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CARR V. J.A. BERRIMAN PTY LTD (1953) 89 CLR 327

High Court of Australia – 5 June 1953

FACTS

Berriman and Carr entered into a contract for Berriman to build a factory on Carr's land in Sydney. The architect was Oser, who was an agent of Carr for the building contract. Carr was to level the land by 31 May and was to supply steel to Berriman for a contractor to process. The fabrication of the steel was a major part of the contract.

Carr failed to level the land in time and contracted itself with Acos to fabricate the steel. Berriman claimed there were two breaches of the contract and terminated the contract. Carr and Berriman sued each other for the breach of the contract.

ISSUES

Did Carr breach the contract when he failed to level the site and contracted with Acos to fabricate the steel. Was Berriman entitled to terminate the contract after the two breaches of contract by Carr?

FINDING

Carr had committed two breaches of the contract. The contracting for fabrication of the steel to Acos amounted to a repudiation of the contract by Carr, and Berriman was entitled to end the contract.

A claim by Carr that Oser, the architect, had a direction to take work off Berriman, was rejected as Oser merely informed Berriman that the fabrication of steel would be done by Acos. Oser did not exercise a power to modify the works.

QUOTE

"One would be disposed to think that this second breach alone amounted to such repudiation as justified rescission.

It is to be remembered that Carr's action in placing the fabrication of the steel in other hands was deliberate.

Mr Barwick cited the case of James Shaffer Ltd v Findlay Durham & Brodie (1953) 1 WLR 106, but the case seems to present a marked contrast with this case. In that case the defendants were desirous of doing, and were in fact doing, their very utmost to perform their contract. It is possible that Carr believed the architects had power under the conditions of the contract to "omit" therefrom the fabrication of the steel and so leave him at liberty to make other arrangements for the doing of that work. But he had, in the words of Latham CJ in Luna Park (NSW) Ltd. v

Tramways Advertising Pty Ltd. (1938) 61 CLR, at p 304 "given" Berriman "the right to believe that the contract would not be performed according to its true construction".

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Moreover, the step was taken without inviting the exercise of any discretion on the part of the architect. Mr Oser seems simply to have been presented with a fait accompli and to have tried to make the best he could of it." - page 350 –351 of (1953) 89 CLR 327

IMPACT

A principal can not unilaterally decide to take work off the contractor.

A variation clause will only be effective if the Superintendent is exercising his power to vary the works and not simply informing the contractor that the work had been taken away.

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