

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Council of the Municipality of Brisbane and others v. Clark and Fauset and another, from the Supreme Court of Queensland; delivered 22nd February 1896.

Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD MORRIS.

SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The Respondents, who were Plaintiffs below, are engineers in Brisbane; and the Appellant Municipalities, who were Defendants below, were in the year 1890 constituted a joint local authority for the purpose (among others) of establishing and maintaining ferries across the Brisbane river. In the early part of 1893 a bridge over the river was closed for repairs after a flood, and a ferry was wanted. On the 2nd March the Plaintiffs wrote to Mr. Stephens, President of the Defendants' Board, submitting a plan for a ferry punt. After describing the mode of working the punt, its capacity, and its speed, the letter concluded thus : "The cost to the Board of the whole under steam will be two (£2,000/0/0) thousand pounds, and we agree to guarantee same for two months, the Board allowing us during that period to appoint our own Engineer. Time for completion will be (10) ten to (12) twelve days."

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Immediately afterwards the Plaintiffs made an addition to their offer which, as written, is dated 3rd March, and is as follows:—"In reference to the accompanying offer we further agree to run the steam punt, provide engineer and fireman, coal, etc., continuously for an average of 12 hours per day, for 7 days per week, for the sum of 25*l.* per week; and in the event of any delay arising through fault of machinery gear or punt we bind ourselves under a penalty of 20*l.* per day."

The Board met on the 2nd March, and must then have had both these offers before it, as appears by the following Minute signed by Mr. Stephens on the 9th:—

"From Clark & Fauset, offering to sell punt for the sum of 2,000*l.*, to give a 2 months' trial, and run her at a cost of 25*l.* per week, the Board to receive all fares, the punt to be ready in 12 days, they also place themselves under a penalty of 25*l.* per day.

"The two last mentioned letters, with any other offers that may be made, were left in the hands of the Chairman, Aldermen Hipwood and Luya; Alderman Stephens moving and Alderman Heaslop seconding the motion."

The next meeting of the Board was held on the 9th March. The Minutes of proceedings were signed by Mr. Stephens on the 16th, and are as follows:—

"Alderman Luya reported that the Committee had investigated the offers to build and run ferry punts between Alice and Ernest Streets." The report then refers to a rejected offer from another quarter, and continues: "They then considered Messrs. Clark and Fauset's offer; they then saw the punt, and examined her, and found her thoroughly sound. They measured her and found her as stated by Messrs. Clark and Fauset's letter of

“ offer. The terms for running her to be 25/.
 “ per week, with a fine of 20/. for every day not
 “ worked. They therefore decided to accept
 “ Messrs. Clark and Fauset’s offer. 500/. to be
 “ paid in a few days after the running of the
 “ punt commences. Mr. Peters to give a report
 “ on the punt, and the whole of the within
 “ statement to be in writing. No papers have
 “ been signed. All risks to be with Messrs. Clark
 “ and Fauset during the time they are working
 “ the punt under this Board. They undertake to
 “ run the punt as long as the Board require it.
 “ Mr. Hipwood agreed with Mr. Luya’s report.
 “ The report was adopted, and the chairman was
 “ authorised to get the agreement from Messrs.
 “ Clark and Fauset, and have it ready for
 “ signature at the next meeting.”

These four documents, which are referred
 to frequently in the proceedings below as
 Exhibits 3, 4, 5, and 6, contain the contract on
 which the Plaintiffs are now suing. The jury at
 the trial found it, and the Court have held it, to
 be a complete agreement in writing. It will be
 convenient first to deal with the objections
 raised by the Defendants to the validity of this
 contract.

The Queensland statute of Frauds is in the
 same terms with the English statute, so far as
 relates to contracts for goods of more than 10/.
 value. If some note or memorandum in writing
 of the bargain be made and signed by the party
 to be charged, or his agent thereunto lawfully
 authorized, the Statute does not avoid it. The
 case of a Corporate body is provided for by the
 Local Government Act of 1878, Sec. 160. That
 enables the Board to make a contract of this sort
 by a writing signed by the Chairman or any two
 of the Aldermen acting by the direction and on
 behalf of the Board. It does not expressly say
 that a memorandum in writing, such as is

evidence of a contract, may be so made; but it cannot have intended to require more formality for a signed memorandum than for a signed Contract; nor has any argument been presented to that effect. In fact it has not been very seriously contended here that, if the four exhibits show a contract, it is not sufficiently put in writing to satisfy the Statute of Frauds.

The objection mainly insisted on by Sir Robert Reid is of a less formal character, viz., the objection that the minutes signed on the 9th March introduce new terms to which the Plaintiffs never agreed; so that the documents do not, without the assistance of parol evidence, contain a complete contract. He argued that the minutes of the 9th March import three new conditions. They are: 1, the fine of 20%; 2, the payment of 500%; and 3, the risks to be thrown on the Plaintiffs. It seems to their Lordships that the first and third of these conditions are not new at all, but are consonant with the offer of the Plaintiffs; and that the second is merely an additional obligation on the Defendants to pay at a more nearly defined time a part of the price; whereas according to the Plaintiffs' offers no time was defined, and payment might be delayed on account of their obligation to guarantee the punt for two months. The minutes therefore contain nothing to detract from the Board's adoption of the report which decides "to accept Messrs. Clark and Fauset's offer."

Their Lordships so far agree with the Court below in upholding the jury's finding that the four exhibits were intended to form a complete contract, and that the contract was actually effected.

The main defence was rested on another ground, viz., that the first contract was rescinded, and that a fresh contract was made, by virtue of

which the Plaintiffs would remain owners of the punt, and would work the ferry on certain stipulated terms. Upon this part of the case the findings of the jury marked 9, 13, 14, 15 are material. They are to the effect that the Plaintiffs did not deliver the punt to the Defendants about the 6th April 1893; and that the agreement of 2nd March 1893 was by mutual agreement rescinded about 3rd March before breach. These findings and others consequential upon them made it necessary to enter up judgment for the Defendants. They have however been set aside by the Full Court, as unsupported by evidence, with the effect that judgment has been entered for the Plaintiffs.

The oral evidence is that of two Plaintiffs on their side, and of Mr. Stephens, the President, on the side of the Defendants. There is little or no contradiction on material points. It appears that the Plaintiffs were ready to run the punt on Thursday the 6th April. Stephens was present. Clark asked him if they should open the punt "officially" next morning, but he preferred to postpone it till Monday the 10th. The Plaintiffs therefore ran the punt and took the fares till Monday. On that day they addressed a letter to the Defendants as follows:—

" Gentn.,

" We most respectfully beg to inform
 " you that the Steam Ferry Punt is now ready
 " and in thorough working order, in fact we
 " have been plying between Alice and Ernest
 " Streets since Friday last.

" We shall be glad if the Board will be good
 " enough to come round and judge for them-
 " selves to-day at any time that may suit them
 " as there are several alterations absolutely
 " necessary in connection with the approaches
 " which require immediate attention."

On the same day a conversation took place between the Plaintiffs and Stephens. The

Plaintiffs say that they asked to have 500*l.* speedily according to the contract; that Stephens said the Board had no money; that he then suggested that the Plaintiffs should run the punt themselves and take the money, when the punt would become theirs at the end; that the Plaintiffs agreed provided they could be secured in the working of the ferry for 26 weeks, or as an alternative receive 10*l.* for every day for which the bridge was reopened prior to the end of 26 weeks; that Stephens told them to put that arrangement in writing, and he would see that they got it; and in the meantime to go on running the punt under the arrangement. Stephens does not dispute any part of this statement except that the Plaintiffs asked for payment, and that he said the Board had no money, and that he promised the Plaintiffs that they would get the proposed arrangements; he only promised that the Board would attend to it. These differences are immaterial for the present purpose. It is clear that on the 10th April the Plaintiffs were ready to perform their original contract, that Stephens suggested a new plan, that negotiations were at once set on foot, and an interim arrangement made that the Plaintiffs should work the ferry and take the fares.

12. After a letter dated 12th April from the Secretary of the Board, referring to a verbal offer by the Plaintiffs, and intimating its acceptance by the Board on certain terms, the Plaintiffs formulated their new offer in a letter, dated 14th April and addressed to the President. The passages material to the present purpose are :—

“ We are willing to run the steam punt built
 “ by us to the order of the Board (the price
 “ being £2000 : 0 : 0), between North and South
 “ Brisbane at Alice and Ernest Streets re-
 “ spectively.”

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“ 2ndly, We are agreeable to a penalty or fine
 “ not exceeding (£5/-/-) Five pounds per day,
 “ though the loss would be greater to us than
 “ the Board. 3rd, The agreement, we respect-
 “ fully submit, should be for (26) twenty-six weeks
 “ certain, anything less would be a loss, and
 “ should the bridge be completed before the 26
 “ weeks the Board to compensate us at the rate
 “ of (£10/-/-) ten pounds per day for any time
 “ under the said 26 weeks that the bridge may
 “ be completed.”

This letter was not answered by the Defendants till the 20th June, when their Secretary wrote giving the decision of the Board on the whole series of conditions proposed by the Plaintiffs. The material passages are :—

- “ „ 2 „ Penalty to be £10 per day for
 “ failure to run.
 “ „ 3 „ Agreement as to fixing time.
 “ This cannot be guaranteed,
 “ but believe will exceed time
 “ specified by you.”

The meaning of the latter answer is that in the opinion of the Defendants the reopening of the bridge, which would make the ferry useless, would be later than the end of the 26 weeks. In point of fact however it took place earlier.

The Plaintiffs' reply was sent on the 22nd June. They express themselves satisfied with other answers of the Board; but say they cannot possibly submit to the Board's reply to Nos. 2, 3, and 11. They then assign their reasons. The Board replied on the 24th; insisting on the penalty of 10*l.* for not running (No. 2), saying nothing about guaranteed time (No. 3), and conceding the point in No. 11 to the Plaintiffs. On the 28th the Plaintiffs replied that they now decline to be mulct in any penalty whatever for failure to run. Then the negotiations were discontinued. The Plaintiffs

went on working the ferry and receiving the fares. Apparently they thought that their last word on the disputed points had been accepted. For when the bridge was opened, four weeks before the time agreed with the contractor, they wrote a letter to the Board, dated 7th September, claiming compensation at the rate of 10% per day. They were however quickly undeceived, for the Board on the 9th September referred them to the letter of the 20th June in which the Board refused any guarantee.

Some further correspondence and offers took place, which it is not now material to consider. The Plaintiffs, having it made clear to them that the Defendants had never agreed to the required guarantee, fell back on the original agreement of March. They sent in an account in which they credited themselves with the cost of the punt and the expenses of working the ferry, and debited themselves with the takings. The result is a balance of more than 900% against the Defendants, for which the present action is brought.

The position of the Plaintiffs is that as the negotiations begun on the 10th April never ripened into a contract, the original contract of March was never displaced; and that the arrangement for the Plaintiffs working the ferry which was made on the 6th or 7th April, though at first intended to last only for a day or two, and afterwards only until the new scheme should be settled, has in fact run on till the opening of the bridge.

The Defendants have argued, at the bar that both parties intended to rescind the contract of March quite irrespectively of the formation of a new one. In their plea to the action they alleged that the first agreement was on or about the 3rd March by mutual agreement cancelled and rescinded, and a new agreement "not neces-

"sary to be herein stated" substituted in lieu thereof. It may not be necessary for the purpose of pleading to state the substituted agreement. But one must be proved, because there is no evidence of any rescission or attempt to rescind the agreement of March except for the purpose of making a new agreement. The only new agreement suggested is founded on the negotiations which began on the 10th April. The Plaintiffs apparently were willing to abide by their interpretation of those negotiations. But as regards two important items, one of which has turned out to be very material, the parties were never in accord, and the dispute which arose in September showed conclusively that there was no new agreement at all. How the jury, following the plea, came to find that on the 3rd March the agreement of the 2nd was rescinded and a new one substituted, it is impossible to understand. The Court have been quite right in setting aside those findings as totally devoid of evidence to support them.

The finding as to non-delivery of the punt is also unintelligible. If it means only that the punt did not pass from the possession of the Plaintiffs into that of the Defendants, that is true, but not material. If it means that owing to that circumstance the Plaintiffs broke their contract, every word of the evidence is against it. Nothing can be clearer than that the only reason why the Plaintiffs' contract to build and deliver a punt was not completely carried into execution as early as the 7th April, was that at the suggestion of Stephens the completion was delayed, first for convenience, and afterwards with the view of considering a new scheme.

With regard to the amount sued for, no objection has been raised to the account stated by the Plaintiffs. All the defences have been rested on the ground that the Defendants are not

bound by any contract made in March. In that they are wrong and the Court below right! Their Lordships hold that the appeal ought to be dismissed with costs, and so they will humbly advise Her Majesty.
