

Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of The Dominion Coal Company, Limited, v. The Dominion Iron and Steel Company, Limited, and The National Trust Company, Limited; and of The Dominion Iron and Steel Company, Limited, and The National Trust Company, Limited, v. The Dominion Coal Company, Limited, from the Supreme Court of Nova Scotia; delivered the 11th February, 1909.

Present at the Hearing :

LORD ROBERTSON.

LORD ATKINSON.

LORD COLLINS.

SIR ARTHUR WILSON.

[Delivered by Lord Atkinson.]

In this case the Dominion Coal Company (hereinafter called the Coal Company), the Defendant in the Action, appeals from a Judgment of the Supreme Court of Nova Scotia, dated the 22nd January 1908, affirming the Judgment of Mr. Justice Longley in favour of the Respondents (the Plaintiffs in the Action), by which specific performance of a certain agreement, dated the 20th October 1903, entered into between the Coal Company and the Dominion Iron and Steel Company, Limited (hereinafter called the Steel Company), was decreed, and the Plaintiffs were declared entitled to damages for certain breaches of this agreement, which damages were referred for assessment.

A Cross-Appeal against the same Judgment has been filed by the Plaintiffs, and the Appeals have by order been consolidated. The Cross-Appeal, however, was not pressed.

The main question for their Lordships' decision turns upon the construction of three or four clauses in this agreement. Both the Coal Company and the Steel Company are incorporated by Statutes of the Colony, and had, at the date of the agreement, common directors.

The Coal Company had leased from the Crown extensive coalfields on each side of Sydney Harbour, in the Province of Nova Scotia, but had only opened mines on the south-east side of the harbour. These mines, four in number, named the "Hub," "Harbour," "Phelan," and "Emery," were worked by the Steel Company under lease from the Coal Company from the 12th July 1902 till the 20th October 1903. Before the latter date pits Nos. 1 to 5 had been opened on the Phelan seam and worked; pit No. 6, which is some considerable distance (4 miles) from the nearest of the other pits on this seam, was only opened in June or July 1906.

The Steel Company owned and operated extensive works for the manufacture of steel at Sydney. On the 1st July 1899 they entered into an agreement with the other Respondent, the National Trust Company, Limited (hereinafter called the Trust Company), for securing a bond issue of \$8,000,000, by which the Steel Company assigned to the Trust Company all its present and future assets, the Steel Company to remain in possession till default. The Trust Company duly gave its consent to the execution by the Steel Company of the agreement sued on. It is unnecessary to refer to the several transactions which took place between the Coal Company and the Steel Company prior to October 1903 further than to point out that, as a consequence of them, each company must

have been well acquainted with the business of the other, its needs and capacities, the mode in which it was carried on, and the character of the coal won in the pits theretofore worked.

The agreement of the 20th October 1903 recited that the Steel Company had erected steel works at Sydney and was operating the same, and that the parties had agreed that the lease of the mines to the Steel Company should be cancelled, that the Coal Company should re-enter the premises leased, and that the coal thenceforth to be supplied to the Steel Company should be supplied on the terms and conditions thereafter contained, and it then set forth in 14 paragraphs in great detail what the terms and conditions were. The most important of these provisions are the following :—

(1) That the said Coal Company from its mines in Cape Breton County other than those lying north or west of Sydney Harbour will supply on the terms and conditions hereinafter stated to the Steel Company all the coal that the Steel Company may require for use in its own works as hereinafter described. The word "works" shall mean :—

Firstly, the following works now or hereafter constituting the Steel Company's steel and iron plant at Sydney or used in connection therewith with any additions thereto and substitutions therefor of a like character which the Steel Company may deem requisite at Sydney or east or south of Sydney Harbour within ten miles of Sydney Town :

(A) The blast furnaces.

(B) The coking ovens used for making coke for the said furnaces.

(C) The steel furnaces.

(D) The rolling mills for manufacturing rails, railway fish or angle plates, other plates for joining rails, structural steel, iron and steel bars, plates and rolled rods for wire manufacturers and providing rolling mill products analogous to any of those above-named, excepting always rails, fish plates and plates for joining rails, be hereafter used in commerce in lieu of the products above-named to such an extent as to reduce the demand for the same then for manufacturing such analogous

products of not more finished character and also for manufacturing such fundamental raw material as billets, slabs or blooms.

- (E) Or in event of the articles or materials mentioned in paragraph (D) being hereafter produced by mills other than rolling mills, then such other mills.

Provided always that all the products of said steel furnaces and mills shall be made from iron produced by such blast furnaces with the addition only of the spiegel iron, ferro manganese, raw ore, scrap steel, scrap iron and materials other than iron and steel necessary to be added to the pig iron product of such blast furnaces in order to make steel, and shall be either for the use of the Steel Company in the construction and repair of its plant or for purposes of sale.

- (F) Incidentally to the foregoing, the necessary gas producers, kilns, ovens, foundries, electrical machinery, hoisting engines and repair shops, but for use only in furnishing material for the construction, repair and operation of such furnaces, coking ovens and mills, and for lighting and heating the said works.

Secondly. The mines and quarries which the Company may operate at Sydney or elsewhere in Canada and in Newfoundland for the purpose of supplying material other than coal and products of coal to the said blast furnaces and steel and iron plant as above described.

Thirdly—

- (A) The steam vessels owned or hired by the Steel Company, on not less than three months' time charter and operated for its own requirements, and
- (B) The switching engines at Sydney and at its mines and quarries which the Steel Company may require incidental to the operation of its said business as above described.

Provided always that the Coal Company, notwithstanding anything in this contract contained, shall not be obliged to supply in any one month a quantity of coal exceeding the quantity required to furnish the coal or coke necessary to operate blast furnaces of a capacity not exceeding that of the Steel Company's present four blast furnaces, and to operate the steel furnaces and mills with incidental plant

as above described engaged in manufacturing the product of such four blast furnaces or their equivalent with the mines, quarries, vessels and engines operated incidentally thereto.

* * * * *

(3) All coal furnished shall be freshly mined and of the grade known as "run-of-mine," reasonably free from stone and shale, and shall be supplied from such seams then being worked by the Coal Company as the Steel Company may designate. The Coal Company may, after the expiry of four years from the date of this agreement, supply slack coal of the same specification as to quality as above if suitable for use in steel making and for blast furnace coke, and may also supply slack coal for other purposes for which it can be used without disadvantage by the Steel Company. In construing the above clause the use of slack coal shall not be deemed to be a disadvantage merely because the use thereof necessitates changes in the grate bars of the Steel Company. "Suitable" shall be construed to mean that the slack coal so supplied when properly washed by the Steel Company shall not contain a percentum of impurities, to wit: ash and sulphur, appreciably greater than the percentum of impurities in the same coal of run-of-mine grade when crushed and washed in the same manner.

All coal supplied hereunder that requires to be washed shall be washed by the Steel Company, and should the Steel Company establish and operate a coal washing plant between the point of origin of such coal and the Steel Company's blast furnaces, the Coal Company shall, at the actual cost thereof, allow such coal to be washed in transit.

(4) The Steel Company further agrees with the Coal Company that, so long as the Coal Company shall be willing and ready to supply coal for the use of the Steel Company, all coal required by the latter shall be purchased from the Coal Company to the amount agreed to be supplied by the Coal Company under the terms of this contract.

The Steel Company, in exercise of the privilege conferred upon it, designated the Phelan seam as that from which they desired to be supplied.

It was established in evidence beyond dispute (1) that over 90% of the coal required

by the Steel Company was to be used for the different processes in the manufacture of steel (described in the evidence as "metallurgical"), and less than 10% for the generation of power; (2) that coal which in its raw state contained more than 2.75% of sulphur, and, after having been broken and washed, more than 1.7%, was unfit for the former purposes, and could not be used without danger of injury to the manufactured products.

In March 1905 the Steel Company gave the Coal Company notice that from the 1st April 1906 they would require to be supplied with 80,000 tons of coal per month. No objection was taken to this demand, and it is not disputed that, during the eight months succeeding that date, the Coal Company obtained from the Phelan seam coal suitable for all the Steel Company's purposes vastly in excess of this amount. It was proved at the trial, and found by the Judge, that the Coal Company had on many occasions failed to deliver the amount of coal required, and that the Steel Company had in consequence been obliged to purchase coal at a higher price elsewhere to keep their works going. The trial Judge referred it to a Referee to ascertain the damages sustained by reason of these short deliveries, and decreed that the Coal Company should pay the same when ascertained.

Between the 1st and 9th November 1906 the Steel Company rejected as unfit for use in their works 153 car-loads of coal, *i.e.*, about 2,698 tons. Thereupon a lengthy correspondence took place between the officials of the respective companies as to the rejection and return of this coal. At length, on the 8th November 1906, the Manager of the Steel Company wrote to the Coal Company the following letter:—

We are in receipt of your favor of November 7th, and note that you state that cars which we refused to

accept contained coal as labelled, namely: Phelan Seam of run-of-mine grade, which has been carefully picked and in accordance with the contract. We beg to state that the coal contains an undue percentage of shale and slate and sulphur and is unsuitable for our requirements, and is not in accordance with the contract. This certainly is a reason why we should not accept this coal.

Referring to our letter of October 18th, in which we notified you that after October 31st we would not accept from you any coal excepting freshly mined run-of-mine coal from the Phelan Seam, we beg to say that we certainly think you were aware of the quality of the coal we required for our uses on the plant, and now notify you that all coal you deliver to us must be freshly mined run-of-mine coal from the Phelan Seam and suitable for our purposes.

To this letter the Coal Company, on the 9th November, replied as follows:—

In consequence of your peremptory refusal to accept the coal which we have furnished and have been ready and willing to furnish in accordance with terms of our contract with you, dated 20th October, 1903, there is no course left open to us but to accept the necessary consequence of your action in this matter. Your conduct in refusing to accept delivery of coal furnished and to be furnished constitutes a clear repudiation on your part of your obligations under the contract, and renders further performance on our part impossible. We therefore formally notify you that the contract mentioned is at an end.

I greatly regret your repudiation of a contract the nature of which has involved the expenditure of millions of money on our part, and we cannot understand your disregard, not only of our contract rights, but of the large interests necessarily affected by your action.

You have also violated the contract by not returning our cars, and by purchasing coal from other parties in violation of the provisions of the contract.

Our cars in the assembly yard loaded with coal furnished under the contract and rejected by you we will proceed at once to remove.

The trial Judge found as questions of fact (1) that the coal rejected was unfit for use by the Steel Company for its metallurgical purposes

owing to the large quantity of sulphur it contained ; and (2) that it was not "reasonably free from stone and shale." The Supreme Court accepted those findings, and, in their Lordships' opinion, they were abundantly justified by the evidence.

A considerable body of evidence was given to establish that the only coal won from the Phelan seam which was unfit for all the Steel Company's purposes was that which came from the workings in pit No. 6 and those on the east side of pit No. 4.

During the year 1905 the parties endeavoured to compose their disputes and to establish a *modus vivendi* between them, but, by letter dated the 18th October 1906, the Manager of the Steel Company formally terminated the arrangement which had been arrived at, and the parties were thenceforth remitted to their legal rights.

The Steel Company and the Trust Company accordingly instituted this Action on the 8th December 1906, and in their statement of claim, in addition to claiming damages under the several heads therein set forth in respect of the breaches of contract alleged to have been committed by the Coal Company, prayed (amongst other things) that it might be declared that, as against each of the Plaintiffs, the Coal Company had no power to rescind the contract of the 20th October 1903, and that they might be ordered to carry out the same, and that they might be restrained by injunction from carrying on any business until the said contract had been carried out, and that a receiver might be appointed over their business in case they refused to carry out the same, or, in the alternative, in case the Court should be of opinion that the Plaintiffs' remedy was for damages for loss of their contract, the

Plaintiffs claimed in respect thereof \$15,000,000 in addition to the damages under other heads.

Owing to the nature of the relief claimed and granted, the main question to be determined is, whether the rejection and return by the Steel Company of these 153 car-loads of coal, coupled with the demands they made in respect of the future supply, justified the Coal Company's repudiation of their contract. And this again depends on the question, what, on the true construction of the contract, is the meaning of certain words or phrases contained in it, namely, (1) the words "all the coal that the Steel Company may require for use in its own works as hereinafter described," occurring in the first few lines of paragraph No. 1; and (2) the words "reasonably free from stone and shale," occurring in paragraph No. 3.

It is not, in their Lordships' view, a case in which it is necessary to import by implication words into a contract in order to effectuate the common intention of the parties to it. What is necessary is to determine what they meant by the language they employed. The numerous authorities cited in argument dealing with the principles upon which terms are to be so introduced into a contract need not, therefore, be discussed.

It was strenuously contended on behalf of the Coal Company, both before their Lordships and in the Colonial Courts, that in the coal trade the phrase "reasonably free from stone and shale" has a trade meaning; that it, in effect, implies that the coal is to be as free from stone and shale as it can be made by reasonable and proper picking, and nothing more; and that, no matter how over-charged with stone or shale the coal may be, if these impurities happen to be carried in laminæ permeating the lumps of coal so that they cannot be removed

by picking, the coal must be taken to be reasonably free from stone and shale within the meaning of the words. In the opinion of their Lordships, this contention cannot be sustained. The words of the contract, they think, mean that the coal must in fact be "reasonably free from stone and shale," irrespective of the method by which that fact may be ascertained.

The proper meaning to be given to the words contained in paragraph No. 1 is a matter much more difficult to determine.

It is clear upon the evidence that coal may satisfy all the requirements of paragraph 3, and yet be so overcharged with sulphur as to be quite unfit to be used for metallurgical purposes. And the contention of the Coal Company is that, though over 90 % of the coal supplied to the Steel Company was, as they well knew, required for those purposes, yet they are under no obligation to deliver coal reasonably suitable for them, provided only it satisfies the requirement of paragraph 3. Both parties, the Coal Company alleges, knew the nature of the coal taken from the seam. Up to the date of the agreement it was, with the exception of what came from the east side of pit No. 4, all suitable for the smelting operations carried on by the Steel Company. Guided by this knowledge, the Steel Company (they urge) concluded that the provisions of paragraph 3 afforded them adequate protection, and that they were therefore willing to take their chance as to the purity and fitness of the coal to be won from the seam or seams they might designate. The function of paragraph 1, the Coal Company allege, was merely to furnish a measure of supply.

No doubt there is much to be urged in favour of this view ; but, on closer examination of the

several provisions of the contract, it appears to their Lordships not to be the true view of the mutual rights and obligations of the parties.

In the first place, the detailed enumeration and description of the Steel Company's works contained in paragraph 1 cannot have been introduced as a measure of quantity. This is clear from the proviso at the end of the paragraph, which itself sets up a definite measure of quantity of a different character, namely "the quantity required to furnish the coal or coke necessary to operate blast furnaces of a capacity not exceeding that of the Steel Company's present four blast furnaces, and to operate the steel furnaces and mills with incidental plant as above described engaged in manufacturing the product of such four blast furnaces or their equivalent." Evidence was given that the restriction of the amount to the requirements of the four blast furnaces existing at the date of the agreement, or of furnaces equivalent to them, was one of the advantages the Coal Company gained by the new arrangement of which the agreement of the 20th October 1903 was part.

Again, in the enumeration in paragraph 1, there is no limitation as to the number of blast furnaces, coking ovens, steel furnaces, rolling mills, &c., which the Steel Company might use or employ. In the absence of such a limitation the enumeration could not afford any measure of quantity; yet it must be taken to have been introduced for some purpose, and the only purpose it can apparently subserve is to specify precisely and in detail the various uses to which the coal to be supplied was to be put. There would be no object, however, in doing this if the Coal Company was not at all concerned with the suitability of their coal for these uses.

Again, only one of the requirements of paragraph 3 deals with the chemical composition of the coal. It is to be "reasonably free from stone and shale." Nothing is mentioned expressly in any other part of the contract as to the ash to be left when it is burned, or the amount of sulphur it may contain, and there obviously cannot be any such thing as run-of-mine slack. The slack to be supplied, however, must be "suitable for use in steel making" and for blast furnace coke"; that is, it must not, when washed in the same manner as the run-of-mine coal, contain appreciably more ash or sulphur than the coal. The standard set up is, no doubt, a standard for slack, but it is strange that the freedom of the slack from sulphur should be measured by the purity in the same respect of the coal, if the amount of sulphur, at least in an organic form, contained in the coal was a matter with which the Coal Company had no concern. On the other hand, if the coal was to be so free from ash and sulphur as to be "suitable for use in steel making and for blast furnace coke," it would be a most natural thing to provide that the slack should be equally pure, and, therefore, equally suitable in these respects. The provision at the end of paragraph 3 in reference to washing the coal was apparently introduced to relieve the Coal Company from an obligation which the other parts of the contract threw upon them, or might throw upon them; but coal is washed to make it suitable for use for metallurgical purposes, and there is nothing in this contract to impose on the Coal Company a duty to wash the coal, unless it be found in an obligation to provide coal suitable for these purposes. And if that duty had not been thus impliedly imposed upon them, it is difficult to see why special clauses should have been

introduced to relieve them from it. The whole clause seems, therefore, to suggest that the suitability of the run-of-mine coal for the uses indicated was within the contemplation of the parties when they entered into the contract.

Paragraphs 4 and 9 of the contract are most important. They impose on the Steel Company, for the full period of 90 years, an obligation to purchase all the coal they may require from the Coal Company, if the latter are ready to supply it, and provide, further, that the Steel Company shall not sell any of the coal supplied to them without the consent in writing of the Coal Company unless the latter refuse to re-purchase it at \$1 per ton, *i.e.*, 20 cents per ton less than the cost price. These provisions would mean complete and speedy ruin to the Steel Company if 90 % of the coal supplied, or even a much less proportion of it, were unsuitable for the operations it was contemplated and intended they should carry on. And it is quite inconceivable that any rational business men would enter into an arrangement necessitating such results. These provisions of the contract are only explicable on the assumption that, of the coal to be supplied, 90 % was to be reasonably suitable for use in the operations it was known the Steel Company intended to carry on in the works so fully described. In their Lordships' opinion, the words "all the coal that the Steel Company may require for use in its own works" must, therefore, be read and interpreted as if they ran "all the coal *suitable in character* that the company may require for use in its own works." It by no means follows, however, from this construction that the Coal Company warrant that all the coal to be supplied shall be of this character, or that they are absolutely bound, during the long period of 90 years, to supply from the designated seams coal of this kind to the

amount required. Nor was either of these propositions contended for. The obligation of the Coal Company is, in their Lordships' opinion, much more limited. It is, as regards this matter of quality, independent of the provisions of paragraph 3 and of the obligations they specifically impose. They are bound to supply from the designated seam or seams coal reasonably suitable in quality for the purposes of the Steel Company indicated in the contract, to the extent that the same can be obtained by the reasonable and proper working of the mines opened or to be opened therein. The burden this places on the Coal Company is easy to bear, and is fully compensated for by the price to be paid for their coal, moderate though that price be. They will, no doubt, be prevented from doing what they have, in effect, done, and claimed the right to do, namely, the right to discriminate against the Steel Company, to select deliberately from their vast supplies of coal the particular description which they knew to be almost entirely unsuitable for the uses for which it was required, and to dispose of what was suitable for those uses to others; but beyond that it would not hamper them in their business. According to this view, the Coal Company were not justified in repudiating their contract, but the Steel Company are not entitled, at one and the same time, to specific performance of the contract and to damages for the loss of it. Inasmuch, however, as, according to their Lordships' view, this is not a contract of which, on the authorities cited, specific performance would be decreed by a Court of Equity, the Plaintiffs are entitled, owing to the wrongful repudiation of the contract by the Defendants, to treat the contract itself as at an end and to recover damages for the loss of it, in addition to damages in respect of those breaches of it which may have

been committed before repudiation, ~~namely, up to the 31st October 1908.~~ The proper reference should, their Lordships think, be directed to ascertain these damages.

Their Lordships will therefore humbly advise His Majesty that the Judgment of the Supreme Court should be affirmed, and that the case should be remitted to that Court to have the damages under the two heads above mentioned assessed in the usual way.

The Appellants must pay the costs of the Principal Appeal. There will be no order as to the costs of the Cross-Appeal.
