ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 4 OF 2001

BETWEEN

WOODS DEVELOPMENT LIMITED — Appellant

and

ROY NICHOLAS — Respondent

Before:

Sir Dennis Byron — Chief Justice
The Hon Mr Albert Redhead — Justice of Appeal
The Hon Ian D Mitchell QC — Justice of Appeal (Ag)

Appearances:

Mr D Hamilton for the Appellant
Mrs M White for the Respondent

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2002: February 13, 15

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JUDGMENT

[1] Mitchell JA (Ag): This case involved a question of the alleged repudiation of a construction contract. The essential facts are not in dispute. The Appellant was a land-owner constructing a building on its land at Friar's Hill Road in Antigua, while the Respondent was a heavy duty equipment owner and operator. There was a contract in writing dated 22 August 1994 between the Appellant and the Respondent for the Respondent to transport 9,345 cubic yards of fill from Cedar Valley to the Appellant's construction. The Respondent was required by the contract to mine, load, transport, spread, wet and roll the finished grade as required for a contract price of $175,000.00. Shortly after the contract was entered into the Respondent commenced work and was paid up to 21 October 1994, based on his invoices, a total of $100,000.00. One day in mid-November 1994, the Respondent was required by the Appellant to drain water and to do land cutting. The Respondent pointed out that this was work outside of his contract and demanded that he be paid additionally for it. The Appellant's representative John

Beaulieu demanded that the Respondent do the extra work for nothing. The Respondent did not agree to this. John Beaulieu then told him, "Park. You must lock it down." The Respondent took this as a command to cease all work for the Appellant. He left the site and never returned to it despite several requests by the Appellant. The Appellant gave the Respondent two weeks to return to the construction site to complete the contract, and when he failed to do so, requested him to remove his remaining equipment from the site and employed other contractors to complete the contract at an increased price. The Respondent sued the Appellant for the balance of the contract price of $75,000.00. The Appellant did not counterclaim for damages. The learned trial judge found:

> [24] On the totality of the evidence it is my considered opinion that there was a dispute as to whether what the [Respondent] was asked to do did form part and parcel of his contract. It was at this stage when the disagreement arose and the [Respondent] refused to perform work outside the terms of his contract that the [Appellant] refused to sit down and negotiate with the [Respondent].
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> [25] The [Respondent] was within his rights in not performing this extra work, as there had been a unilateral alteration of the terms of the contract by the [Appellant].

[2] The learned trial judge found that the Appellant had unilaterally introduced other extra work outside the terms of the contract, and that the Respondent was entitled to treat the contract as discharged. He held that the Appellant was liable in damages to the Respondent in the amount of $75,000.00, the balance of the contract sum, and costs to be taxed if not agreed by reason of its repudiation of the contract between the Appellant and the Respondent.

[3] The learned trial judge based his finding that the demand of the Appellant that the Respondent do extra work outside the contract amounted to a repudiation of the contract by the Appellant entitling the Respondent to accept the repudiation and to sue for damages on the judgment of Sir Denys Williams CJ of Barbados in the case of Alleyne, Arthur and Hunte Ltd v Griffith and another (1992) 42 WIR 53. The learned trial judge said:

> [27] As he delivered judgment in the Alleyne, Arthur case Sir Dennis Williams CJ remarked thus:

> It was said in Re Patel Bronze and Metal Co Ltd (1918) 1 KB 315 at page 322 that a deliberate breach of a single provision of a contract may under special circumstances, and particularly if the provision is important, amount to a repudiation of the whole bargain . . . In my judgment the defendant and its associated company Plantations repudiated the plaintiff's contracts when they unilaterally altered the contractual terms requiring them to work on Saturdays. This was an important change which entitled the plaintiffs to regard themselves as being dismissed.
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> [28] Similarly in our present case the defendant had repudiated the contract by unilaterally introducing other extra work outside the terms of the contract and the plaintiff is entitled to treat the contract as discharged.

[4] The law on the rights of an innocent party where the other party has wrongfully refused to perform obligations is settled. It is set out conveniently in Fercometal SARL v Mediterranean Shipping Co SA [1988] 742 per Lord Ackner at page 747. The rule is that the wrongful refusal by one party to a contract to perform his obligations will not automatically bring the contract to an end. The innocent party has an option. He may either accept the wrongful repudiation as determining the contract and sue for damages or he may ignore or reject the attempt to determine the contract and confirm its continued existence.

[5] Sir Denys Williams in his judgment in the case of Alleyne, Arthur and Hunte [supra] had based his decision on the authority of In re An Arbitration between Rubel Bronze and Metal Company Limited and Vos [1918] 1KB 315. The principle set out in that decision is found in the judgment of McCardie J at page 322 as follows:

> It has been authoritatively stated that the question to be asked in cases of alleged repudiation is "whether the acts and conduct of the party evince an intention no longer to be bound by the contract": see per Lord Collins in General Billposting Co v Atkinson [1909] AC 118, 122. The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not, as a rule, be deemed to amount to repudiation. . . But, as already indicated by Withers v Reynolds (1831) 2 B&Ad 882, a deliberate breach of a single provision of a contract may, under special circumstances, and particularly if the provision be important, amount to a repudiation of the whole bargain . . . In every case the question of repudiation must depend on the character of the contract,

> the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and on the general circumstances of the case.

[6] Viscount Simon LC in the House of Lords decision in Heyman and another v Darwins Ltd [1942] 1 All ER 337 at page 340 put it this way:

> The first head of claim in the writ appears to be advanced on the view that an agreement is automatically terminated if one party "repudiates" it. That is not so. As Scrutton LJ said in Golding v London & Edinburgh Insurance Co Ltd (1932) Lloyd LR 487 at page 488: "I have never been able to understand what effect repudiation by one party has unless the other accepts it." If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and, even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance . . . Alternatively, the other party may rescind the contract, or (as it is sometimes expressed) "accept the repudiation," by so acting as to make plain that, in view of the wrongful action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can at once sue for damages . . . However, repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other.

[7] There was nothing in the evidence of either the Respondent or the Appellant in this case that showed an intention of the Appellant to repudiate the contract to mine, transport, spread, wet and roll the 9,345 cubic yards of fill. There was instead a disagreement between the Respondent and the Appellant as to whether the Respondent would be entitled to be paid for the extra work that he had been asked to do. The Respondent was entitled to refuse to do the extra work unless he was paid an additional sum. The Appellant on his part was entitled to order the Respondent to cease doing the extra work in question in the absence of agreement that the work would be done gratis. That is the reasonable interpretation of what the Appellant did on the day of the dispute in question. It ordered the Respondent to cease the work it was doing and over which extra work the dispute concerning payment had arisen. The Respondent was not entitled to take the view that the entire original contract had thereby been repudiated by the Appellant and to walk off the job as he did. When he was asked by the Appellant to continue with the original contract he was contractually bound to do so. His refusal to do so was a

repudiation on his part of the original contract which entitled the Appellant at its option to accept the repudiation and to retain other contractors to complete the unfinished part of the contract. The Appellant was even entitled to counterclaim for damages caused to the Appellant due to the repudiation by the Respondent, but in the event did not choose to do so. The learned trial judge misunderstood or misapplied the dicta of Williams CJ in coming to the view that the demand of the Appellant of the Respondent to do extra work outside of the original contract amounted to a repudiation of the original contract. I would allow the appeal, the Respondent to pay the costs of the Appellant in the High Court agreed at $10,000.00 and in the Court of Appeal of $11,250.00.

I D Mitchell, QC
Justice of Appeal (Ag)

I concur

Sir Dennis Byron
Chief Justice

I concur

Albert J Readhead
Justice of Appeal