a commercial man at first sight is that clause 38 is providing that, in the event of termination, whether or not notice has been given as required by the contract, neither party shall be liable to the other for damages.

Whichever interpretation be correct, clause 38 cannot be described as free from genuine ambiguity. There is nothing to suggest that the letter of 14 March 1985 was written on other than a bona fide understanding that clause 38 did entitle the Australian company to take the course of treating the agreement as terminated. The Judge thought that the Auckland company had rather snatched at the apparent opportunity of alleging a repudiation. Whether or not that be so, the letter from the respondent's solicitors of 24 April 1985 is wholly consistent with the view that the respondent had been acting in good faith on a mistaken

interpretation. There is no ground for this Court proceeding on any other view.

Mr Harrison in support of the appeal cited the main authorities and summarised his argument by saying that they showed that, before a party could rely on a mistake to protect himself from having repudiated unlawfully, he must have relied on grounds or terms in the contract providing for rescission. Assuming that this proposition is right, it is nevertheless clear that the respondent company did precisely that. Erroneously, as we will assume, it relied on clause 38 as giving rise to an entitlement to terminate. Accordingly we are unable to accept that counsel for the appellant can bring the present case within the principle propounded by him. It follows that the appeal must be dismissed.

Costs should follow the event. There will be an order in favour of the respondent for $1250 together with disbursements, including the reasonable travelling and accommodation expenses of counsel, to be settled by the Registrar.

Solicitors:
M.K. Moorhouse, Auckland, for Appellant
Bell Gully Buddle Weir, Auckland and Wellington, for Respondent