Privy Council Appeal No. 86 of 1919.

The Steel Company of Canada, Limited - - - - *Appellants*

v.

The Dominion Radiator Company, Limited - - - *Respondents.*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH JULY, 1919.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD PARMOOR.
MR. JUSTICE DUFF.

[*Delivered by* THE LORD CHANCELLOR.]

In this case their Lordships find themselves in agreement with the view taken both by the Trial Judge and by the Appellate Division. They hold the view that the case is particularly clear, and under those circumstances adopt the course of stating shortly, and without consideration, the reasons which have led them to that conclusion.

This is an appeal by the defendants in the action, from a judgment of the Appellate Division, delivered on the 15th July, 1918, dismissing an appeal from a judgment of Mr. Justice Middleton which was given on the 26th October, 1917. The action was brought to recover damages for alleged breaches of two contracts for the sale of, and delivery by, the appellants to the respondents of pig-iron; the first dated the 23rd December, 1915, for 1,000 tons, and the second dated the 25th September, 1916, for 1,200 tons. Their Lordships did not invite Sir Erle Richards to discuss the issues which arose or might have arisen under the second contract dated the 25th September, 1916,

because they had formed a view adverse to his contention upon the first contract, and no issue arose or could arise upon the second contract unless the appellants succeeded in their contentions on the earlier contract. The dispute as to the second contract arose in the following way. It was claimed by the appellants that the first contract had automatically expired; it was consequentially claimed by them that any deliveries made by them after the date on which according to their contentions, the first contract had so expired were made under the second contract and at a different price. This contention was repelled by the respondents, and thereupon the present litigation arose.

Their Lordships have formed the view that the appellants are wrong in the contention which they put forward in relation to the first contract and it is, therefore, unnecessary to consider any question in relation to the second contract. Their Lordships have carefully considered the argument advanced by the appellants. It is contained in a letter which will be found on page 130 of the Record.

The letter is dated the 18th December, 1916, and is written by the appellants to the respondents and it contains the following passage :—

> "We note what you say in reference to our invoices of the 1st and 5th December, and on investigation we find they are correct, as the contract they were applied against is the only pig iron contract we have with you at this date."

And these are the material words :—

> "The contract you refer to was never in force, it having been automatically cancelled through your failure to recognise its conditions by exercising the privileges contained therein—to which you were entitled—prior to its expiration date, viz., 30th June, 1916."

That letter embodies and clearly states the contention upon which the appellants to-day relied before their Lordships. In other words it is claimed that the contract contained a definite date by which deliveries were to be completed; that time was of the essence of the contract; that deliveries were not completed by that date and that, thereupon, the contract expired by effluxion of time. It is by necessary implication claimed that it was the duty of the respondents to have asked for or obtained deliveries by that date; and that in their failure to do so, the contract automatically came to an end. In order to examine that contention, it is necessary to consider the terms of the contract, which are to be found on page 108 of the Record. If the above contentions are to succeed it must be established that, under those terms, the respondents were obliged, assuming any initiative which might prove necessary, to require and to obtain delivery. The contract has been read. It contains in terms no such provision. The actual language which is used in reference to the time of delivery is as follows :—

"Time of delivery—between date of completion of current contract and the 30th June, 1916, in equal monthly instalments."

The conditions contain a clause which may be read :—

> "Default in payment of any delivery will entitle seller to cancel contract. If, after entering into a contract, the purchaser fails to execute any of his obligations thereunder, the sellers have the right to terminate the contract without prejudice to any claim for damages they may make."

A later paragraph of the conditions contains the following stipulation :—

> "Seller gives the buyer the privilege of cancelling any one month's delivery, if such delivery is delayed more than thirty days beyond the expiration of the month in question, provided buyer notifies seller within ten days after the expiration of the said thirty days' delay, of their desire to cancel."

It is evident from these conditions that time was not of the essence of this contract, and that it was not treated by the parties as being of the essence of the contract. It is not less clear that no obligation was thrown upon the purchaser to demand or insist upon delivery. The terms of this contract in no way relieve a vendor who was, equally with the buyer, bound to give effect to its terms, from the obligation of demanding, before seeking to avoid the contract, that the purchaser should take delivery under its provisions. A demand on the part of the vendor that the purchaser should take such delivery was, in their Lordships' opinion, a condition precedent to a claim on his part that the failure of the purchaser to take delivery had discharged him from his obligations under the contract.

It was stated by Sir Erle Richards that the case was conducted in the Court below by the parties on the footing that the appellants were only bound to deliver as and when requested to do so by the respondents. The method in which the case was conducted in the Court below could hardly, unless formal admissions were made, discharge their Lordships from the duty of construing and reaching a conclusion upon the actual terms of the contract, but it is a sufficient comment upon this particular submission of the appellants that if it be true that the case was conducted by the parties in the Court below on this footing, they must have been at one at least on this point, that the contract had not automatically come to a conclusion at the relevant date in June.

It remains only to make an observation on the submissions advanced on the subject of damages. On this part of the case it was contended by Sir Erle Richards that in the first place the relevant date at which damages were to be measured was the date at which the last delivery ought, according to his contention, to have been made under the contract. That contention cannot be supported when once the view is taken, which their Lordships do take, that the contract was broken by the appellants and that, therefore, the relevant period for ascertaining the amount of the damages must be the date of the breach. But it is also said by the appellants in relation to at least one parcel that the respondents were supplied with a substituted commodity which

if not identical in quality with what should have been supplied under the contract, was nevertheless suitable for and did in fact subserve the purpose for which the contract steel was required. It is contended that this parcel was purchased at a smaller rate and, therefore, that credit should have been given to the appellants for the difference in value. It is sufficient for their Lordships to say upon that point that the Trial Judge after hearing argument, formed a view upon the matter, that the view taken by the Trial Judge was carefully considered by the Appellate Court, and that they too reached a conclusion hostile to the appellants.

It has not been the practice of their Lordships in such circumstances to disturb the conclusions reached in the Courts below, and their Lordships see no reason for adopting such a course in this case.

Under these circumstances and for these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

THE STEEL COMPANY OF CANADA,
LIMITED,

v.

THE DOMINION RADIATOR COMPANY,
LIMITED.

DELIVERED BY THE LORD CHANCELLOR.

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