1921
*June 10, 13.
*Oct. 11.

FRANK SAMUEL AND OTHERS (PLAINTIFFS) .... APPELLANTS.

AND

BLACK LAKE ASBESTOS AND CHROME COMPANY (DEFENDANT) .... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Contract—Purchase of goods—Time for delivery—Extension—Breach—Measure of damages—Substituted contract.

By a contract entered into in April, 1917, S. agreed to purchase a specified quantity of chrome ore from the Black Lake Co., delivery to be completed on Nov. 1st. The ore was not delivered on that date though S. had been urging expedition and had offered to extend the time and in October the company wrote S. that material shipments could not be made for some months and suggesting that the contract be cancelled, which S. refused to do. There was no formal extension. In November conversations took place between S. or his representative and the manager of the mines which ended in the latter undertaking to deliver the ore as fast as it could be got out. The delays continued with S. still urging expedition until June, 1918, when the company wrote that no further deliveries would be made. In an action by S. for damages the breach of contract was admitted the only question being its date and the consequent measure of damages.

Held, reversing the judgment of the Appellate Division (48 Ont. L.R. 561) that there was no breach of the contract before June, 1918; that there was no new contract entered into as a result of the conversations that took place in November, 1917, but the parties acted throughout on the basis of the original agreement made in April; and that the measure of damages was the difference between the contract price and the value of the ore in June, 1918.

---

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

1921
SAMUEL
v.
BLACK LAKE
ASBESTOS
AND
CHROME CO.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial as to the measure of damages.

The material facts are stated in the above head-note.

Anglin K.C. and *R. C. H. Cassels* for the appellants. The respondents were in fault and the appellants exercised forbearance up to June 21st, 1918. The breach occurred on that date and the measure of damages should be the difference between the contract price and the value of the ore then as there was no market. See *Ogle* v. *Earl Vane* (2); *Hickman* v. *Haynes* (3).

H. J. Scott K.C. and *R. S. Cassels K.C.* for the respondents referred to *British Westinghouse Electric Co.* v. *Underground Electric Railways Co.* (4).

IDINGTON J.—The respondent, in the end of April and beginning of May, 1917, entered into two written contracts with the appellants to sell and deliver to them Canadian Lump Chrome ore.

The following is a copy of the first of these contracts:

Philadelphia, April 25th, 1917.

Messrs. Black Lake Asbestos & Chrome Co., Ltd.,
Black Lake, P. .Q., Canada.

Dear Sirs:—We have to-day bought for our account from you a lot of Canadian Lump Chrome Ore on the following conditions, viz.:

Quantity 1,500 gross tons of 2,240 lbs. each.

Brand or make.

Quality good, well prepared chrome ore.

Price: Ore analyzing 32 to 35% chromic oxide, $23.50; for ore analyzing over 35% to 38%, $25.75; for ore analyzing over 38% up to 39%, $27.50, with a scale of $1.00 for each full unit over 39% and up to 42%. All per gross ton.

(1) 48 Ont. L.R. 561.
(2) [1868] L.R. 2 Q. B. 275; 3 Q. B. 272.
(3) [1875] L.R. 10 C.P. 598.
(4) [1912] A.C. 673.

1921

SAMUEL v. BLACK LAKE ASBESTOS AND CHROME CO.

Idington J.

Terms of payment to be made in U.S. gold coin or equivalent.

Cash in full to be paid in Black Lake, less 25c. per ton as heretofore.

Place of delivery f.o.b. cars, Quebec Central Railroad Company's tracks, between Robertsonville and D'Isræli, P.Q.

Time of shipment: As fast as possible. The entire quantity to be shipped not later than first of November. This purchase is subject to the Canadian Government granting permission to ship to the United States.

Shipping directions: Will be given as fast as the ore is loaded.

Remarks: Sampling and analyzing to be done by us, at our expense. Where our determinations are not satisfactory to seller, he is to have the privilege of disposing of such carloads which are to be replaced.

Note: Each delivery to constitute a separate and independent contract unless otherwise stated.

All agreements contingent upon strikes, accidents, delays of carriers, or other unforeseen circumstances beyond the reasonable control of the sellers, wars of this or other nations, as well as interruptions of navigation through strikes or other causes, in which case deliveries against this contract may be suspended.

Sellers are not compelled to replace shipments lost at sea.

Accept. May 29, 1917.

Black Lake Asbestos & Chrome Co., Limited.

(Sgd.) J. E. Murphy, Jr.

Yours truly,

(Signed) Frank Samuel.

The second is identical in its terms save being for 2,000 gross tons instead of as in the first for 1,500 tons and the dates of the making being 2nd May, and acceptance the 29th of May and in the use of the word "analyzing" for "containing." A printed form was used in each case and I surmise one used by appellants.

The respondent not only failed to complete delivery by the 1st November, 1917, named in each of the respective contracts for limit of time therefor, but continually held out to appellants hopes of doing so and accepted their forbearance from time to time until June, 1918, when the respondents' many broken promises had apparently become unbearable to appellants and led them to write respondents the following letter:—

Philadelphia, Pa., June 11th, 1918.

Messrs. Black Lake Asbestos & Chrome Co.:

Dear Sirs:—Referring to our two contracts with you for chrome ore on April 25th and May 3rd, 1917, we are advised by our representative at Black Lake that your Black Lake office is shipping chrome ore to other parties without giving us the opportunity to sample and analyze this ore and apply against our contracts with you. We consider this a repudiation on your part of our contracts, and therefore, will have to take legal action and hold you for non-delivery of this ore.

We telegraphed you to this effect to-day and must have an immediate answer in reference to same. We are sending a copy of this letter to your Black Lake office.

Yours very truly,

(Sgd.) Frank Samuel.

The substance of this letter was also sent by telegraph on the 11th of June, but no reply came to either until the following:—

No 20 Victoria Street,

Toronto, Ontario, June 21st, 1918.

Frank Samuel, Esq.,

Harrison Building,

Philadelphia, Pa., U.S.A.

Dear Sir:—Delay in answering your telegram and communication of the 11th inst. has been due to the writer's absence from the city.

The contracts to which you refer bear on their face a ground for termination, viz., the pinching out of ore, which unfortunately took place on our properties.

We regret to say, also that the sampling and analysis which has been done by your representative in the past has been most unsatisfactory.

In addition, practically our entire output at the present time is being used for home consumption, and we regret that we cannot make any further shipments to you.

Yours very truly,

Black Lake Asbestos & Chrome Company, Limited,

(Sgd.) Robert F. Massie,

Managing Director.

1921
SAMUEL v. BLACK LAKE ASBESTOS AND CHROME CO.
Idington J.

Hence this action for damages in which respondents set up many defences all of which were decided by the learned trial judge to be unfounded.

He assessed (expressly relying upon *Ogle* v. *Vane* (1), hereinafter referred to) the damages on the basis of the difference in market price for such goods on the date of respondents' last letter, quoted above, and the price named in each of said contracts.

On appeal therefrom to the first Appellate Division of the Supreme Court for Ontario, that court maintained said judgment in all respects save in the taking of said date as basis for the assessment of damages.

It instead thereof directed a reference to the Master in Ordinary to inquire and state the damages.

Instead of taking any fixed date as the basis for applying the relevant law to the existent facts it directs said master

> to ascertain and state what quantity of Canadian lump chrome ore within the grades contracted for was diverted from delivery to the plaintiffs by the defendants other than for unsatisfactory analysis of the ore, and sold to other persons between May 1st, 1917, and June 22nd, 1918, and whether any and if so what quantity of similar ore was purchased by the plaintiffs between the said dates to replace the ore so diverted and sold to other persons, and is to allow to the plaintiffs, as damages, in respect to the ore, so diverted and replaced, the excess, if any, between the price paid by the plaintiffs in each case and the contract price for the same grade of ore. And as to the residue of the 2,660 tons undelivered by the defendant the said Master shall allow as damages the sum of $30.26 per ton, being the difference per ton between $23.50 the contract price and $53.76, the market price on June 21st, 1918, of ore of the lowest grade contracted for, but the defendant shall be entitled to shew before the said Master in mitigation of the said last mentioned damages: (1) that the plaintiffs bought at a lower price than $53.76 per ton by reason of the situation caused by the defendants default in delivery, and (2) that the plaintiffs bought in in the market at a lower price than $53.76 per ton in excess of the amount required to fill their forward contracts, and in either of the said events the damages on the ore so bought shall be calculated on the basis of the said lower price instead of at the sum of $30.26 per ton.

(1) L.R. 3 Q.B. 272.

I, with great respect, cannot find in my view of the contract above set forth and the relevant facts anything to warrant the court below in finding as the reasons for its judgment shew, that

as each car was diverted from the respondent (now appellant) and shipped elsewhere that was a repudiation *pro tanto* and was known to be so by the respondent (now appellant) through his agent Wooler.

The contract was not for the entire output of the mines of respondent regardless of its obligations to others either express or implied. The only words in the contract giving any colour for such an interpretation are, I submit, the words "fast as possible" which, seeing it had till the 1st November—a period of seven months—to get out and load about three thousand tons of the desired ore, must be interpreted reasonably.

Let us imagine a buyer under such like contract, on discovery that other customers of the vendors were getting shipments from him of the like goods, immediately going into the open market and buying at a lower price than named in his contract and trying then to evade the acceptance of delivery tendered him within the ultimate time named for delivery and setting up such a defence.

I submit such a proceeding could not be countenanced and that such a defence would not be listened to for a moment. Nor can the counterpart thereof as presented herein be maintainable. Contracts for delivery by instalments at stated times have been presented in some cases to courts and damages assessed on that basis as evidently what was within the contemplation of the parties concerned therein. But that is not the nature of this contract. Nor do the words therein "note: each delivery to constitute a separate and independent contract unless otherwise

stated," which seem to be relied on by the reasons assigned below, make it so. They are words which form part of a printed form used in making the contract and the only operative effect they can have herein would be in the event of a contest as to the quality of goods that had been so delivered, or something akin thereto, arising out of such delivery or in relation to such goods as had been delivered.

There is no dispute herein arising out of past deliveries.

The only thing here in question is what arises out of non-delivery to which the said note is entirely inapplicable.

I submit, therefore, the first part of the above quoted direction to the master is not maintainable.

Thus, I conceive, is also eliminated from our consideration, all that transpired up to the time limit of 1st November for the complete fulfilment of the contract, save in so far as the correspondence between the parties hereto prior to that date may, and I think, must, be looked at to help in the due appreciation of what followed up to the 21st of June, 1918.

It is upon the correct appreciation of the said correspondence so had, that maintenance of the remaining parts of the order of reference should depend.

The difference between the market price of such goods as in question, on the 1st November, 1917, and the price agreed for under the contract, would be the true measure of damages for the breach then, of the contract, unless otherwise provided, or determined by the conduct of the parties.

On the 17th October, 1917, in reply to a complaint as to the tardy nature of deliveries under the contract, on the part of appellants, the respondent wrote Samuel (the writer of said complaint) as follows:—

Dear Sir:—We have your favour of the 11th inst. and in reply beg to advise, that we do not expect to be in a position to make larger shipments of chrome ore on your contract before next summer, so if you wish to cancel your contract on the first of next month we will do so. We regret very much that we are unable to make larger shipments on your contract at present, but it is a cause beyond our control. Kindly let us have your reply to this offer at an early date.

Yours truly,

Black Lake Asbestos & Chrome Co., Ltd.,
Per J. E. Murphy, Jr.

Reply thereto (dated 23rd October) was as follows:—

Dear Sirs:—We are in receipt of your favour of October 17th, and in reply would state that we cannot cancel our contract with you for chrome ore, as our people are willing and anxious to receive this ore at the present time, and we must ask you to get shipments off as rapidly as possible.

Very truly yours,

(Sgd.) Frank Samuel.

It seems quite clear that respondent by offering cancellation meant literally what it said and did not intend to be held for damages in case of assent on the part of appellants to the proposition presented.

On the 20th November the correspondence is resumed and it continued until June following of such a character as clearly to demonstrate that the respondent was claiming it was doing the best it could to live up to the contract and was asking and accepting appellants' forbearance and promising future deliveries and that the appellants were exercising due forbearance and perhaps more than the respondent deserved.

Indeed it would have been improper under such relations as said correspondence discloses to have brought chrome ore of kind and quality named in the contract for the sole purpose of asserting an action for damages and thereby establishing the measure of such damages as appellant had suffered.

1921
SAMUEL
v.
BLACK LAKE
ASBESTOS
AND
CHROME CO.
Idington J.

The respondent's factum points to a letter of appellant of 18th March, 1918, pointing out to the former the measure in which it had failed to live up to its promises and to threats it had made of a discontinuance of the forbearance that had hitherto been shewn respondent unless it shewed a better appreciation thereof.

It is to be observed that said letter went no further than pointing out the course which the appellant might be driven to adopt and hence they remained liable to fulfil their part of the contract until they had gone further or the respondent had as it did later repudiate in clear and explicit terms.

The answer to the respondent's attempt to use this letter as evidence that the contract had ended is not confined to that alone for the effect of it was to produce a delivery of it and acceptance by appellants of two more car loads of chrome ore in the month of April.

Thus by the concurrence of both parties the contract had not ended and the final breach thereof taken place.

The decision in the case of *Ogle* v. *Earl Vane* (1), seems to me to exactly fit the facts in the case as I find them by a perusal of the entire correspondence. In that case Blackburn J. wrote the leading judgment. In the Exchequer Chamber, in appeal therefrom, the court was unanimous and it may not be amiss to remark that Willes J. was one of those writing to express the opinion of the court. Shortly thereafter in 1875, in the case of *Hickman* v. *Haynes* (2), a strong court in appeal, Lindley J. writing the judgment, accepted that decision as a guide and applied the principle involved.

(1) L.R. 3 Q.B. 272. (2) L.R. 10 C.P. 598.

In 1899 the late Chief Justice Lord Russell of Killowen in the Commercial Court applied the identical principle thus involved to the decision of the case of *Ashmore & Son* v. *C. S. Cox & Co.* (1), and at the close of his judgment page 443 furnished an apt illustration of what should be borne in mind in dealing with the facts presented herein.

Unfortunately respondent seemed to have been inclined herein throughout to get away from the actual facts as I view them both in its dealing with the appellants and the case presented to the court, or to read them backwards.

In my view of the facts the case is simple and the appeal should be allowed and the judgment of the learned trial judge be restored with costs here and in the first Appellate Division of the Supreme Court of Ontario.

DUFF J.—The appellants, I think, are entitled to succeed on the principal ground on which they based their appeal, namely that there was no substituted contract but that the time for delivery was extended from time to time in forbearance and by way of indulgence at the request of the defendants. That is, I think, a substantially just interpretation of what occurred between the parties, and it is also, I think, what the trial judge intended to find although his findings, perhaps, are not very precisely expressed.

No question arises here such as that which, but for the arrangement between the parties, might have arisen in *Tyres* v. *Rosedale Iron Co.* (2), where the

(1) [1899] 1 Q.B. 436. (2) [1875] L.R. 10 Ex. 195.

1921
SAMUEL
v.
BLACK LAKE
ASBESTOS
AND
CHROME CO.
Duff J.

plaintiffs insisted upon putting an end at once to the indulgence and required immediate delivery of all the overdue instalments. No such question arises here, because the immediate cause of the indulgence being terminated was the repudiation by the defendants of their obligations under their contract.

ANGLIN J.—At the conclusion of the argument I had a strong impression that the disposition made of this case by the learned trial judge had been entirely satisfactory and should not have been interfered with. Further consideration has confirmed that view. The issues as to the breach of the contract by the defendants, the date when such breach occurred, alleged purchases by the plaintiffs to replace ore which the defendants had failed to supply and the quantum of the plaintiff's damages were presented for trial and were tried out. The evidence supports the finding of a wilful breach of contract by the defendants deliberately made in order to take advantage of an increased market price. Forbearance by the plaintiffs at the instance of the defendants prevented an actionable breach before the 21st of June, 1918, when such a breach undoubtedly occurred. The assessment of damages as of that date was therefore warranted. The measure of damages adopted by the trial judge—the difference between the sale price and the value at the date of breach—was that prescribed by the law under such circumstances as the evidence disclosed no market in which the goods were procurable at the date of the breach. The quantum allowed has not been successfully challenged. Prior to the 21st of June, 1918, the plaintiffs were under no obligation to look elsewhere for ore in order to mitigate their damages. Indeed they could not safely purchase ore to

replace what the defendants were bound to furnish as the contract being still open they might be compelled to take the latter. After the 21st of June, so far as the evidence shews, no ore was available—certainly none at any price less than that which the learned trial judge fixed as the value at that date of the ore in the delivery of which the defendants made default.

There is in my opinion nothing to justify further investigation. The appellants had their day in court. They took their chances on the evidence submitted at the trial. If they failed to take every advantage of the opportunity they then had they must suffer the consequences. With respect, the judgment of the trial judge was in my opinion entirely right; it should not have been disturbed and should now be restored.

BRODEUR J.—I concur in the result.

MIGNAULT J.—The only question here is as to the quantum of the damages to which the appellants are entitled for the admitted default of the respondent to make deliveries in accordance with the requirements of the two contracts which it had made with the appellants to sell them the total quantity of 3,500 gross tons of Canadian lump chrome ore. The quantity undelivered was 2,660 tons, and by the terms of the contracts the whole of the ore should have been delivered not later than the first of November, 1917.

The finding of fact of the learned trial judge with regard to the question whether the time for delivery had been extended beyond November 1st, 1917, is as follows:—

From the beginning defendants were dilatory in making delivery, so that long before November 1st—the date fixed for the completion of the deliveries—it became apparent that full delivery would not be made within that time. Plaintiffs did not then stand on their strict right to enforce performance at that time, but while continually pressing for more prompt and larger deliveries than they were getting, the facts warrant the inference that the effect of what happened between them was an extension from time to time of the time for making deliveries until hope for further deliveries was ended by a notice of June 21st, 1918, by the defendants declining to make further shipments to plaintiffs. Not only is this so but Mr. Tomlinson makes the statement that plaintiffs had extended the time for delivery down to the time defendants repudiated the contracts, which statement has not been contradicted.

It is true that the learned judge arrives at this finding by means of an inference from the facts proved, but there was certainly no refusal of the respondent to make any deliveries after November 1st, and subsequently to that date the appellants pressed for the carrying out of the contracts, and the respondent made certain deliveries thereunder, so that until the final refusal to make further deliveries in June, 1918, both parties were acting under the original contracts of sale. The inference of the learned trial judge is therefore fully justified by the evidence.

I cannot accept the contention of the respondent that after the 1st of November, 1917, a substituted contract was entered into to sell ore to the appellants as fast as it could be mined, which contract not being in writing could not be enforced, but, according to my reading of the correspondence, until the final repudiation in June, 1918, the original contracts were considered in force and acted upon by both of these parties.

If therefore there was not a substituted contract, but a mere forbearance as to deliveries under the original contracts, the time of repudiation or of refusal to make further deliveries is the time at which the

damages for breach of contract should be assessed. Unfortunately for the respondent the price of chrome ore had very notably increased from November 1st, 1917, to June 21st, 1918, when the letter of repudiation was written, so that its position is worse than if it had declined to make further deliveries after November 1st. But it is impossible to accept the latter date as the one at which the damages should be assessed, for both parties acted under the contract for several months afterwards, and really the respondent, by its letter of repudiation, has determined the time for ascertaining the damages to which its repudiation entitles the appellants.

The only point remaining is whether the variation made by the Appellate Division in the judgment of the learned trial judge should be sustained. This involves the question whether an opportunity should be given to the respondent to shew, if it can, whether or not the appellants, under their obligation to minimize the damages, bought chrome ore to replace that undelivered by the respondent, the damages then being the difference between the contract price and the price at which such ore was purchased. After due consideration, I have come to the conclusion that up to the time of repudiation the appellants were not entitled to purchase chrome ore to replace that yet undelivered by the respondent, and that if they had made such a purchase they could nevertheless have been forced by the respondent to take the full quantity mentioned in the contracts. The reference ordered by the Appellate Division would therefore be without any possible use, for, if the appellants could not buy as against their contract, it is immaterial to inquire at what price they did in fact purchase ore. The appellants were dealers in ore and as there was a great

1921

SAMUEL v. BLACK LAKE ASBESTOS AND CHROME CO.

Mignault J.

demand for the commodity they naturally bought all they could. It is true that the contract states that each delivery should constitute a separate and independent contract, but that certainly does not mean that as to the quantity undelivered there should be as many contracts of sale as there were tons or carloads to be delivered. And even were there such a multitude of contracts to be fulfilled not later than November 1st, unquestionably the time for delivery could be extended by forbearance beyond that date, and then the damages for the final breach of contract would have to be determined as of the time of the breach.

In my opinion, therefore, the judgment of the learned trial judge should not have been disturbed, and the appeal should be allowed and this judgment restored. The cross-appeal of the respondent should be dismissed with costs.

I may add that inasmuch as the contracts in question were made in the Province of Quebec where also the breach occurred, the liability of the respondent should have been determined according to the Quebec law. The parties however assumed otherwise and they appealed to the law of the forum which was applied by the courts below. I am not to be taken as dealing with the matter under any other basis.

Appeal allowed with costs.

Solicitors for the appellants: *Blake, Lash, Anglin & Cassels.*

Solicitors for the respondent: *Cassels, Brock & Kelley.*