JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 25/83

BEFORE: The Hon. Mr. Justice Rowe, P.
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice White, J.A.

BETWEEN - THE ATTORNEY GENERAL

and

THE MINISTRY OF HOUSING - DEFENDANTS/APPELLANTS

AND - THE BANK OF COMMERCE PLAINTIFF/RESPONDENT

R.G. Langrin and Wendell Wilkins instructed by Director of State Proceedings for Appellants.

Dr. Lloyd Barnett and Dennis Morrison instructed by Lincoln Eatmon of Dunn, Cox & Orrett for Respondent.

June 5, 6, 7, 1984; & February 22, 1985

ROWE, P.:

Vanderpump, J. entered judgment on behalf of the respondents in the sum of $152,750 with costs to be taxed or agreed on a claim by them against the appellants for the return of a Massey Ferguson Tractor, Serial No. K3095 and a Benford 21/14 Concrete Mixer, Serial No. 154075 or their value and damages for their retention or alternatively, damages for conversion.

The Ministry of Housing was minded to construct a major low income housing development to be known as the Catherine Hall Sites and Services Project in St. James. It entered into a written contract with Thompson Construction Company Ltd. (Thompson's) dated October 14, 1976 for that Company to execute infrastructure and building works on the site for a contract price of 2.049 million dollars. Work was to commence in November 1976, with a completion date of January 31, 1978. But the contract did not proceed smoothly. Not only were

there agreed variations totalling some $586,187, but the contractor experienced cash-flow problems throughout and the performance fell woefully behind schedule. Matters reached such a state that in March 1978, the employer terminated the contract and employed a second set of contractors to complete the project. At the time of termination the contractor's liability to the Ministry was quantified at $352.160.61 and the overall loss to the Ministry on the project, due to non-performance was estimated to be $735,807.72.

Thompson's contract with the Ministry contained a special clause in connection with Plant and Machinery brought upon the site. Clause 53 which is entitled - "Property in Materials and Plant" has a significant bearing on the question to be resolved on this appeal and I set out below the full terms of that clause:

> "(1) For the purpose of this Clause:-
>
> (a) the expression "Plant" shall mean any Constructional Plant and materials for Temporary Works but shall exclude any vehicles engaged in transporting any labour, plant or materials to or from the Site;
>
> (b) the expression "agreement for hire" shall be deemed not to include an agreement for hire purchase.
>
> (2) All Plant, goods and materials owned by the Contractor or by any company in which the Contractor has a controlling interest shall, when on the Site be deemed to be the property of the Employer.
>
> (3) With a view to securing, in the event of a forfeiture, under Clause 63 the continued availability, for the purpose of executing the Works, of any hired Plant, the Contractor shall not bring on to the Site any hired Plant unless there is an agreement for the hire thereof which contains a provision that the owner thereof will on request in writing made by the Employer within 7 days after the date on which any forfeiture has become effective and on the Employer undertaking to pay all hire charges in respect thereof from such date, hire such Plant to the Employer on the same terms in all respects as the same was hired to the Contractor save that the Employer shall be entitled to permit the use thereof by any other contractor employed by him for the purpose of completing the Works under the terms of the said Clause 63.
>
> (4) In the event of the Employer entering into any agreement for the hire of Plant pursuant to sub-clause (3) of this Clause all sums properly paid by the Employer under the provisions of any such agreement and all expenses incurred by him (including stamp duties) in entering into such agreement shall be deemed

"for the purpose of Clause 63 to be part of the cost of completing the Works.

(5) The Contractor shall upon request made by the Engineer at any time in relation to any item of Plant forthwith notify to the Engineer in writing the name and address of the owner thereof and shall in the case of hired Plant certify that the agreement for the hire thereof contains a provision in accordance with the requirements of sub-clause (3) of this Clause.

(6) No Plant (except hired Plant) goods or materials or any part thereof shall be removed from the Site without the written consent of the Engineer which consent shall not be unreasonably withheld where the same are no longer immediately required for the purposes of the completion of the Works but the Employer will permit the Contractor the exclusive use of all such Plant goods and materials in and for the completion of the Works until the occurrence of any event which gives the Employer the right to exclude the Contractor from the Site and proceed with the completion of the Works.

(7) Upon the removal of any such Plant, goods or materials as have been deemed to have become the property of the Employer under sub-clause (2) of this Clause with the consent as aforesaid, the property therein shall be deemed to revest in the Contractor and upon completion of the works the property in the remainder of such Plant, goods and the materials as aforesaid shall subject to Clause 63 be deemed to revest in the Contractor.

(8) If the Contractor shall fail to remove any Plant goods or materials as required pursuant to Clause 33 within such reasonable time after completion of the Works as may be allowed by the Engineer then the Employer may:

(a) sell any which are the property of the Contractor; and

(b) return any not the property of the Contractor to the owner thereof at the Contractor's expense;

and after deducting from any proceeds of sale, the costs, charges and expenses of and in connection with such sale and of and in connection with return as aforesaid shall pay the balance (if any) to the Contractor but to the extent that the proceeds of any sale are insufficient to meet all such costs, charges and expenses shall be a debt due from Contractor to the Employer and shall be deductible or recoverable by the Employer from any monies due or that may become due to the Contractor under the contract or may be recovered by the Employer from the Contractor at law.

(9) The Employer shall not at any time be liable for the loss of or injury to any of the Plant, goods or materials which have been deemed to become the property of the Employer under sub-clause (2) of this Clause save as mentioned in Clauses 20 and 65.

> (10) The Contractor shall where entering into any sub-contract for the execution of any part of the Works incorporate in such sub-contract (by reference or otherwise) the provision of this Clause in relation to Plant, goods or materials brought on to the Site by the sub-contractor.
>
> (11) The operation of this Clause shall not be deemed to imply any approval by the Engineer of the materials or other matters referred to herein, nor shall it prevent the rejection of any such materials at any time by the Engineer."

For the purposes of the performance of the Contract, Thompson brought upon the site, inter alia, the two articles of machinery referred to in the statement of claim and these articles were on site at the termination of the contract. The employer in the purported exercise of rights conferred under the Contract of October 14, 1976, refused to deliver the machinery to anyone while the project was still under construction.

Ten months after it had entered into its contract with the Ministry of Housing and had committed the concrete mixer to the project, Thompson by deed of August 8, 1977 assigned the said concrete mixer to the respondents as security for a loan of $70,000 with interest at 17% per annum. This deed in the form of a Bill of Sale was registered as a charge against the Company in the Office of the Registrar of Companies on August 17, 1977 pursuant to section 93 of the Companies Act.

A further loan of $50,000 with interest at the rate of 17% per annum was made by the respondents to Thompson on January 30, 1978 and on this occasion, the Massey Ferguson Tractor was included in a Bill of Sale, as security for the loan. This Bill of Sale, too, was similarly registered under section 93 of the Companies Act.

By letter dated June 6, 1979, the respondents demanded of the appellants the return of the machinery but this the appellants declined to do. At the trial of the action Vanderpump J. held that on a construction of clause 53 of the Contract between the appellants and Thompson, it did not appear that the property in the two chattels passed initially to the Ministry of Housing. He further held that under the forfeiture clause 63(1)(d) of the Contract, the Ministry of Housing was entitled to sell the machinery on or about

is to be deemed to be something else, as between the parties to the contract that thing is to be treated as if it were that something else and accordingly in a contract document it is to be treated by the parties to the contract, as if it took on the deemed mantle, but as regards third parties and the world at large, such a contractual provision had no binding effect.

In the course of argument we were referred to certain authoritative works, viz.,the 10th Edition of Building and Engineering Contracts by HUDSON; the Second Edition of PERSONAL PROPERTY by J. CROSSLEY VAINES; and the Fourth Edition of BUILDING CONTRACTS by DONALD KEATING. Mr. Langrin relied fulsomely on passages from Hudson's, while Dr. Barnett was critical of certain opinions therein expressed.

As to the nature of vesting clauses in building contracts, Keating at page 125 of his Work says:-

> "It is common to have a clause which purports to vest materials and sometimes plant in the employer before they are fixed. The principal objects of such a clause are to provide a security to the employer for money advanced and to enable the employer to obtain the speedy completion of the works by another contractor in the event of the original contractor's default, by providing materials and plant on site ready to use free from the claim of the original contractor, and his creditors, or his trustee in bankruptcy or liquidator. "

Hudson at p. 671 expresses the purposes of the vesting clauses thus:

> "The Courts have acted on the basis that these clauses are inserted not merely to enable the contract to be performed, but also to obtain due security for its performance."

Both learned authors quoted above are explicit that it is the language of the particular contract which must be construed as a whole, to arrive at the true meaning of the vesting clause. But broadly speaking there appears to be two lines of decided cases based on the use of particular words. As Keating says on page 126:

> "Whether or not the clause achieves its purposes depends upon the words used. If the formula used is 'the materials shall become and be' or 'be and become' the property of the employer, then normally, 'the clause means what it says, operates according to its tenor, and effectively transfers the title.' If, on the other hand, words like, 'considered to be' or 'deemed to be' (the property of the employer) are used, the clause may be ineffective to achieve its purpose and the property may remain in the Contractor, but even so the contract must, it is submitted be read as a whole to ascertain the intention of the parties." (Emphasis mine).

The language used in a building contract In re Keen and Keen Ex parte Collins [1902] 1 K.B. 555 was held ineffective to pass the property to the building owner. Clause 10 of that contract provided that "all plant, work and materials brought to and left upon the ground by the contractor shall be considered to be the property of the board". Bigham J. found that clause, if read by itself, to be ambiguous. He did not say why. However, he looked at other clauses in the contract, e.g. (a) one providing for non-removal of any plant or machinery from the site without express written permission of the Architect; and (b) one providing for immunity on the part of the building owner for loss or damage to any part of the plant and machinery. Then he contrasted these provisions, firstly, with the non-inclusion of a revesting clause and secondly with the common usage under building contracts for the contractor to remove the surplus materials and plant from the site on the completion of the works. On all these factors, he concluded that there was no intention to vest the plant and materials in the building owner, whose position was however saved because he had exercised his option of forfeiture although that had been done after the builder's bankruptcy.

Mr. Langrin sought much support from the decision of Farwell J. in Hart v. Porthgain Harbour Company Limited [1903] 1 Ch. 690. One Cook had entered into a contract with the defendant company to build a dam. This contract provided for the construction of temporary

works, for forfeiture on the default of the contractor to perform in a timely manner, for re-possession in case of the contractor's bankruptcy, and in clause 11 that:

> "The whole of the plant and materials brought on the ground by the contractor is to be marked with his initials in legible characters. All such plant and materials shall be considered the property of the Company until the engineers shall have certified the completion of the contract, and no plant or materials shall be removed or taken away without the consent or order in writing of the engineers. "

Eight months after the contract had been signed, after the temporary works had been completed and after other plants and machinery had been brought on the site by the contractor, the contractor mortgaged the materials of the dam and the plant and machinery on site to the plaintiff who registered the mortgage as a Bill of Sale.

Farwell J. first drew attention to the purpose of the contract when he said:

> "The whole contract is based on the theory that the Porthgain Harbour Company are to be put in possession of a completed pier, the only thing which would be of any use to them ..... The company never got a a completed pier, which is what they were bargaining for and they failed to get it by reason of the default of the Contractor. "

Where Bigham J. was concerned with the practice in the trade for unused materials to be taken away by the Contractor upon the completion of the works, Farwell J. pointed out that as he was not dealing with completed works such an eventuality was immaterial. And although there was no specific use of the word "vest" or "revest" in that contract, Farwell J. construed the term "all such plant and machinery shall be considered the property of the company" to mean that it vests the property in the employer subject to a condition that upon certification of proper completion of the contract, the contractor shall be at liberty to remove them. The clause in the contract was sufficient to create an automatic vesting of the property in the employer and upon the act of certification of completion of the works the unused materials and the plant on site would revest in the contractor.

The classic statement of the law, quoted by the text book writers, appears from the judgment of Farwell J. in the Porthgain case at page 696 of the Report. There he said:-

> "In my opinion these clauses are put i n for the purpose, not merely of enabling the contract to be performed, but also as a due security for its performance. They are not mere machinery to enable the Porthgain Harbour Company, either themselves or by another contractor, to complete the performance of the contract, but they are also a security for the company that the work shall be performed; and the company are entitled to avail themselves of that security if, by the default of the contractor, the work is not performed at all."

Referring to the decision of Bigham, J. in re Keen and Keen Exparte Collins, supra Farwell J. merely said that that case turned on a mere question of construction and as Bigham J. pointed out there were words in that contract which rendered it plain that no property ever passed.

An interesting case relied upon by Dr. Barnett for the respondents, is that of Brown v. Bateman [1867] L.R. 2 C.P. 272. It concerned a building contract whereby the builder would construct houses upon the land of the owner, then lease them. In the course of construction the owner would make advances to lthe builder. A judgment was obtained against the builder and the judgment-creditor seized some of the building materials and building properties under a warrant of levy. The goods were not sold. In an action by the judgment-creditor against the building owner, two clauses of the building contract between the builder (judgment-debtor and by then a bankrupt) and the land owner, came up for consideration.

Clause 7 thereof provided:

> "That all bricks, timber, materials, and other things which shall have been brought upon the said premises by or for Hargreaves, his Executors etc. for the purpose of erecting such buildings as aforesaid, shall be considered as immediately attached to and belonging to the said premises; and no part thereof shall be removed therefrom by him or them without the consent in writing of Holledge, his heir or assigns, or his or their Surveyor. "

The 8th Clause made special provisions in the event of default by the builder. After certification of such default, the owner was authorized:

> "Immediately or at any time or times after such default ..... to enter into and take possession of the whole or any part of the said land which shall have been comprised in any lease or leases granted as aforesaid ..... with all buildings and improvements thereon and all bricks and other building materials standing and being thereon for his and their own use and benefit ....."

Counsel, on behalf of that judgment-creditor, eloquently submitted that when the 7th and 8th clauses of the contract were read together, as indeed they must, what the building-owner had was a licence or right to enter and seize certain materials in case of the builder's default but they did not as against third person convey to the land-owner any present interest in those materials, at all events until some act was done by him in assertion of his right.

Bovill C.J. found that the two clauses in the contract were not inconsistent with each other and held that each should be given effect. The fact that the owner had the power to seize materials on default by the builder did not in the opinion of Bovill C.J. qualify the owner's right under clause 7. He said, however:

> "It is not necessary to say whether that clause (cl. 7) creates an express legal right or interest in the landlord, because in my judgment it confers upon him a clear equitable right to the materials brought upon the premises for the purpose of being used in their construction, without any actual interference on his part."

Keating J. was also unsure whether the 7th clause created a legal right in favour of the owner of the materials but he too agreed that an equitable interest had arisen to protect the owner against the claims of a third party claiming through the builder.

In Keen and Keen Ex parte Collins no one could assert that at the moment when the materials were brought on to the builder's land they were in reality attached to the premises. Yet by the avenue of a legal fiction they were to be so considered as so attached

> "In the former case it has sometimes been held that the clause was ineffective to achieve its aim and that the property remained in the builder, at the mercy of his creditors and trustees in bankruptcy."

The underlined words cannot easily be construed as being part of an assenting opinion.

Dr. Barnett was able to suggest some 14 features of the contract in the instant case which rendered it similar to the agreement in Re Keen and Keen, supra, and he submitted that the use of the deeming provision is to indicate that at all times the ownership of the plant and materials rests with the builder (Thompson) but while on the site they were to be deemed to be the property of the land-owner.

Clause 53 (7) of the Contract makes provision for the revesting of Plant, goods or materials in the Contractor where such Plant etc. have been removed from the site with the approval of the employer. This sub-clause also specifically provides for the revesting in the contractor of all surplus Plant, goods or materials upon the completion of the Works.

In none of the cases reviewed herein were there such precise revesting clauses as are to be found in the instant contract. True, the contractor is permitted to remove plant etc. from the site during the currency of the contract and that permission may not be unreasonably withheld by the employer. But the occasion for removal only arises when the plant etc. are no longer immediately required for the purposes of the completion of the Works. To underpin the relationship between the contractor and the employer, the contract goes on to provide that although the plant etc. on site are deemed to be the property of the employer, the contractor is entitle to their exclusive use while the contract is being timely performed. If indeed the property in the plant etc. did not pass to the employer, all the provisions for revesting would be meaningless. Bigham J. did not have a similar fact situation in re Keen and Keen / ex parte Collins,

supra and he was anxious that an employer should not be unjustly enriched at the expense of the contractor unless the contract contained the clearest words to produce that effect.

When the relevant clauses are read and construed together the only reasonable interpretation is that as a security for due performance of the contract, the machinery were vested in the Ministry and the Ministry thereby acquired possession and a special property in the machinery which was only determinable on re-vestment in the contractor in accordance with the terms of the contract. The contractor had divested himself of any power to deal with the machinery (whether by sale or hypothecation) in defeasance of the Ministry's rights and interest. By failing to disclose the Ministry's interest the loan obtained from the Bank was an obtaining by fraud. Accordingly, unless and until possession and property in the goods had been determined as provided by the contract neither in conversion nor in detinue would an action be maintable against the Ministry.

Thompson Construction Company Ltd. purported to pass the property in the two pieces of equipment in question to the respondents. This they had no power to do as at the time of the entry into the two Bills of Sale with the respondents, the property in the equipment had already been transferred to the appellants. I am of the opinion that the appellants were entitled to reject the demand of the respondents for the delivery of the machinery as the Works had not been completed. The appellants were entitled under the contract to retain the machinery as security for the due completion of the Works.

I would allow the appeal and enter judgment for the appellants with costs both here and in the Court below to be agreed or taxed.

KERR, J.A.:

I agree.

WHITE, J.A.:

I agree.

July, 1980.

His further decisive finding was that the two Bills of Sale transferred the machinery to the respondents subject to a right of redemption on the repayment of the loan. Having regard to that finding, the learned trial judge went on to hold that as the loans had not been repaid, the appellants had no legal right to detain the machinery when called upon by the respondents to deliver them up.

Although the appellants filed six grounds of appeal and Mr. Langrin argued each of them, he relied mainly upon his first ground which complained that the learned trial judge had misdirected himself on the law in concluding that condition 53 of the contract did not pass to the employer the property in all the plant, goods and materials which were owned by Thompson, the Contractor. He submitted that when the contract was signed on October 14, 1976, the property in the chattels which were on the building site passed to the Ministry of Housing subject to being revested in the Contractor when the contractual obligation was filfilled. The consequence of this vesting clause, he said, was that as long as the contract remained unfulfilled there was no property in those chattels over which Thompson could create a right in preference to that of the Ministry of Housing. On the assumption that that was a correct legal submission, Mr. Langrin submitted that the so-called charges contained in the Bills of Sale created no immediate interest in the respondents and at best could only be considered as affecting rights to be acquired in respect of those chattels in the future.

For the respondents, Dr. Barnett submitted that at the time of the execution and registration of the Bills of Sale, the respondents had no knowledge of the terms of the contract between the appellants and the Ministry of Housing and that upon a proper construction of the deeming clause in clause 53 of that contract, it had no relevance to the respondents who were innocent third parties. He submitted that the word "deemed" should be interpreted in the sense that where a thing

and no action on the part of the owner was required to perfect this right which to him then appertained. On the question of construction, the Court did not say, "Well if the materials can be forfeited to the owner under clause 8 after the happening of certain events and after specific action has been taken by the owner of the land, how then can it be said that under clause 7 the land-owner had a right over those materials from the moment they were brought upon the land?" It temporized by finding a clear equitable right which was enough to defeat the claim of the judgment-creditor.

In re Winter ex parte Bollard [1878] 8 Ch. D. 225, the Court was concerned with what amounted to mutual dealings under the Bankruptcy Act of 1869 [U.K.]. The issue arose out of a building contract but all the cases cited concentrated upon the position under the law of Bankruptcy. Bacon C.J. disposed of the issue of the legal ownership of the property brought upon the building site under a building contract in three swift sentences. He said:

> "The contract which was made is one of the most familiar kind. A contractor brings plant upon the works, and he undertakes that while he is engaged on the works it shall belong to the Commissioners, and that the things in question are to be deemed their property, that is to say, that they shall not be removed. He is entitled to the plant, because, if he is not, the property has passed from him."

The learned Chief Justice made no mention of the second important reason for the deeming provision in a building contract viz., that the plant shall be security for the due performance of the contract. And, of course, he did not say why the property could not have passed from the builder to the owner of the land under the contract.

An opportunity was afforded to the Privy Council in Bennett and White (Calgary Ltd.) vs. Municipal District of Sugar City [1951] A.C. 786 to comment upon the differences in meaning and effect, if any, between phrases such as "be and become" and "shall be deemed". Their Lorships mentioned, without express endorsement, the judgment of Farwell J. in Hart v. Porthgain Harbour Company Ltd., supra. What was said of the decisions of the group in which In re Keen and Keen supra falls, could well be construed as a mild disapproval, viz.: