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*Feb. 17.
*Mar. 11.

THE BRITISH WHIG PUBLISHING COMPANY (PLAINTIFF)..... APPELLANT;

AND

THE E. B. EDDY COMPANY (DEFENDANT)..... RESPONDENT.

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

Contract—Construction—Paper supply—Annual supply—Yearly requirements.

A contract between a publishing company and a company manufacturing paper provided that "the company agrees to sell and the purchasers (publishers) to purchase, during the period commencing on the 1st day of January, 1916, and ending on the 31st day of December, 1918, for use in the publication of the British Whig newspaper * * * one hundred and fifty tons approximately of paper per year (being the whole of the purchasers' requirements) * * *

Held that this was not a contract for the supply of 450 tons but one calling for an annual supply of approximately 150 tons.

Held, also, Idington and Duff JJ. dissenting, that the governing words were "one hundred and fifty tons approximately of paper per year" and not the expression between parentheses which only referred to 150 tons as an estimate of the yearly requirements; that the obligation of the manufacturer was to supply "about" 150 tons each year; and that the fact that in each of the first two years the publisher was furnished with 50% more than 150 tons did not affect this construction.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment for the plaintiff at the trial (2) and dismissing the latter's cross-appeal.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 19 Ont. W.N. 279. (2) 18 Ont. W. N. 378.

The only question for decision on the appeal is the construction to be placed on the portion of a contract between the parties which is set out in the head-note.

Christopher C. Robinson for the appellant.

G. F. Henderson K.C. and *M. G. Powell* for the respondent.

THE CHIEF JUSTICE.—At the conclusion of the argument in this case I entertained no reasonable doubt that the appeal failed and should be dismissed.

A careful perusal of the agreement in question and further consideration of the facts as proved satisfied me that the reasons for judgment of the trial judge, Middleton J., and of Chief Justice Mulock and Mr. Justice Riddell of the Appellate Division were sound and that their construction of the contract in question was the correct one.

I have had the advantage of reading the reasons for judgment prepared by my brother Anglin and as these reasons embody my own views fully I do not deem it necessary to add anything to them, and I would, therefore, for the reasons stated by him, dismiss the main appeal as well as the defendant's cross-appeal, both with costs, reducing the amount awarded plaintiff, on Mr. Robinson's admission, by the sum of $249.42.

IDINGTON J. (dissenting).—The appellant is a newspaper publisher and the respondent a manufacturer of paper. They entered into a contract of which the most important clause is as follows:—

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Idington J.

The company agree to sell and the purchasers to purchase during the period commencing on the 1st day of January, 1916, and ending on the 31st day of December, 1918, for use in the publication of the British Whig newspaper published in the city of Kingston, one hundred and fifty tons approximately of paper per year (being the whole of the purchasers' requirements) on the following terms and conditions

The questions raised relate to the interpretation and construction of this clause.

The learned trial judge held that the words

one hundred and fifty tons approximately of paper per year

were the essential dominating part of the clause and contract, and consequently, that the damages for breach thereof by failure on the part of respondent in the third year of the term to deliver the quantity thus called for, must be assessed on the basis of one hundred and sixty-five tons, less the quantity delivered in that year.

Why one hundred and sixty-five tons instead of one hundred and thirty-five tons should be taken as such basis would be puzzling but for the fact that the parties concerned had some discussion in a friendly way in anticipation of the breach, and respondent then proposed to add 10% to the approximate amount named in the contract.

Even so, I submit with great respect, such an estimate of the approximate amount might as well have been put at 10% below as 10% above that.

However, in my view of what the parties were contending for, which I am about to state, this new suggestion of mine is only to illustrate how far apart it was possible for the parties to have been in making such an elastic contract.

It seems to me quite clear that the approximate amount of one hundred and fifty tons a year was, in the minds of those concerned, nothing but an estimate

of the possibilities and that the actual goods the appellant was contracting to buy and the respondent contracting to supply, was the paper required for use, in the publication of the newspaper published by appellant in Kingston, during each year of the currency of the contract, and that was intended by both parties to be the whole of the appellant purchaser's requirements for said purposes.

The actual requirements for the purpose so specified doubtless would be found in the result reduced to an absolute certainty, yet must in the course of business events necessarily be given some flexible meaning to which business common sense would have to be applied to avoid quarrelling over details in the last year of the currency of the contract.

No one on either side of such a contract would expect a definite stock-taking at the beginning or ending of such a term as contracted for. Hence they had to make reasonable allowances in estimates of requirements in giving and supplying the last order under the contract.

And in approaching the making of such a contract to the due execution of which reasonable conduct and fair dealing must be applied, it was quite natural they should begin by a guess of what was the possible or probable quantity to be needed.

I can easily see how such a form of a long contract such as before us grew, and bit by bit was amended in accordance with past experience not only in relation to appellant's business but that of very many others carrying on the business of newspaper publishing.

In doing so the important clause now in question seems to have become rather ambiguous. Yet I have no manner of doubt that if the appellant had improperly undertaken a re-selling of the goods so

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Idington J.

supplied, to the detriment of the respondent, the latter could have had the doing so restrained; or that if the appellant had improperly bought any part of its requirements elsewhere than from respondent, the latter could, and no doubt would have claimed damages for such a breach, and that the basis for the measure thereof must necessarily in such case have been the quantity of the requirements of appellant having due regard to what I have adverted to above as to reasonable allowance in the possibly final orders for the year.

In such an action for damages the court or jury trying it would be bound to consider, if having any regard to the intention of the parties, what was the probable amount of the paper necessary to supply the requirements of the appellant in its specified business.

The jury in such a case would be asked to consider what was within the reasonable contemplation of the parties.

And the true basis therefor would not, I submit, be the estimate or guess of what was presented as the approximate quantity when coupled up with something much more specific as herein, but that which would, in a business way, as result of experience, be quite capable of being demonstrated to be a substantially larger quantity than the original guess.

I submit this test of the realities in order to get away from what seems to me rather an illusory way of selecting arbitrarily some words of a contract and discarding others, and forgetting to realize what the parties actually were trying to do by means of the contract they were framing. In other words, the subject matter of the contract was not the estimated, but the actual requirements of a specified business.

The contract certainly is ambiguous and in all such cases the acts, conduct and course of dealing of the parties before and at the time they entered into it, may be looked at in order to ascertain what they had in contemplation and what they did immediately after in pursuance thereof.

It is clear that the experience of the three years' contract which preceded this one demonstrated that a hundred and fifty tons was far below the probable requirements yet the parties acted in dealing with each other on the basis I suggest and for the first two years of this contract, acted on same basis.

The appellant's business seemed to be growing and that was mutually advantageous until an unfortunate condition of affairs arose in the third year of the contract which rendered it otherwise for respondent.

Neither was to blame for the unexpected condition in question, nor could it excuse the breach of contract.

I am of the opinion that the appeal should be allowed; the judgments of the courts below reversed with costs here and in the Court of Appeal, and the damages be assessed on the basis of the quantity required for the appellant's business specified in the contract, and that alone.

If the parties cannot agree of course a reference must determine the amount.

I suspect it can be determined between themselves as matter of business better than any referee can do it.

DUFF J. (dissenting).—I concur in the view expressed by Mr. Justice Ferguson with which Mr. Justice Masten agreed.

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Duff J.

My reasons for this conclusion are quite sufficiently stated in the judgment of Ferguson J. and consequently it is unnecessary to do more than summarize them in a sentence or two.

The phrase "being the whole of the purchaser's requirements" and the word "approximately" must be construed by reference to one another and by reference to the fact explicitly stated in the contract that the purchase is a purchase of paper for a particular use. I think the more reasonable construction is that which treats the first mentioned phrase as the governing one and the quantity named as an estimate only.

I think also that the contract being one which is susceptible of more than one necessarily exclusive meaning, the course of dealing between the parties prior to the contract as well as the course of dealing under the contract itself are relevant facts for the purpose of deciding what is the right construction. I concur with Mr. Justice Ferguson in the opinion that the fact proved by the invoices that shipments were made and expressed to be made under this very contract in the years 1916 and 1917 in excess of 150 tons, is an important and weighty fact pointing to the conclusion to which the learned judge arrived.

ANGLIN J.—I am of the opinion that the plaintiff's appeal should be dismissed for the reasons stated by Mr. Justice Middleton (1), and by the Chief Justice of the Exchequer Division and Mr. Justice Riddell (2).

The contract to be construed expressly provides that it "is to be read and interpreted as made at * *

(1) 18 Ont. W. N. 378. (2) 19 Ont. W. N. 279.

the City of Hull, Quebec." But, as was determined in *McConnel* v. *Murphy* (1), cited by Mr. Robinson, the governing principle in Quebec as in the provinces where the English common law prevails

must be to ascertain the intention of the parties through the words they have used. This principle is one of universal application.

Their Lordships proceed to point out that there is no technical or artificial rule in the law of Quebec which bears upon the construction of a mercantile contract such as that before us.

The question is really as to the meaning of language and that must be the same everywhere.

See, however, Art. 1019 C.C.

The contract was in my opinion absolute for the sale of

one hundred and fifty tons (150 tons) approximately of paper per year.

I read "approximately" as the equivalent of "about" and regard it as having been inserted

only for providing against accidental variations arising from slight and unimportant excesses or deficiencies.

Brawley v. *United States* (2).

This qualifying word is not

supplemented by other stipulations or conditions which (might) give it a broader scope or more exclusive significancy

as the words "more or less" were in Brawley's contract.

The words immediately succeeding—

or at that proportionate rate for any shorter broken period covered by this contract

(1) L.R. 5 P.C. 203, 219. (2) 96 U.S.R. 168, 172.

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Anglin J.

further indicate that a quantitative definition of the subject matter was uppermost in the minds of the parties. What that subject matter was to be having been thus defined, it seems to me that proper and adequate effect is given to the words "(being the whole of the purchasers' requirements)" by treating them as a statement of expectation. The converse case was thus dealt with by Mr. Justice Atkin in *In re Harrison and Micks, Lambert & Co.* (1), approved by the Court of Appeal in *Tibbits Brothers* v. *Smith* (2). No case has been cited—no doubt because none can be found—where a contractual provision for the sale of a defined quantity of goods has been held to be overridden by a subsequent *ex facie* parenthetical clause such as that now under consideration. The words "(being the whole of the purchaser's requirements)", as Sir Wm. Mulock says

> do not form any controlling part of the contract but are merely an intimation as to the purchaser's expected requirements.

The English authorities relied on by the appellant, which with others are collected in 25 Hals. Laws of England, page 214, note (f) to paragraph No. 366 and the 1920 supplement at page 1365, are all cases in which the statement as to quantity was obviously introduced merely as an estimate, the contracts having provided for the sale of a particular lot of goods specified by description or otherwise designated. *Bourne* v. *Seymour* (3), cited by Mr. Justice Riddell, is certainly more closely in point than any of them and is about as helpful as a decision on the construction of one contract can well be on that of another not drawn in identical terms.

(1) [1917] 1 K.B. 755, 761. (2) 33 Times L.R. 508.
(3) 16 C.B. 337.

The problem is purely one of construction—to ascertain what are the governing words in the document before us which determine the subject matter of the contract. Those words, in my opinion, are

one hundred and fifty tons (150 tons) approximately, of paper per year.

The construction for which the appellant contends, on the other hand, gives no effect to this specification of the quantity of the subject matter.

The ambiguity or uncertainty necessary to justify resort to evidence of conduct to assist in ascertaining the intention of the parties, in my opinion is not found in this contract.

I agree with the learned trial judge and the Appellate Divisional Court that "each year stands by itself"—that the contract is not for 450 tons to be delivered during a three year period but for one hundred and fifty tons a year.

Mr. Robinson's assent to the contention that the basis for computing the damages should be an obligation to supply 150 tons instead of 165 tons for the year 1918 involves a reduction of the amount awarded by the sum of $249.42 as I make the computation. I would dismiss the defendants' cross-appeal as well as the main appeal—both with costs.

BRODEUR J.—The question in this case is whether the defendant company agreed to supply all the paper required for the publication of the two newspapers of the appellant company or simply the approximate quantity of 150 tons a year.

It seems to me that if the parties intended that all the requirements of the newspapers should be provided for by the respondent company the contract would have been drafted in a different way.

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Brodeur J.

Instead of stipulating that the Eddy Company would sell approximately 150 tons of paper and then adding within parentheses (being the whole of the purchaser's requirements) if the parties had put the latter words at first and stated that the Eddy Company would supply the whole quantity of paper required for the publication of the newspapers in question with the addition after that of the words "about 150 tons" it would not have altered the exact meaning of the agreement and of the extent of the obligation. It would have meant that the supply of all the paper required for the publication of these two papers should be made by the vendor.

It should not be forgotten also that this contract is on a printed form. The words in parentheses which the appellant seeks to be the ruling words of the agreement are printed and the words "150 tons" are typewritten.

Where there are formal and general words which are the usual terms used in a contract and there are other special and peculiar words, and the question is which are to have most weight, the terms that a man has thought of for himself and written into the contract, if they conflict and cannot be reconciled with the printed words, ought to have most weight. *Desrosiers* v. *Lamb* (1).

Besides, I cannot read this contract as meaning by its own expressions a right on the part of the purchaser to get from his vendor all the paper he required for his newspapers because he simply stipulated that 150 tons was all the purchaser's requirements, remaining free to purchase elsewhere if he wanted a larger quantity at a better price.

(1) M.L.R. 4 Q.B. 45.

As to the cross-appeal, I would dismiss it. The defendant company has no right under the contract to apply to the last year the surplus quantity which it delivered in the previous year. Each year stood by itself.

The appeal and the cross-appeal should be dismissed with costs.

MIGNAULT J.—This case should be dealt with on no higher basis than as involving the construction of quite a usual form of contract. It is noticeable that the contract says:

> This contract is to be read and interpreted as made at the Head Office of the company at the City of Hull.

Therefore the question of its construction falls to be determined in this case according to Quebec law, of which, although it was not proved as a fact before the courts below, this court is bound to take judicial notice: *Logan* v. *Lee* (1); *John Morrow Screw & Nut Co.* v. *Hankin* (2).

The portion of the contract in respect of which the dispute has arisen is the following:—

> 1. The Company agree to sell, and the purchasers to purchase. during the period commencing on the first day of January, A.D 1916, and ending on the thirty-first day of December, A.D. 1918, for use in the publication of "The British Whig" newspaper or newspapers published in the City of Kingston, Ont., one hundred and fifty (150) tons approximately of paper per year, or at that proportionate rate for any shorter broken period covered by this contract, (being the whole of the purchasers' requirements), on the following terms and conditions:—

Does this mean that the purchaser is entitled to a quantity of paper sufficient in each year to satisfy its requirements irrespective of the quantity mentioned, or does it signify that this quantity alone, whether or not it satisfies these requirements, is to be delivered under the contract?

(1) 39 Can. S.C.R. 311. (2) 58 Can. S.C.R. 74.

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Mignault J.

This is the whole question to be decided, and in order to solve it the parties have made a diligent search in the books for similar cases and perhaps naturally, because the case was brought before the Ontario courts, they refer us to English or Canadian decisions exclusively. I think, however, that in a matter of this kind, where the only inquiry is as to the meaning of a contract, decided cases, unless they interpret an absolutely identical clause, are of very little assistance. In all such cases, the paramount rule is to give effect to the intention of the parties and as to this intention the language of the contract, and if it be ambiguous the course of dealing of the parties, are the best guides.

The Quebec Civil Code (Arts. 1013 *et seq.*) has laid down, for the interpretation of contracts, certain general rules which it will be useful to follow in this case.

Thus when a clause is susceptible of two meanings, it must be understood in that in which it may have some effect rather than in that in which it can produce none (Art. 1014).

All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire Act (Art. 1018).

In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation (Art. 1019).

However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract (Art. 1020).

Applying these rules, the obligation to sell paper was contracted by the respondent, so the clause in question, if it be of doubtful meaning, should be

construed in favour of the respondent. Care must be taken however to so interpret the contract that effect may be given to all its terms.

Such evidence as there is here is not of much assistance. The contract is on a printed form furnished by the respondent. The blanks were filled in by means of a typewriter Thus the words "one hundred and fifty (150)" are typed. The remainder of clause 1 is printed, including, of course, the parenthetical phrase. Before this contract the parties had entered into other similar contracts specifying also 150 tons, but notwithstanding this specification, the respondent, without objection, furnished quantities in excess of 150 tons per year. Similarly, during 1916 and 1917, the respondent, without objection, supplied paper as ordered and in excess of 150 tons. It is true that, in this action, it seeks to have this excess credited to 1918, but as to that it is clearly wrong. The whole difficulty comes from the fact that the price of paper rose sharply in 1918 and the respondent claimed that if it were bound to furnish up to the requirements of the appellant in that year it could only do so at a loss.

Prima facie I would say that the sale here is of a specified quantity of paper, to wit 150 tons "approximately," the latter word having the meaning of "more or less." The difficulty, however, is to give some effect to the words "being the whole of the purchaser's requirements." To say that the respondent contracted to sell paper to the extent of the appellant's requirements, whatever they might be, would deprive of any useful effect the specification of 150 tons. A more natural meaning can be given to the parenthetical phrase, without rendering this specification meaningless, by saying that it was a representation by the appellant that the whole of its requirements

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Mignault J.

would be 150 tons approximately, and that is the way the contract reads. The respondent may conceivably have had good reasons for insisting that the specification of a quantity should be accompanied by a representation that the quantity specified was the whole of the purchaser's requirements. At all events, while we cannot disregard these words, if they can be given a natural meaning by taking them as a representation or estimate of the purchaser's requirements, I would not hesitate to do so, the more so that if I adopt the appellant's construction, I would deprive of any useful effect the specification of the quantity.

The course of dealing of the parties may of course be taken into consideration, if a contract be ambiguous, but it can be here explained by the fact that the price of paper had not appreciably varied at the time when the excess deliveries were made.

On the whole I have come to the conclusion not to disturb the judgment below and this involves dismissing both the main and the cross-appeal.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellant: *Cunningham & Smith.*

Solicitors for the respondent: *Powell, Snowdon & Bishop.*