Privy Council Appeal No. 12 *of* 1962

Australian Blue Metal Limited – – – – – – *Appellant*

v.

Robert Frank Hughes and others – – – – – *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JULY 1962

Present at the Hearing:
LORD REID.
LORD RADCLIFFE.
LORD EVERSHED.
LORD MORRIS OF BORTH-Y-GEST.
LORD DEVLIN.
[*Delivered by* LORD DEVLIN]

This is an appeal from a decree of the Supreme Court of New South Wales made in its equitable jurisdiction on 11th December, 1961, dismissing with costs a suit instituted by the appellants as plaintiffs for an injunction and other relief in aid of rights claimed by them under an agreement in writing for the mining of magnesite dated 14th June, 1957. In the proceedings before the Supreme Court a number of issues arose. Their Lordships have found it necessary to consider only one of these issues and they will now summarise the facts that are material to that issue.

The respondents are members of a partnership known as the Hughes and Caldwell Partnership. There have from time to time been changes in the composition of the partnership which it is unnecessary to detail. The partnership has been in existence since 1936; and for the sake of convenience their Lordships will refer to it as " the respondents ". Likewise, their Lordships will describe as " the appellants ", not only the appellant company which was incorporated in 1951, but its predecessors in title, namely, a partnership which before 1951 traded under the name later adopted by the company.

The respondents have since September 1937, had the benefit of a mining lease granted under the Mining Act 1906, entitling them to mine for magnesite and chromite in an area of about 55 acres, described as P.M.L.1 and situated in the Young district in New South Wales. The appellants have since 1942 held a similar mining lease over two areas numbered P.M.L.15 and P.M.L.16, which adjoin P.M.L.1. On 6th October, 1942, the respondents granted to the appellants a licence to mine for magnesite on P.M.L.1. The licence was contained in an agreement in writing which provided that it was to last for five years unless previously terminated by the licensees giving eight weeks' notice in writing. It was an exclusive licence, except that the licensors reserved to themselves certain limited rights of working. It specified maximum and minimum quantities of magnesite which were to be mined annually by the licensees and gave to the licensors a share of the proceeds of the magnesite won and sold. Operations under this licence ceased in 1944. After 1944 some mining was done under P.M.L.1 by some of the respondent partners working themselves and some by various licensees of the partnership who mined in return for payment of royalties.

Up to 1956 the appellants had not done much if any work on their own leases P.M.L.15 and 16. In February 1956 they began work on these leases,

employing eventually about half-a-dozen men and such equipment as was necessary for mining by the " open cut " method. The equipment consisted of a bulldozer, a Diesel shovel loading device, a compressor and jack hammer, drills and four trucks. Provision was made on the site for two store sheds and a little shed for storing explosives.

In November 1956 the appellants and the respondents entered into an oral agreement whereunder the appellants were to have the right to mine for magnesite on a part of P.M.L.1 in return for a royalty of 10s. 0d. per ton of magnesite mined. This agreement was put into writing on 9th January, 1957. The document produced was much briefer and far less formal than the previous agreement between the parties of 5th October, 1942. It contained no express term defining the period for which it was to run or providing by any means for its termination. It did not specify any quantity of magnesite that was to be mined nor did it say whether or not the licence was to be exclusive. The material clauses are as follows:—

> " 1. The company shall have the right to mine for magnesite on P.M.L.1 east of a line running south from a turn in the fence on the northern boundary of such P.M.L.1.
>
> 2. The company will pay to Hughes and Caldwell royalty of 10s. 0d. per ton in respect of all magnesite won and delivered from such area.
>
> . . . . . .
>
> 4. The company will pay such royalties and render statements monthly to the aforesaid Logan Hunter Caldwell . . .
>
> . . . . . .
>
> 7. The company will fill in all excavations made by it or its employees except the last excavation which is to be left with three in one batter."

Between January and May 1957 the operations of the appellants on P.M.L.1 were conducted at a loss. On the 5th June, 1957, the appellants through their secretary told the respondents that they would have to pull out on 30th June unless they could decrease their costs, increase revenue and increase production. As a result of this conversation a new agreement was made in writing between the parties on 14th June, 1957. It is in the same terms as the agreement of 9th January except that the royalty figure is reduced from 10s. 0d. per ton to 6s. 0d.

Just about this time the appellants had begun work on a part of P.M.L.1 that is described as being " south of the gully " and by the middle of June it soon appeared that this work was going to be very profitable. The respondents thereupon contested the appellants' right under the agreement to be operating south of the gully. On 19th August the following letter was written by the respondents' accountants to the appellants:—

> " We desire to convey to you a resolution passed by the partners of Hughes and Caldwell at a meeting of their syndicate at a meeting held on 14th August, 1957.
>
> That the Australian Blue Metal Company be requested to immediately vacate P.M.L.1 and therefore cease to work its lease for magnesite.
>
> We will therefore be pleased if you will kindly cease operations immediately on P.M.L.1."

The letter was not complied with. There was further correspondence between the parties ending with a solicitor's letter on 16th October, 1957, alleging that the appellants were trespassers and requiring them to vacate the land by the end of the month; but the appellants are still there.

The proceedings now before the Board were begun by the appellants on 13th May, 1958 by a statement of claim in which they sought an injunction restraining the respondents from preventing their access to the land for the purpose of mining for magnesite. The Supreme Court refused the injunction. The first conclusion reached by Jacobs, J. for his decision, and the only one which their Lordships have fully considered, is that the agreement of 14th June, 1957, was properly terminated by the notice of 19th August, 1957, " because upon its true construction the right to mine thereby given was terminable at will by the licensors provided that the plaintiff company thereupon had a period of grace in which to remove any mined mineral and to vacate the land."

It will be observed that by the letter of 19th August the appellants were required not only to cease work immediately but also to vacate the land immediately. The two things are not the same. The respondents do not now contend that, even if they were right in demanding the immediate cessation of work, they were also right in demanding the immediate vacation of the land. The appellants were entitled to " a period of grace " for the purposes stated by His Honour. But the respondents did not in fact try to exclude the appellants from the land and the appellants do not suggest that any period of grace to which they were entitled had not expired long before proceedings were begun. The appellants have however argued that the letter ought to have stated the period of grace which the respondents were prepared to allow. Whether the notice of termination is in the correct form is bound up with the larger question whether reasonable notice is required at all. Their Lordships will defer consideration of this argument until the point can be considered as a whole.

The agreement of 14th June 1957 is not a lease nor an assignment of a lease. It is properly described as a mining licence. What it does is to authorise the appellants to exercise on a part of P.M.L.1 the rights which the respondents held as mining lessees. What is now in issue is whether the respondents were entitled peremptorily to forbid the appellants to do any more of the mining which the agreement authorised them to do. That issue turns very largely on what is meant by " the right to mine " granted by clause 1 of the agreement. When it is said that a licence coupled with an interest is irrevocable, what is meant is that the licensor cannot revoke such a licence if the licensee is thereby prevented from exploiting the interest that the licensor has granted to him. What is the interest comprised in the words " the right to mine "? If what is conveyed is a right to mine for a certain quantity or for a certain period, then the licence is irrevocable until the interest has been determined, that is, until the certain quantity has been obtained or the certain period has run out. If the right to mine is terminable at will, then the licence, subject to any need there may be for a period of grace, is revocable summarily. Thus the main question in this case turns on the true construction of clause 1.

His Honour has construed the right to mine as being terminable at will. The appellants submit that this is wrong and they advance two alternative constructions. The first is that the right to mine continues " so long as magnesite remains to be won or until the title or interest of the respondents in P.M.L.1 should determine, whichever event should first happen." The second is that the right is terminable only upon the expiration of a period of reasonable notice.

Before considering the arguments advanced in support of these three constructions, their Lordships will note two significant features of the agreement. The first feature is that the licence granted by the agreement is non-exclusive. That is agreed. It follows from that that the appellants were not on any view acquiring the right to mine all the magnesite on the land. It was open to the respondents to reduce the magnesite obtainable by the appellants, maybe very considerably, by resuming work themselves or by creating any number of other licensees. The second feature is that no express obligation was imposed on the appellants to do any mining at all and in their Lordships' opinion none can be implied. The only practicable way of framing such an obligation with sufficient precision to make it enforceable is to do what was done by the parties in the 1942 agreement and specify a minimum quantity of material that has to be won in a given period. Their Lordships were referred to *Hillas v. Arcos* (1932) 147 L.T. 503, a case in which the House of Lords was able to use the implication of reasonableness to fill the gaps left by the parties. But in the present case there are no criteria which would enable a court of law to determine what would be a reasonable quantity. There would be too many uncertain factors to be taken into account, such as the profitability of mining in the future and the possibility of work being done by other licensees and the division of available labour or equipment between P.M.L.1 and the appellants' own areas. In their Lordships' opinion the appellants could work or not as they liked on P.M.L.1.

Their Lordships turn now to consider the first of the constructions advanced by the appellants. The two terminating events to the licence period which are suggested are, first, the date when no magnesite is left to be won, and, secondly, the date when the respondents' title or interest to P.M.L.1 expired. Both these dates may appear at first sight to be easily ascertainable but in truth they are not. " When no magnesite is left to be won " cannot mean when there is no perceptible quantity left on the land. It must mean when the magnesite that is worth mining is exhausted, that is, when there is no payable magnesite left. That must depend on the state of the market. Magnesite which ceased to be payable in one year may become payable again in the next.

The second date would be easily ascertainable if the appellants were content to relate it to the termination of the mining lease which the respondents held at the time when the agreement was made. But they are not because that lease expired on 2nd September, 1957, i.e., ten or eleven weeks after the agreement was made. The Mining Act 1906 makes provision for renewals which are in fact easily obtainable. The appellants therefore contended — rightly as their Lordships think— that the agreement did not contemplate that the licence should expire automatically with the existing lease. But the Act places no limit upon the number of renewals which can be granted. Viewed in this way, the respondents' title or interest in the land would naturally be made to continue for as long as there was enough magnesite to make the lease worth holding. So the second suggested period is no real alternative to the first. The first is quite indefinite, for not only has it no clearly defined closing date but its length is at least partly dependent upon the degree of effort which the appellants are under no obligation to make.

In the light of these considerations, is it reasonable to read the provision in clause 1 granting " the right to mine for magnesite " on the defined part of P.M.L.1 as meaning all the magnesite that they can get on that part? The words themselves are neutral and there is no other express provision of the agreement that helps with their construction. The appellants relied upon clause 7 which requires them to fill in all excavations except " the last", which is to be left with a three in one batter. They argued that the use of the word " last " implied that they should be entitled to nominate the stage of operations at which further excavating by them was to cease. Their Lordships cannot read any such implication into this clause. The last excavation does not mean the last on the land from which magnesite is taken, but the last one to be opened by the appellants before the termination of the grant. The clause does not help to decide how the termination should be effected.

Accordingly their Lordships doubt whether, even if the agreement is looked at by itself, the construction proposed by the appellants is a reasonable one. Considering it in the light of the circumstances in which the agreement was made, their Lordships find it impossible to assume that the parties intended it to endure for as long as the magnesite lasted. That would be an agreement even more important to the parties than the one they made in 1942 and they might be expected to encompass it with something of the same formality. It is highly improbable that the respondents would have granted so much without requiring, as they did in 1942, a corresponding obligation to mine, or without at least reserving a right of termination if they were dissatisfied with the progress made. If the appellants had really thought that they were going to get all the magnesite on the land, they could hardly have been content with a non-exclusive licence. For a licence in that form enables the respondents to give away as much of the magnesite as they or others can get. Finally—and this is perhaps the most telling of all the factors to be considered—it has to be remembered that the agreement was made to give effect to a special plea, based on conditions that might well have been, and in fact did prove to be, only temporary, for the reduction of the royalty. It is most unlikely that either party supposed that thereby the respondents were putting it out of their power ever to demand a return to the original rate.

There is left then the choice between terminability at will and terminability on reasonable notice. On this point the appellants have, in their Lordships' opinion, a stronger argument upon the construction of the agreement, looked at by itself; and certainly there is nothing inherently improbable in the implication in such an agreement of a term requiring reasonable notice. Their Lordships return to the question of what is conveyed by " the right to mine for magnesite " in clause 1. This on the face of it gives to the appellants the right to get a certain quantity of magnesite. So, it is argued, unless the grant is to be treated as ineffective, some way must be found of defining the quantity obtainable. Since their Lordships have rejected the construction which would define the quantity by saying that it is all that the appellants can get in an unlimited period, i.e., until there is no more to get, they are driven, so it is argued, to accept the only alternative way of defining the quantity, which is to say that it is what the appellants can get within a limited period. That period, since it is not expressly named, must be a reasonable period, i.e., a period terminable by reasonable notice. Clause 4, with its provision that the appellants will pay royalties and render statements monthly is prayed in aid against any construction which gives the agreement an abrupt termination. Finally it is urged that if the agreement is terminable peremptorily, it gives the appellants no " right " at all. If the respondents could immediately after the agreement was signed revoke it forthwith and before the appellants had even had an opportunity to begin mining, they could not be said to have a " right to mine ".

Mr. St. John for the respondents met these arguments by inviting the Board to read clause 1 as conferring not a contractual right but only a permission to mine. Prima facie no doubt, when the word " right " is used in a contract, it means a contractual right and a right that is unilaterally determinable at pleasure is not a contractual right. But the word can be used in the less strict sense. If in this document it were being used in the sense of a contractual right, one would expect to find a corresponding contractual obligation. There is none. The right to mine is not matched by the obligation to mine. The appellants have a choice whether to work or not and the corollary of that is that the respondents should have a choice whether to allow them to work or not. Their Lordships consider that clause 1 should be construed as conferring only a revocable permission to mine. This gives the respondents no advantage over the appellants for the latter could at any time bring the agreement effectively to an end simply by ceasing work without even having to send a peremptory notice to that effect.

It is true that it does not require very much to induce a court to read into an agreement of a commercial character, either by construction or by implication, a provision that the arrangements between the parties, whatever they may be, shall be terminable only upon reasonable notice. *Winter Garden Theatre v. Millenium Productions* [1948] A.C. 173 was a case in which the appellants granted a licence of their theatre to the respondents for the production of plays: the licence was held to be terminable only on reasonable notice. Their Lordships were strongly pressed to take the course which the House of Lords took in that case. But a question of this sort depends entirely on the facts of the particular case. In the *Winter Garden* case the licence agreement was a formal document for a minimum period with options to the licensee to extend. What was contemplated was the production of plays and that involves an initial expenditure to be recouped during the period of a run. Here the circumstances are very different. No large initial expenditure was necessary before mining could begin. The equipment was on the site, having been brought there for use on P.M.L.15 and 16, on which it could at any time be used again. The agreement originated casually out of an informal arrangement. The parties expressed their own view about it as clearly as could be in the conversation of 5th June. When the appellants then threatened to pull out by the end of the month, no suggestion of reasonable notice was made by them and none was asked for by the respondents. In these circumstances, their Lordships are satisfied that the agreement of 14th June, 1957, was, as were the agreements which led up to it, nothing

more than an *ad hoc* arrangement whereby the labour and equipment which the appellants had available might be employed on the respondents' land to their mutual advantage so long as it suited both parties.

But even if their Lordships had held that the agreement was terminable only on reasonable notice, it would not have made any difference to the result of this appeal. Since they heard lengthy argument on this point which affects also the point on the " period of grace " that they have already mentioned, they will proceed to state their reasons for this conclusion.

The question whether a requirement of reasonable notice is to be implied in a contract is to be answered in the light of the circumstances existing when the contract is made. The length of the notice, if any, is the time that is deemed to be reasonable in the light of the circumstances in which the notice is given. That does not mean that the reasonable time is the time during which one party or the other could reasonably wish for the contract to continue. It is unlikely that when the notice is given the parties could agree on that. The reasons which moved one party to desire a long notice would move the other to desire a short one. The implication of reasonable notice is intended to serve only the common purpose of the parties. Whether there need be any notice at all, and, if so, the common purpose for which it is required, are matters to be determined as at the date of the contract; the reasonable time for the fulfilment of the purpose is a matter to be determined as at the date of the notice. The common purpose is frequently derived from the desire that both parties may be expected to have to cushion themselves against sudden change, giving themselves time to make alternative arrangements of a sort similar to those which are being terminated.

The sort of notice which the appellants want in this case is one which, in the phrase used in the *Winter Garden* case, allows them to reap where they have sown. It is certainly reasonable from their point of view that the contract should not be terminated abruptly just when their operations were moving out of an unprofitable phase into a profitable one. But the question which a court has to ask itself is whether that is a factor which would have been operating in the minds of the parties at the time when the contract was made. There is no evidence from which their Lordships can infer that it would have been. The appellants' operations happened to be unprofitable in the beginning but it was not in their nature that they should be. There is no sufficient evidence of any heavy initial expenditure which could only be recouped in time. Their Lordships cannot infer as the common purpose of any requirement of reasonable notice anything more than the ordinary purpose—time on the one hand for the appellants to deploy their labour and equipment profitably elsewhere and on the other hand for the respondents to find another licensee. Since there is no claim for damages in these proceedings, there is no need to say what such a period should be. It is enough to say that any time which their Lordships would have fixed, had there been a requirement for reasonable notice, would have expired before these proceedings commenced.

The appellants, however, have another string to their bow. They say that the reasonable period, correctly estimated, must be specified in the notice. None was specified in the notice of 19th August; and the period of 16 days, specified in the notice of 16th October, they say, is far too short to be reasonable. So they say that there never was any valid notice terminating the licence which consequently is still running. They are contending for the sort of notice which in the cases where this point has been considered has been called a " dated notice ", that is, a notice of revocation of licence which either names a day for the termination of the licence or specifies an exact time by reference to which the day may be ascertained.

The respondents, assuming that it has been held against them that some notice is required, dispute that what is required is a dated notice. There are of course cases in which the requirement of a dated notice is unimportant. A notice of dismissal, whether good or bad, ordinarily puts an end to a contract of service. The respondents contend that the notice of 19th August,

whether good or bad, put an end to the licence, leaving the appellants, if it was bad, to their remedy in damages. They rely also on the letter of 16th October as being a good dated notice. Their Lordships will assume that the licence in this case would continue until ended by a notice given in accordance with the contract and they will assume also in the appellants' favour that a reasonable time would be longer than the 16 days allowed by the notice of 16th October. They will proceed to consider whether the contract in this case required a dated notice to be given.

An express provision about notice can be in any form which the parties care to adopt. If the term is that a contract is to terminate six months (or a reasonable time) after notice given, the notice need amount to no more than an election to terminate. It will automatically take effect after the expiry of six months (or of such period as the Court subsequently determines to be reasonable). On the other hand, an express term can prescribe the form and content of any notice to be given and then a notice in the wrong form or with insufficient content will be bad. If the contract is, as here, entirely silent about notice and a term has to be implied, the nature and requirements of the term to be implied must be settled according to the ordinary rules governing the implication of a term. The question then will be whether the necessary implication extends beyond that of a simple notice to embrace a notice in a particular form or with a particular content.

The Board is dealing here with a contract of a commercial character in which the parties are on an equal footing. Each was free to stipulate in the contract for such length of notice as it required but, wittingly or not, they left it open. In such a case it would be unusual to find that the parties had in mind the further requirement of a dated notice. When such a requirement is made, the party giving notice has put upon him the burden of fixing a period which must be reasonable in the light of circumstances of which he may have only incomplete knowledge. In the *Winter Garden* case Lord Uthwatt at p. 200 suggested that the licensor would be entitled to require from the licensee such information as was necessary to enable him to form an opinion as to the proper length of a reasonable notice. The Board respectfully doubts whether this would be a satisfactory solution of the "practical difficulties" to which his Lordship had earlier referred. A reasonable time would have to be allowed for answering the inquiries and an uncooperative party might draft his answers in a way which would necessitate further inquiries. In the end the reasonable period for inquiry and answer might well exceed the reasonable period of notice. Even when all the circumstances are fully known differing assessments can easily be made of what is a reasonable time and the judge who has in the end to decide it often finds that there is almost as much to be said in favour of one assessment as of another.

Thus the burden of specifying the time with precision may be a very difficult one to discharge. Their Lordships cannot imagine the licensors in a case such as the present agreeing to bear it. It would mean in effect that if when they gave notice they guessed wrong, the licence, instead of continuing for a few months, might continue for years, maybe until after the information elicited in a law suit enabled them to make a more accurate estimate.

The authorities in which this question of dated notice has been considered do not draw any distinction in principle between a period of reasonable notice and a period of grace. There appears at least in theory to be a distinction between the common law principle by which the need for reasonable notice is implied and the equitable principle by which the period of grace is imposed for the protection of a party who might otherwise suffer undue hardship from sudden termination. In a case like the present the main object of the reasonable notice would be to prolong for a limited period the right to mine; and the sole object of the period of grace would be so that the plaintiff could remove his equipment and the fruits of his labours without becoming a trespasser. One would suppose that the period of reasonable notice, if one were required by the contract, would secure both objects and that a period of grace would be needed only if the licensee could be required to cease mining forthwith. In the *Winter Garden* case, however, the period

of grace was superimposed upon the period of reasonable notice; see the speeches of Lord Uthwatt at 199 and Lord MacDermott at 205. It is unnecessary for the purposes of the present case that the distinction between the two should be fully explored. Their Lordships adopt the passage in Viscount Simonds' speech in *Tool Metal Manufacturing Co. Ltd. v Tungsten Electric Co. Ltd.* [1955] 2 A11 E.R. 657 at 668 where he said that in this matter of the dated notice no distinction was to be drawn between cases in which equity imposed the rule and those in which the common law implied the term; in either case it depended on what was fair and reasonable between the parties.

The Board's decision in *Canadian Pacific Rly. Co. v. The King* [1931] A.C. 414 was put forward as an authority for the proposition that in all cases of a licence there is a fixed rule that the notice must be a dated notice. If this were so, there would be a conflict of authority for the decision of the English Court of Appeal in *Minister of Health v. Bellotti* [1944] 1 K.B. 298 is to the contrary effect. In their Lordships' opinion there is no such rule and they consider that the Board's decision in the former case was rightly distinguished in the House of Lords in the *Tool Metal* case as a case which depended on its own unusual circumstances. Their Lordships conclude that there was no obligation on the respondents in this case to specify in their letter of 19th August a reasonable period before the termination of " the right to mine " or to specify a period of grace thereafter. Their Lordships uphold the decision of His Honour that the contract was properly terminated by the letter of the 19th August substantially for the reasons which he has given.

A point about the letter of 19th August was taken before the Board which does not appear to have been pressed upon His Honour. There is no doubt that notice of the decision to revoke must be communicated to the licensee. It was argued that the letter of 19th August was not a notice at all. It was said that it was written without authority because one of the partners was not present at the meeting of the syndicate to which the letter referred. It was said also that in the circumstances in which it was written it ought to be construed not as a notice revoking a licence but as a denial that any licence had ever been granted. Their Lordships have considered the arguments addressed to them on this point but find them unacceptable.

They will accordingly humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs.

(85919) Wt. 8004/82 100 8/62 Hw

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