

**WIRE INDUSTRIES STEEL PRODUCTS AND ENGINEERING CO (RHODESIA) (PVT) LTD v ANGLO RHODESIAN STEEL PRODUCTS AND ENGINEERING CO LTD (1965) ZR 126 (HC)**

HIGH COURT

CHARLES J

9th September 1965

**Flynote and Headnote**

**[1] Companies - Association of - existence, continuation of - substantial degree of its functions continued:**

The test of whether an association of companies had 'ceased to operate' focuses on whether it continues to perform a substantial degree of its functions.

**[2] Contract - Condition subsequent - burden of proof on person contending that condition has occurred:**

A party seeking to avoid an established liability under a contract which provides for cessation of liability upon the occurrence of a condition subsequent has the burden of proving that the condition has occurred.

**[3] Evidence - Burden of proof - condition subsequent to contractual liability:**

See [2] above.

*A O R Mitchley* for the plaintiff

*Hadden* for the defendant

**Judgment**

**Charles J:** In this action the plaintiff claims against the defendant the sum of £329 as owing under an agreement which was made between them and others in April, 1960.

The plaintiff and defendant are companies which, in 1960, manufactured metal doors and windows and allied products and were members of the Central African Metal Window Manufacturers Association (hereinafter called 'the Association'). That Association had as its object the stabilising of selling prices of metal doors and windows and allied products in the Federation of Rhodesia and Nyasaland so as to ensure fair and reasonable profits to its members, and it operated by fixing selling prices and discounts, allocating monthly quotas of sales to members, imposing penalties upon members who over - sold their quotas, and distributing the penalties amongst members who had sold below their quotas, and controlling the acceptance and distribution of tenders for work at a price of over £500 by fixing the prices at which members were to tender. The rules of the Association provided that each member was to pay a monthly levy for the administration of the Association and to make a fidelity deposit of money with the Association, and that the Association was to continue until the 30th April, 1960, 'and thereafter six months' notice is to be given to any member wishing to withdraw'.

In April, 1960, the plaintiff entered into an agreement (hereinafter called 'the agreement') with other members of the Association, including the defendant, whereby the plaintiff was to cease manufacturing and selling its products as from the 1st May, 1960, and the other parties were to pay to it as from 1st May, 1960, to 30th April, 1964, a proportion of the net amounts due to them each month from their sales of goods. The agreement provided, by clause 9, that the defendant, *inter alia*, was bound to make the payments last mentioned 'irrespective of whether it remains a member of the Association but it shall not be bound to make such payments in respect of any period for which the Association ceases for any reason to operate during the period from the 1st May, 1962, to the 30th April, 1964; it shall, however, be bound to make such payments in respect of any period during the term when the Association or any association with similar objects of which it is a member, does operate'. The agreement also provided, by clause 1, that no alteration or modification of the rules of the Association were to affect the plaintiff's rights under the agreement. The plaintiff, pursuant to the agreement duly, ceased to operate and the defendant made the payments due to the plaintiff up to the 30th September, 1963. At a meeting of the Association on the 1st October, 1963, the representative of one of its members, The Monarch Steel Window Manufacturers (Private) Limited, announced that his company was withdrawing from the Association. It was then resolved 'that the Association would carry on in a modified form for the purpose of allocating orders on the running

Government contracts, to discuss labour relations and duty claims and other problems common to the Industry; that all pricing arrangements, the reporting and allocating of enquiries, Quotas, Audit, Guide Sheets and all other Secretarial work connected with the day to day running of the Association shall cease as from the 1st October, 1963'. An instruction was also given to the secretaries of the Association to close its books and refund to members their fidelity deposits and their shares of the accumulated funds. The plaintiff was not represented at that meeting.

On the 9th October, 1963, the firm which acted as secretaries for the Association wrote to the members, including the defendant, setting out proposals for continuing the Association in a modified form. To that the defendant replied on the 19th October, 1963, expressing its preference 'not to associate ourselves with the other members until such time as the existing breach can be reviewed and some suitable arrangement for the members to come together as far as pricing arrangements are concerned'. On the 27th November, 1963, the secretaries wrote to the defendant enclosing a Revenue and Expenditure Account of the Association up to the 31st October, 1963, and suggesting that a sum of £440 17s 11d be retained for three months in order to meet some outstanding small accounts and the possible event of members coming together again. That proposal was accepted by the defendant by letter dated the 3rd December, 1963.

Since the meeting of the 1st October, 1963, members of the Association, including the Monarch Company, have associated together in the acceptance of requisitions on previous Government tenders and for the allocation of new Government tenders, and the same firm of secretaries has continued to act for them in those matters. On the other hand, the members have been engaging in a 'price war' between themselves in Southern Rhodesia in respect of non - Government contracts. The defendant has not participated in

1965 ZR p128

CHARLES J

any of those activities. Further, it has received the refund of its fidelity deposit which it had made with the Association, though it has not given six months' notice of retirement from the Association. On the basis that the Association ceased to operate on the 1st October, 1963, and that it has not joined any similar association, the defendant has not made any payments to the plaintiff under the agreement since the 30th September, 1963. It is for the payments since that date that the sum of £329 is claimed with interest.

The plaintiff's case is that the Association is still operating in fact in respect of Government contracts and tenders and that, in any case, it is still in existence, since it has not been dissolved with the plaintiff's consent and the members have not given six months' notice of retirement, and that, consequently, the defendant was still liable under the agreement. It is to be observed that it is immaterial to the defendant's liability under clause 9 whether or not the Association continued in existence after the 1st October, 1963, or whether or not the defendant continued to be a member of it after that date. [1] What is material is whether or not the Association had ceased to operate for any reason after that date, a question which has to be answered according to whether or not it had continued to perform a substantial degree of its functions. Cessation of operations automatically occurred if the Association was actually dissolved and wound up as a result of the meeting of the 1st October, 1963, whether or not the dissolution was valid as against the plaintiff. Consequently, the material question whether or not the Association had ceased to operate after that date depends on whether the functions of the Association relating to Government contracts and tenders - functions which are not shown by the evidence to be unsubstantial - continued to be carried on by the Association itself or really came to be performed by a new association of which the defendant is not a member.

[2] [3] In my judgment the *onus* is upon the defendant to show that the functions in relation to Government contracts and tenders were really come to be performed by a new association. The defendant contracted a liability which was to continue for a definite period unless a certain avoiding event, namely the cessation of operations by the Association, occurred within the period. In accordance with established principles, the creation of the liability having been established it continues until the avoiding event has been proved to have occurred.

I am not satisfied on the balance of probabilities that the functions which have been performed since 1st October, 1963, have not been performed by the Association but by a new association, having regard to the resolution of the 1st October, 1963, being that the Association would carry on in a modified form; to the fee of the firm of secretaries at a reduced rate for services which it continued to render having been contracted with the Association; to the winding up of the affairs of the Association not being completed until outstanding Government contracts and tenders had been satisfied; and to new Government contracts and tenders having been dealt with by the Association as such.

As a result, I hold that the defendant is liable to the plaintiff in the sum claimed. There will be judgment accordingly.

*Judgment for plaintiff.*