

## McCRACKEN v. O.R.C. GOVERNMENT.

1909. *March* 29. MAASDORP, C.J., and FAWKES  
and WARD, JJ.

*Contract.—Repudiation.—Cession.—Execution.—Reasonable time.*

Where M had obtained in November, 1907, a cession from A of a contract entered into with the Government in May, 1906, whereby the latter had agreed to grant a bonus on the manufacture of biscuits, on condition that the erection of a factory was forthwith commenced, the Government having assented to the cession, and M claimed a declaration of rights thereunder after delaying a further twelve months without performing his part of the contract, *Held*, that the delay on the part of A must be taken into consideration, and that, as M had failed to perform his part of the contract within a reasonable time, the contract had lapsed.

The plaintiff alleged that on the 1st November, 1907, with the consent of the defendants he became the cessionary of a contract entered into between the defendants and Messrs. Anderson & Co. on the 25th May, 1906; that he was desirous of carrying out the terms of the contract, and had taken preliminary steps, by arranging for the necessary capital and in other ways, for that purpose; that in September, 1908, the defendants had both verbally and in writing in breach of the agreement intimated to the plaintiff that the contract had lapsed and was no longer of force and effect, and refused to be further bound thereby. The plaintiff therefore claimed a declaration of rights and in the alternative £5000 damages.

The defendants pleaded, *inter alia*, that they had committed no breach of the agreement, that they had not repudiated it, and that in any case the plaintiff was debarred from his right of action in that he had not complied with the terms of the agreement within a reasonable time, having in effect done nothing as yet towards the performance of his part of the contract.

The recital of the contract read as follows :—

Whereas the manufacturers have acquired certain sites in Bloemfontein on which they have erected a jam preserve and confectionery factory, and whereas it is the intention of the manufacturers forthwith to commence the erection of another factory on the same site for the manufacture of biscuits and cakes, and whereas it is the desire of the Government to encourage to the best of the means at its disposal the industry for the prosecution of which such last-mentioned factory is to be erected. . . .

Under the contract the Government<sup>2</sup> agreed, in consideration of the manufacturers undertaking to introduce into and maintain in Bloemfontein a business and industry of this nature, to pay a certain bonus on biscuits and cakes, provided they were manufactured exclusively from South African meal and flour. The bonus was to be payable from the time the factory commenced to work. The contract was entered into for a period of five years from the date of signing, and on the condition that, should the operations of the factory be suspended for a period longer than twelve months at a time, the agreement should *ipso facto* determine.

The Court intimated that the point at issue was whether the plaintiff had failed to perform his part of the contract within a reasonable time.

*Blaine, K.C.* (with him *De Jager*), for the plaintiff.

*Lloyd* (with him *P. U. Fischer*), for the defendants: There was no breach of the contract on the part of the defendants, and having alleged a breach, the plaintiff has only the option to cancel the contract and sue for damages, or to carry out his part of the contract and then sue thereon. See *Frost v. Knight* ([1872] 7 L.R. Ex. at p. 117).

[MAASDORP, C.J.: Are you willing to let the contract stand, since you deny repudiation?]

The contract is voidable at our option owing to the plaintiff's delay, but he cannot claim a declaration of rights so long as the defendants have not committed a breach of the contract. See *Johnstone v. Milling* (55 L.J. Q.B. 162).

On the question of repudiation plaintiff put in three letters, the material portions of which read as follows:—

No. 1. (Under Colonial Secretary to plaintiff, dated the 31st August, 1908).

Consequently, the agreement, if still binding, has only to the 25th May, 1911, still to run, but the Colonial Secretary is further advised that as the operations of the factory have already been suspended for a longer period than twelve months the agreement has lapsed."

No. 2. (Plaintiff's attorney to the Under Colonial Secretary, dated the 22nd September, 1908).

We take exception, however, to the last part of your letter, claiming that the contract has lapsed, because it is alleged that the operations of the factory have begun. Our client is advised the Government cannot maintain this position, and we are therefore instructed to definitely ask whether the Government is going to persist in that attitude, inasmuch as our client has been in negotiation with financiers to start operations immediately, and it will become necessary for him to know definitely what his position is, so as to take the necessary steps to protect his rights.

No. 3. (Under Colonial Secretary to plaintiff's attorneys, dated the 30th September, 1908).

In reply to your letter of the 22nd inst., I am directed by the Hon. the Colonial Secretary to state that in view of the facts set forth in their letter of the 31st ult., to Mr. McCracken, to which you refer, they regret that they cannot depart from the attitude which they have taken up in regard to Mr. McCracken's claim to a bonus for the manufacture of biscuits.

MAASDORP, C.J.: We hold that the letters amount to a repudiation. We wish to hear counsel on the question of reasonable time, and the character of the business; the erection of plant and any machinery that may have to be specially constructed are points of importance in that connection.

*Lloyd*: The contract required the work to be commenced *forthwith*, i.e. as soon as possible under the circumstances of the case. The intention of the Government is clear from the limiting of the contract to five years and from the clause as to the cessa-

tion of operations for twelve months. The plaintiff had been manager for Anderson & Co., and as cessionary took the contract subject to the incidents thereof, and the fact that the cession had been recognised by the Government cannot be taken as a waiver of the right to demand execution within a reasonable time, and the plaintiff has done nothing in this direction.

*Blaine, K.C.*: The plaintiff claims that the reasonable time can only be reckoned from the date of the cession. I can produce evidence to show that the restrictions as to the class of flour used render the contract almost impracticable, and that on application to the defendants for relaxation of this clause they kept the plaintiff waiting for a definite answer for five months. I submit the defendants are not entitled to take advantage of their own negligence.

[*FAWKES, J.*: If a man enters into a disadvantageous contract, can he set off the time he spent in endeavouring to get it amended?]

The plaintiff is not liable for the delay on the part of Anderson & Co.

[*MAASDORP, C.J.*: He is liable as cessionary, and pleas against Anderson & Co. would be good against him.]

Even if the Government's delay is ignored, only eight months have passed since the cession, and it is possible that the whole business might be completed within a time which would still be reasonable. I have evidence to prove that eighteen months would not be an unreasonable time for the completion of the work, and that, as specifications, &c., had to be obtained, the work could not be commenced under six months, and that Anderson & Co. had already got the necessary specifications before they ceded to the plaintiff.

The contract and the letters referred to having been put in, no further evidence was taken.

*MAASDORP, C.J.*: The point to be decided has been considerably narrowed down by the arguments of counsel. The question is whether the plaintiff is entitled to bring an action on the ground that he has within a reasonable time fulfilled his part of the contract. Taking the dates given, there can be  
O.R.C. '09.

very little doubt that if Anderson & Co. were suing in this matter the reasonable time would be held to have expired long ago. The contract was ceded to the plaintiff, and it had—a portion of it—expired in January, 1908. The question is whether anything has happened which places the plaintiff in a different position from that in which Anderson & Co. were. It has been argued that an alleged interview between the parties ought to be taken into consideration, and that by the cession and assent thereto by the Government the plaintiff had stepped into the original position of Anderson & Co., whose time the Government had thereby extended. But the Government's position was merely that they had not insisted on their rights against Anderson & Co., but presumed that the plaintiff was in a position to hurry on the work and had made all necessary arrangements. What had the plaintiff the right to expect from the Government? Some fairly reasonable time, provided he had made all arrangements. Taking eighteen months as the reasonable time and deducting six months for obtaining the specifications, which counsel admits have been received, the whole of the remaining twelve months has elapsed since January, 1908. The plaintiff ought to be in a position to start at once; he ought to have made all his preparations. He is not entitled to the time Anderson & Co. were entitled to when they entered into the contract. The contract was entered into for five years, and the plaintiff and his predecessors, Anderson & Co., waited three years before thinking of carrying it out. It would require another year before the manufacture of biscuits could actually be started. That means that there would only be one year for the working of the contract instead of the five years contemplated thereunder. Judgment must therefore be for the defendants with costs.

FAWKES and WARD, JJ., concurred.

Plaintiff's Attorneys: *Botha & Goodrick*; Defendants' Attorneys: *Marais & De Villiers*.