CONTRACTORS' LIENS AND THE INTERNAL COMBUSTION ENGINE

MOTOR REBUILDS, LTD. v. BOLLARD AND OTHERS
[1956] N.Z.L.R. 954

The Wages Protection and Contractors' Liens Act 1939 in theory is praiseworthy, but in practice leaves something to be desired. The decision of North J. in Motor Rebuilds, Ltd. v. Bollard and Others [1956] N.Z.L.R. 954 brings to light some of the problems surrounding the Act and illustrates the difficulties of applying its language to a modern situation.

The Trustees of Cornwall Park in Auckland had agreed with one Hall ("the contractor") that the latter would carry out certain construction work at Cornwall Park at a figure of some £11,000. As the work progressed the contractor became unable to pay his sub-contractors, some of whom instituted proceedings claiming a charge under the Wages Protection and Contractors' Liens Act on the moneys payable by the Cornwall Park Trustees to the contractor.

One of these claimants was the plaintiff company, whose claim was in respect of petrol and oil supplied, and repairs and servicing done to the contractor's vehicles and plant. It appears that for some time before the dealings with the Cornwall Park Trustees commenced, the contractor had been purchasing petrol and oil and having repairs done by the plaintiff company and was required to pay for same on the 20th of each month. However, on the strength of the Cornwall Park job, the contractor arranged to obtain extended credit from the plaintiff company, pointing out that he was dependent on progress payments from Cornwall Park to meet the company's accounts. It is worth mentioning that from this time (February 1954) until the contract was nearing completion (January 1956) the plaintiff company's invoices totalled £2,089 8s. 5d. and over the same period the payments made by the contractor in reduction amounted to £1,190 4s. 11d. leaving a balance of £899 3s. 6d.

The plaintiff company claimed a charge for this amount on the moneys due by the Trustees to the contractor but this claim was disputed by the sub-contractors who had made a similar claim in respect of their work.

North J. in finding against the company based his decision on three factors.

Firstly, the learned Judge stated (at 956) that he was not satisfied that it was ever a term of the contract between the plaintiff company and the contractor, that the latter would use the supplies of petrol and oil and his vehicles and plant solely and exclusively for the Cornwall Park work. The learned Judge pointed out that the reason why the contractor had discussed the Cornwall Park contract with the plaintiff was simply for the purpose of obtaining extended credit; he had neither expressly nor by implication bound himself to use the petrol and oil and repaired vehicles exclusively for the work in question. In fact it was clear that the contractor was free to use his motor car both for work and for pleasure. In this regard North J. referred to In re Williams, Ex parte the Official Assignee (1899), 17 N.Z.L.R., C.A. 712, in which Edwards J. - with whose judgment the other members of the Court concurred - dealt with a claim for a charge under the Contractors' and Workmen's Liens Act 1892 (at 718-9):

> If the contract had been for the supply of materials generally, without specifying their purpose, so that the [contractor] could have done what he pleased with the materials in question, the mere fact that they were used in a particular building would not have created a lien or charge in favour of the person supplying the same; but where a contract is entered into for the supply of materials for the purpose of work in connection with a particular building, it has, in my opinion, since the passing of the statute under consideration, become an essential term of such contract that such materials should be used only for the purpose for which they are supplied.

If this statement were true in 1899, it is equally true today. Section 21 (1) of the 1939 Act (undoubtedly the keystone of Part II of the Act with which we are concerned) provides:

> Where any employer contracts with or employs any person for the performance of any work upon or in respect of any land . . . the contractor and every sub-contractor or worker employed to do any part of the work shall be entitled to a lien upon the estate or interest of the employer in the land . . . and every sub-contractor or worker employed by the contractor or by any sub-contractor to do any part of the work shall be entitled to a charge on the moneys payable to the contractor or sub-contractor by whom he is employed, or to any superior contractor, under his contract or sub-contract. [Emphasis added.]

If we transpose these words into the present context we have:

> Where the Cornwall Park Trustees contract with the contractor for the performance of work upon or in respect of Cornwall Park, every sub-contractor employed by the contractor to do any part of the work upon or in respect of Cornwall Park shall be entitled to a charge on the moneys payable to the contractor by the Cornwall Park Trustees.

The difficulty which faced the plaintiff company, therefore, was to show not only that it had been employed to do part of the "work" - a point to which we will return - but also that the work it was employed to do was in respect of the Cornwall Park contract and that contract only.

It is true that the subsection does not in so many words state that an "exclusive" contract is necessary, but it is submitted that any other interpretation, as far as the supplying of petrol and oil is concerned at any rate, would be unworkable. Assuming for the moment that the supplying of petrol and oil is "work" within the meaning of

the Act - and North J. held that it was not - how could the plaintiff company prove how much was used "upon or in connection with" Cornwall Park and how much was used for other purposes? Conversely (again assuming that the supplying of petrol and oil is "work") if the company could have shown that all the petrol and oil was used exclusively on Cornwall Park it seems that it would have been entitled to succeed.

The second objection taken by North J. (at 956) was that there was a doubt whether the arrangement made between the plaintiff company and the contractor could be considered to be a contract under which the company bound itself to supply all the contractor's requirements of petrol and oil and to do all the servicing and repairs to the vehicles and plant during the progress of the Cornwall Park contract. On this point the learned Judge referred to Ball v. Scott Timber Co., Ltd. [1929] N.Z.L.R. 570. It is submitted, however, that the requirement in that case of a "continuous contract" is not now necessary. Ball's case dealt with the validity of a claim under the Wages Protection and Contractors' Liens Act 1908, s.56(1) of which provided that notice of charge must be given within 30 days of the completion of the particular work for which the charge was claimed. If no notice was given within this period no charge could be claimed under that Act: s. 56(4). Where, therefore, a claim was made in respect of items supplied for a particular job, it was necessary prior to 1940, either to give a notice of charge within 30 days of each supply or to show that each set of materials was supplied pursuant to one continuous contract to supply all the materials for that job. In the latter case, it was necessary to give only one notice within 30 days of the supply of the last set of materials. It was held in Ball's case, in respect of the supplying of timber for the erection of a hall, that the timber was not supplied pursuant to one continuous contract and accordingly a charge could be sustained only for timber supplied within 30 days before the notice was given.

Under the 1939 Act, however, failure to give notice within 30 days is not fatal to a claim for a charge,

although it does affect priorities as between claimants. From a practical point of view, of course, it is desirable to give notice within 30 days of the completion of the work in respect of which the claim is made in order to ensure priority under s. 26. Failing this, notice should be given within 30 days of the completion of the head contract to prevent dispersal of the moneys retained pursuant to s. 32 and possibly also to obtain the benefits of s. 31. Failure to give notice within either of these periods, however, is apparently not fatal to a claim for a charge so that the requirements of a "continuous contract" as laid down in Ball's case are not now necessary. Provided notice is given (and even this may be dispensed with under s. 36 (2)) and proceedings are taken within 60 days of the completion of the head contract (s. 34(4)), a charge can be sustained - that is if there is any money still retained to which the charge can attach.

But even assuming that the plaintiff company could prove: (1) that it was a term of the contract that the contractor would use the materials supplied exclusively for the Cornwall Park work and (2) that the company was bound by a "continuous contract", North J. had a third and fundamental objection to the claim. The learned Judge considered that the plaintiff company had not done "work" upon or in connection with Cornwall Park so as to bring itself within s. 21.

As far as the repairs were concerned, North J. pointed out that the size of the repair account would be contingent upon the state of repair of the vehicles, and that in any case the plaintiff company had a right to a lien on such vehicles for the cost of repair. There can be no doubt that this is correct. But it is submitted with respect that the decision of the learned Judge that the supplying of petrol and oil was not "work" within s.21 lacks a full appreciation of modern conditions. North J. stated (at 957) that the contractor no doubt found it convenient to use his vehicles and plant in performing the contract. It would appear, however, that it is not merely convenient to perform an £11,000 contract with the aid of mechanical equipment but also absolutely impossible to carry out the

work without it. No contractor in his right mind would tender for a job of this magnitude on the basis that all the bull-dozing, carting and other such operations would be done by hand - he would not get the job.

On the other hand, if the decision in the case under discussion becomes known to petrol and oil suppliers, a contractor may henceforth find it difficult to obtain extended credit for large amounts without giving some form of security.

Having regard then to modern techniques and to the everyday use of plant, machinery and vehicles, it is respectfully suggested that the learned Judge could well have adopted a more lenient attitude to the plaintiff company's claim. It is fairly clear that without the company's petrol and oil and the credit arrangement the contractor would never have undertaken the Cornwall Park contract.

North J. continued by saying that if he were to allow the claim of the plaintiff company it would amount to letting in the general creditors of a contractor. With respect, it is submitted that this is not so. Before a general creditor could claim under the Act he would have to show that he had contracted to do part of the Cornwall Park work: in other words, he would have to bring himself within the terms of s. 21.

The learned Judge then went on to consider the case of Kanieri Electric Ltd. v. Hansford and Mills Construction Co. Ltd. [1931] G.L.R. 446. The Kanieri company had supplied electricity to the Hansford company to enable the latter to operate certain plant and machinery used in the erection of a dredge at Hokitika. Blair J. held that the supply of electricity was "work" within the meaning of the definition of that word in the 1908 Act (apart from minor grammatical alterations, the same as that contained in the relevant provisions of the 1939 Act) on the basis that the energy supplied was the mere mechanical equivalent of the energy that would otherwise have been supplied by the muscles of the workmen. The learned Judge allowing the plaintiff's claim for a charge concluded his judgment by saying (at 448):

> . . . If from the definition of "work" there must be excluded all those parts of the "work" which are the result of mechanical devices then the logical result of the argument raised by the defence in this case would be that in all claims for lien under the Wages Protection and Contractors' Liens Act, 1908, there would require to be excluded from the benefit of the Act all that portion of the work which was the result of mechanical devices. In modern times it is the exception to find work done wholly by hand. There is invariably a machine of some sort or kind assisting at some stage of the operations.

North J. in the Motor Rebuilds case expressed doubts about the validity of the Kanieri case but stated that even so it was distinguishable. The learned Judge said (at 958):

> . . . At all events the Kanieri case is certainly not an authority for the view that electricity is "material", and also is distinguishable from the present case in that the electricity was continuously supplied at the site of the work, whereas in the present case the petrol and oil was supplied to the contractor at the plaintiff's service station. . . .

As to the latter point, it is respectfully submitted that the requirement of supplying the labour or materials "on the site" is not necessary. Were it necessary, the sub-contractor who pre-cuts the frame of a house and hands it over to the builder at the factory would not have any rights under the Act; and this even though the rest of the house was built around his framework. It is indisputable, however, that such a sub-contractor has a right of lien and charge in respect of the work done by him. As to the statement of North J. that the Kanieri case (supra) was not an authority for the view that electricity is "material" within the meaning of the Act, it may be thought, not only that a more lenient attitude could have been taken to the plaintiff company's claim in this respect in the Motor Rebuilds case, but also that a more up-to-date approach could have been adopted.

It should be made clear, however, that this note is concerned only with the question whether in view of modern industrial conditions a supplier of petrol and oil should not have a right of lien and charge. It is suggested that he should, but only if he can prove that the petrol and oil were used exclusively for the particular head contract. It must, of course, be remembered that the plaintiff in the Motor Rebuilds case would have failed in its claim in any case because of the lack of an exclusive contract. But it is submitted, with respect, that while North J. had to find against the plaintiff company on the "exclusive" objection, the learned Judge could have nonetheless held that the supply of petrol and oil was itself within the Act. This would have at least been a step in the right direction for the future.

Firstly, it is respectfully submitted that there is no important distinction between the Kanieri case (supra) and the Motor Rebuilds case (supra). In the former, motive power in the form of electricity was supplied to operate machinery. In the latter, motive power in the form of petrol and oil was supplied to operate machinery. To use the analogy of Blair J. in the Kanieri case, the petrol and oil supplied was the mere mechanical equivalent of the energy that would otherwise have been supplied by the muscles of the workmen.

Secondly, if the above argument is not correct, it is submitted that the supplier of petrol and oil may be brought within the definition of "work" as a supplier of materials. Section 20 after setting out the various meanings of "work" states:

> . . . and also includes the supply of material used or brought on the premises to be used in connection with the work . . . .

It is of course true that North J. in the Motor Rebuilds case rejected this argument (at 958):

> . . . In my opinion the word "material" as used in the Act means some substance which in some form or

> another is incorporated in the work, and I do not consider that it includes substances like petrol and oil which were merely used by the contractor in the course of the work to supply the motive power for his vehicles and plant. . . .

But it is submitted, with respect, that this interpretation is hardly acceptable in the light of modern conditions. Petrol and oil are essentials for heavy earthmoving work and although these substances may not be actually incorporated in the job itself it is hardly conceivable that work of the nature in question could have been done without them. Can it not be said quite reasonably that the motive power supplied by petrol and oil is incorporated in the finished job? The results of the motive power can certainly be seen.

With the increasing reliance on heavy machinery it is safe to say that the "petrol and oil" problem will come before the courts more regularly. It seems, however, that on the basis of the Motor Rebuilds case suppliers of these materials are to be left out in the cold. The amount allocated by a contractor in his costing to "petrol and oil account" (perhaps some thousands of pounds) will therefore go to swell the funds available to those who have rights under the Act while those who act for suppliers of petrol and oil will have the unhappy task of telling their client that as the definition of "work" contained in the Wages Protection and Contractors' Liens Act 1939 is practically the same as originally drafted in 1892, and as petrol and oil had hardly been heard of in New Zealand at that time, they cannot expect to be more than mere unsecured creditors.

The position is one which, it seems, is best rectified by legislation, and all that would appear to be required is the addition of the following words to the definition of "work" contained in s. 20 of the Act:

> . . . and further includes the supplying of petrol and oil for vehicles, equipment, plant, machinery and other mechanical devices used exclusively for part of of the work provided that such petrol and oil were supplied for that purpose only. . . .

While this suggested amendment may leave something to be desired, it is at least a starting point. It may not give the supplier of petrol and oil the same rights under the Act as those enjoyed by other sub-contractors, but it at least has the merit of giving them some rights where at present they appear to have none.