KARIBA NORTH BANK COMPANY LIMITED v P.F.M. SHEWELL (1985) Z.R. 150 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, JJ.S.
20TH MARCH AND 19TH APRIL, 1985
(S.C.Z. JUDGMENT NO 8 OF 1985)

Flynote
Contract - Building contract - Vesting clause - Insurance moneys under - policy taken out in joint names of builder and employer - To whom payable.

Headnote
One of the terms of a building contract was that the plant and machinery belonging to the builder and brought on to the works should "be deemed to become the property of the employer". There were other clauses providing for the re-vesting of the ownership in the builder, among other events, on completion. Pursuant to other clauses, the plant and machinery was insured in the joint names of the builder and the employer at the former's cost. The employer claimed that money which had become payable under the policy should be paid to him.

Held:
(i) The object of the insurance clauses was to secure the due performance of the contract and to ensure that money would be available to either party for repair, rehabilitation or replacement of the plant and machinery required for due completion of the works;
(ii) The vesting clause did not confer on the employer rights of beneficial ownership extending beyond the protection of the contract and the securing of its due performance.

Case referred to:
(1) Re Winter, Ex parte Bolland [1878] Ch. D. 225.

For the appellant: K.M. Mwangang'umbi, of Legal Services Corporation.
For the respondent: A.M. Hamir, of Solly Patel, Hamir and Lawrence.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court.

When we heard this appeal we dismissed it with costs to be taxed in default of agreement. We indicated then that we would give our reasons later and this we now do. This is an appeal against the determination of the High Court to the effect that, on a proper construction of the relevant clauses in a building contract between the parties, certain moneys payable under an insurance policy taken out in the joint names of the builder and

the employer, in respect of the builder's construction plant and machinery, are payable to the builder. For convenience, we will refer to the appellant as the employer and to the respondent (who in his capacity as receiver has the rights of the contractor) as the builder.

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By Clause 21 of the contract between the parties, the builder was required, at his cost, to insure ifs the joint names of the parties the property to which we have already referred. There is no dispute, and indeed the terms of this clause make it very clear, that the object of such insurance was not only to secure the due performance of the contract but more important to protect both parties against losses or claims as well as to ensure that moneys would be available to either party under the policy for the purposes of repairing or otherwise rehabilitating or replacing the plant and machinery required for the due completion of the construction works.

The dispute in this case stems from a vesting clause, namely, Clause 53 (4) which is in the following terms:

"All Constructional Plant Temporary Works and materials owned by the contractor shall when brought to on the Site or the case of Hire Purchaser Plant on the Site on its becoming the property of the contractor immediately be deemed to become the property of the Employer."

For completeness, we should also mention that there were other clauses providing for the re-vesting of the ownership of the plant in the builder, among other events, on completion. The learned trial judge held that the vesting clause was designed, "to ensure that the contract was protected performed and completed" and that, "It acted as security for the performance of the contract." the trial Court therefore held that the employer did not become the owner of the property but only acquired limited rights of use under the vesting clause during the performance of the contract.

Mr Mwanang'umbi who appears for the employer, concedes that what he terms the "absolute ownership" remained with the builder and that the employer only enjoyed the limited light which constituted a security for the due performance of the contract. The main thrust of his argument, however, is that, as there was no evidence adduced by the builder to show that he had completed the construction, the builder had not established that the property had re-vested in him. On that ground, and since the insurance money was intended to be used to reinstate the plant for the purpose of completing the construction, the right of use and therefore the right to reinstate the plant was vested in the employer. In the premises, so the argument went, the employer must receive the moneys in issue.

It was not made clear, either from the pleadings or from the statement of agreed facts, whether the builder successfully completed the work or if the contract was determined before such completion, but the submissions made by counsel who appeared for the employer in the Court below suggested that someone else came to complete the work. It

is unnecessary for us to make any assumption one way or the other since, as will appear shortly, it does not matter who completed the work.

Mr Mwanang'umbi cites In Re Winter Ex. P. Bolland (1) in support of the submission that the right of use vested in the employer. In his heads

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of argument, Mr Hamir (who was not called upon) cites the same authority for the purpose of defeating the whole of the employer's claim to the cash in issue. In the case referred to, one of the terms of the building contract was that the plant brought by the contractor on the works should, as in this case, "be deemed the property of." the employers, "for the time being" and should "not be removed during the progress of the work without the written order of the engineer", and that in case of suspension of the works by the engineer for any act or default of the contractor, the same should be "subject to be used" in and about the completion of the works. The works were suspended by the engineer, the contractor went into liquidation, and the works having been completed by the employers, the plant was by consent sold. The liquidator sought to recover the proceeds of sale but the employers argued that they had the right to retain such proceeds or to set off the amount against some money owed to them by the contractor on the ground, inter alia, that the property was in them by reason of the vesting clause. It was held in that case that the plant did not become the property of the employers; that the employers could not retain the money; nor could they set it oh against their counter-claim. The right of use was therefore held not to have conferred any such ownership as contended by the employer.

We agree with the submission in Mr Hamir's heads of argument that the case cited is, for all practical purposes, on all fours with the case now before us. The insurance moneys in this case must, in our considered opinion, be regarded in exactly the same manner as the proceeds of sale in Re Winter. The vesting clause, in this case, can certainly not be construed so as to confer on the employer rights of beneficial ownership extending beyond the protection of the contract and the securing of its due performance.

It was for the foregoing reasons that we upheld the decisions, below and dismissed the appeal.

Appeal dismissed