

Twentsche Overseas Trading Co. Limited - - Appellants

v.

Uganda Sugar Factory Limited - - - Respondents

Uganda Sugar Factory Limited - - - Appellants

v.

Twentsche Overseas Trading Co. Limited - - Respondents  
(Consolidated Appeals)

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 20TH DECEMBER, 1944

*Present at the Hearing:*

LORD THANKERTON

LORD WRIGHT

LORD GODDARD

SIR MADHAVAN NAIR

SIR JOHN BEAUMONT

[Delivered by LORD WRIGHT]

This is an appeal from a judgment of the Court of Appeal for Eastern Africa at Mombasa, reversing a decision in favour of the appellants of the High Court of Uganda, sitting at Kampala, Uganda. The Court of Appeal held that the respondents were entitled to recover damages in an action brought by them as plaintiffs against the appellants as defendants for breach of a contract to deliver steel rails. But the Court decided an issue as to the contract price in favour of the appellants. On that part of the decision the respondents have brought a cross-appeal.

The appellants are a company incorporated in Holland, having a branch at Kampala, Uganda. The respondents own and operate a sugar factory in Uganda, on and for the purposes of which they operate about 72 miles of railway.

The contract was in writing and was contained in the following document:—

Kampala,  
12th August, 1939.

N.V. Twentsche Overzee Handel Mij.  
Twentsche Overseas Trading Co. Ltd.

To: Messrs. Uganda Sugar Factory Ltd.,  
Lugazi.

Dear Sir,

We beg to report as follows on your order as per your Indent No. 92/Tech.

Yours faithfully,  
N.V. TWENTSCHE OVERZEE HANDEL MAATSCHAPPI J.  
(TWENTSCHE OVERSEAS TRADING CO. LTD).

No. 92/Tech.

(Sd.) W. SAMUEL.

DESCRIPTION OF GOODS: 3 (THREE) MILES OF NEW UNMOUNTED LIGHT RAILWAY TRACK for 24" GAUGE, consisting of 70 mm. high 20 lbs. rails, Krupp Section K.10c in dead lengths of 5 m. with 2900 steel sleepers per mile 130 mm. wide, weighing about 11 lbs./yds., Krupp Section K.105B of 1000 mm. cut off length, with closed ends and with 2 holders pressed on, complete with all accessories, *i.e.*, fishplates, fishbolts, nuts, clips, clipbolts and nuts, etc. Approximate weight per mile of track, 50,300 kg.

PRICE £390 per mile of track *c.i.f.* Mombasa, not landed.

TERMS: At 90 days sight in London.

SHIPMENTS: One mile each in November, 1939/December, 1939/January, 1940.

For and on behalf of:—

UGANDA SUGAR FACTORY LTD.,

(Sd.) R. G. VEDD,

*General Manager.*

ORDER ACCEPTED BY H.O. TECHNICAL O.C. 1244.

Please return one copy duly signed by you.

Prices without engagement unless otherwise stated in this report.

This document to which both appellants and respondents were parties, and which both Courts have held to embody the bargain between them, contains no provision as to the source from which the appellants were to obtain the goods. The reference in it to Krupps does not indicate a source of supply; it is merely an item in the specification, of the goods required by the respondents because they were using rails manufactured by Krupps, and it was necessary that the rails ordered under the contract should correspond to those made by Krupps, so that the new rails should, when supplied, fit the rails already in use. The respondents claimed however that the rails specified under the contract were to be rails manufactured by a German firm called Ferrostaal, and by that firm only. On this they based their claim to be excused from their failure to deliver the goods, because to do so, they said, would have involved a dealing with alien enemies and hence the performance of the contract became impossible and illegal. Their case was that the manufacture of the goods in Germany and their importation from Germany was the only mode of fulfilling the contract and was the only mode of fulfilment which was contemplated by the parties and was the condition upon which the appellants entered into the contract. In the first place they based this contention on an allegation that there was a collateral oral agreement between them and the respondents that the goods should be manufactured by and procured from the Ferrostaal Company in Germany. They failed on that warranty contention as both the trial judge and the Court of Appeal held. It depended on proving an oral agreement said to have been made about three weeks before the 12th August, 1939. As they failed on that issue of fact, it need not now be further considered. Whatever was said between the parties at the earlier date was superseded by the final agreement which the Courts of Appeal held was contained in the document of the 12th August, 1939. The Court of Appeal particularly relied upon the considerations laid down in the House of Lords in *Heilbut Symons & Co. v. Buckleton* [1913] A.C. 30, especially in the opinion delivered by Lord Moulton at p. 47 that collateral contracts must from their very nature be rare. A collateral agreement must be in every sense a complete legal contract, and the effect must be to vary or add to the terms of the contract. "Such collateral contracts are viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have effect of lessening the authority of written contracts by making it possible to vary by suggesting the existence of verbal collateral agreements relating to the same subject matter." Their Lordships have quoted these words because they go to help the decision of the main contention as to frustration relied on by the appellants. If, they say, the contract does not expressly require that the rails should be supplied by the Ferrostaal Company and if there is no

collateral warranty to that effect, they are still entitled to be relieved from the obligation to supply, because to the knowledge and intention of both parties, irrespective of contractual stipulation, the goods were to come from Germany and as this had become illegal and impossible the contract was frustrated. It was not true, they said, that there was not frustration unless there was a contractual obligation that the goods were to come from Germany.

The word frustration is here used in what may now that it has received statutory recognition in the Law Reform (Frustrated Contracts) Act, 1943, be regarded as a technical legal sense. It is a sort of shorthand: it means that a contract has ceased to bind the parties because the common basis on which by mutual understanding it was based has failed. It would be more accurate to say, not that the contract has been frustrated, but that there has been a failure of what in the contemplation of both parties would be the essential condition or purpose of the performance. Here it is said that both parties contemplated that the rails were to come from Germany and, when the possibility of that being done, died, the contract died with it.

It is not now necessary to examine the various decisions which have sought to define and explain the nature of frustration. It is enough to refer to the recent decisions of the House of Lords in *Fibrosa Spolka Achoyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32 and *Constantine S.S. Line v. Imperial Smelting Corporation* [1942] A.C. 154, in which the relevant principles are defined and explained. In the former the goods were under the contract which was made before the outbreak of war between an English and a Polish company sold for delivery c.i.f. Gdynia, which at the date of the contract was Polish but when the time came for delivery had become by occupation an enemy territory. There was no difficulty there in holding that the contract was frustrated by interdiction of law having regard to its express terms. It could not be performed except by trading and intercourse with the enemy. Whether frustration occurs or not, depends on the nature of the contract and on the events which have occurred. Here there was nothing in the contract itself which called for the appellants obtaining the rails from Germany. So far as concerns the respondents the buyers, their evidence was that it was purely a matter for the appellants where the rails came from. There were many possible sources of supply, from manufacturers in England, or America, or Belgium, or France, or Germany. The contract left the respondents with a free hand in the matter of how they performed their contract. The trial Judge found that "the balance of probability is that to the knowledge of both sides these goods were to be supplied by Ferrostaal of Germany", or as he puts it later in his judgment "it was in the contemplation of both parties that these rails should be supplied by Ferrostaal of Germany." In the Court of Appeal a more qualified view was taken which is in their Lordships' opinion the most that can be said in support of the appellants' contention. Webb C.J. put his opinion clearly. "I think" he said, "all that the evidence established is that the defendants contemplated getting the rails from Ferrostaal and the plaintiffs knew this and were content, but it did not establish that the defendants were bound to supply Ferrostaal rails and none other—clearly all that the plaintiffs insisted upon was rails that would be interchangeable with their Krupp rails." Thacker J., coming to much the same conclusion, thought that "the respondents cancelled the contract after the war because they believed that they were protected by the condition which they would have had if they had proved, as they did not, the collateral agreement."

In their Lordships' judgment, the appellants were not entitled to invoke the doctrine of frustration on the ground either of the nature of the contract or of the facts. The war did not terminate the contract having regard to its actual terms. Shipment from Germany was not merely no part of the express contract, but it could not be described as the basis or foundation of the contract within the meaning of the frustration doctrine. It was simply the convenient method of performing the contract which the sellers contemplated. Mr. Le Quesne submitted that the appellants

lost the opportunity which they possessed before the war of shipping from Germany. That may be true but it was their own affair. Their Lordships may here again refer to Lord Moulton's words quoted above. To accede to the appellants' arguments would be to impair the confidence of commercial men in the conditions of their contracts. It would lessen the authority of written contracts not merely as Lord Moulton was contemplating by the too easy introduction of collateral agreements but by lax or too wide application of the doctrine of frustration. Modern English law has recognised how beneficial that doctrine is when the whole circumstances justify it, but to apply it calls for circumspection.

In the present case a carefully drawn specification has defined precisely what are the goods called for by the contract. That specification contains no term intended to define what is to be the source of the goods. The contract is silent on the point. To introduce into the specification the term that the goods should be the manufacture of Ferrostaal would be to vary the contract by defining what the contract has left open. And in considering the question of frustration the same result would follow. In a case like this the contract is not frustrated, because only one of the many possible ways of performing it has become illegal and impossible.

Their Lordships do not know of any strictly parallel case in which a contract has been held to be frustrated. The appellants did indeed rely upon words of Russell J. (as he then was) in *re Badische Coy. Ltd.* [1921] 2 Ch. 331 at p. 377. He said of the contract he was then dealing with "There is no doubt in my mind that this contract was to the knowledge of both parties a contract for the supply of goods to be obtained from Germany." It would be proper to add the words "and to be obtained only from Germany," because it is in this way that he states the position at p. 373, "Another ground suggested was that the parties to the contract contracted on the footing that the goods sold would only come from Germany and that accordingly the continued existence or further performance of the contract would involve intercourse with the enemy or tend to assist the enemy." These words of the learned Judge, while no doubt applicable to the facts and documents of this case, cannot be extended to cover a case like the present, where, as their Lordships have held, the parties to the contract did not contract on the footing or common assumption that the goods sold would come only from Germany.

It is scarcely necessary to observe that according to the views of law now accepted the doctrine of frustration may apply to a contract for unascertained goods.

The present appellants, who were respondents in the Court of Appeal, succeeded in their cross appeal that the words in the document of the 12th August, 1939, superseded the specific price named in the earlier part of the document and substituted a reasonable price. This decision involved a considerable advantage to the present appellants, and afforded justification for the order of the Court that the present respondents as they had failed on the issue of the price should not have the costs of the appeal, though they were given the costs of the trial in the first Court. Before their Lordships, the present respondents lodged a cross appeal, which in their Lordships' opinion, was bound to fail, was not persisted in. Their Lordships will accordingly dismiss both the appeal and the cross appeal. They would normally do so with costs in either case, but to avoid separate taxations they will order that the costs of the respondents in the appeal should be reduced by a set-off of one-eighth part thereof, on account of the costs of the cross-appeal.

They will humbly so advise His Majesty.

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In the Privy Council

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DELIVERED BY LORD WRIGHT

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