VANCOUVER MILLING AND GRAIN COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

THE C. C. RANCH COMPANY (DEFENDANT) ..... } RESPONDENT.

1924
*Oct. 22, 23.
*Nov. 19.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Sale of goods—Contract to supply f.o.b. at point of shipment—Liability to obtain cars—Rights and obligations of seller and buyer—Implied condition as to cars being obtainable.

On September 11, 1922, the respondent, of Cayley, Alberta, contracted to supply to the appellant, of Vancouver, 30,000 bushels of wheat f.o.b. cars, Cayley, shipment to be made during September and October. Four shipments to Vancouver were made, but the Canadian Pacific Railway Company, the only railway at Cayley, refused, from October 19 to October 30, to accept shipments of wheat to Vancouver. The respondent notified the railway company of its requirements of cars, and was ready, able and willing to deliver the balance of the wheat on the cars at Cayley before the end of October if cars could have been obtained. The appellants claimed damages for non-delivery.

Held that the respondent was not liable as delivery within the stipulated period was excused to the extent to which it was prevented by the railway company's inability or refusal to supply necessary cars.

Per Anglin C.J.C. and Idington, Mignault, Newcombe and Rinfret JJ.—Where from the nature of the contract and the circumstances under which it was made it is apparent that the parties must have proceeded on the footing that certain conditions, without which performance

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1923] S.C.R. 335.

1924

VANCOUVER MILLING AND GRAIN CO. v. C. C. RANCH CO.

would be impossible, should exist, their existence may be regarded as an implied term of the obligation undertaken and non-performance due to their non-existence, without default of the obligor, will relieve him from performance.

Judgment of the Appellate Division (20 Alta. L.R. 307) affirmed.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge and dismissing the appellant's action for damages for non-delivery of a quantity of wheat under an agreement of sale.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

R. B. Bennett K.C. for the appellant. The contract of sale was formed by the Canada Grain Act ((C.) 1919, c. 27) and the respondent having failed to observe the provisions of s. 196 of said Act respecting the ordering of cars by him cannot escape liability for failure to deliver the grain within the time limited by such contract, even when assuming that it was the appellant's duty to supply cars.

The respondent by consigning the grain to its own agent, the bank, at Vancouver, retained the possession of the grain. The respondent by retaining control over and possession of the grain until it was delivered to the appellant at Vancouver on payment of the 80 per cent of the purchase price, must be taken to have accepted the responsibility of finding the cars for its grain, which grain remained its property until delivered in Vancouver on the order of the bank, by the delivery of the bills of lading.

Eug. Lafleur K.C. for the respondent. In a contract for the sale of goods to be delivered " f.o.b. cars," the obligation is upon the purchaser to provide cars to receive the goods.

The absolute refusal of the Canadian Pacific Railway Co. to accept shipments of grain for Vancouver during the period from October 19 to 31 when the respondent was able, ready and willing to deliver, and the absence of any authority from the appellant to ship elsewhere, prevented and precluded the respondent from completing fulfilment of the contract.

(1) [1924] 20 Alta. L.R. 307; [1924] 2 W.W.R. 150.

The judgment of the majority of the court (Anglin C.J.C. and Mignault, Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—By a contract made through a broker the defendants (respondents) sold to the plaintiffs (appellants) 30,000 bushels of wheat to be delivered during the months of September and October, 1922, f.o.b. cars Cayley, Alberta, 80 per cent of the price to be advanced against bills of lading. Although the broker's note is silent on the point, both parties treated the contract which it evidences as providing for shipment to Vancouver—and that should, we think, be deemed one of its terms.

It is common ground that the Canadian Pacific Railway is the only railway at Cayley and was the carrier contemplated by the contract. The evidence abundantly establishes that the defendants had wheat ready for delivery to meet the obligation of their contract, which they were anxious to fulfil, that they made every effort to obtain cars, but could procure only four during the period fixed for shipment and those cars were duly loaded and forwarded; that, but for the shortage of cars, in no wise attributable to any fault of the defendants, and the absolute refusal of the railway company to accept grain for shipment to Vancouver during a considerable period in the month of October, owing to congestion at that port, the defendants would have carried out their contract and that their failure to do so is ascribable solely to the inability or unwillingness of the railway company to supply cars to take their wheat available for shipment to the plaintiffs.

Under these circumstances is the defendants' obligation to deliver the wheat so absolute that, although not at all at fault, they must pay damages for failure to implement it? Or, having regard to the fact known to both parties that the only available carrier was the Canadian Pacific Railway Co. and to the further fact that the defendants exhausted every reasonable means to obtain cars from it, should that obligation be so qualified that, to the extent to which it was prevented by the railway company's inability or refusal to supply the necessary cars, delivery within the stipulated period was excused? The Appellate Division has taken the latter view (Hyndman J. dissenting) and we

1924

VANCOUVER MILLING AND GRAIN CO. v. C. C. RANCH CO.

Anglin C.J.C.

are, with respect, of the opinion that its judgment was right and should be affirmed.

It is well established that where from the nature of the contract and the circumstances under which it was made it is apparent that the parties must have proceeded on the footing that certain conditions, without which performance would be impossible, should exist their existence may be regarded as an implied term of the obligation undertaken and non-performance due to their non-existence, without default of the obligor, will relieve him from performance. *Taylor* v. *Caldwell* (1) and *Krell* v. *Henry* (2) afford illustrations of this doctrine. Such a term will no doubt be admitted only where the court thinks it necessarily implied in the nature of the contract and having regard to the surrounding circumstances. *Hamlyn* v. *Wood* (3); *Lazarus* v. *Cairn Line of Steamships* (4). There is also authority, both strong and abundant, that if an unforeseen contingency arises which renders performance impossible, and if it can be confidently said that had the parties contemplated that contingency they would as sensible men have provided that upon its happening performance would be excused, such a term may and should be implied in the contract. *Reigate* v. *Union Mfg. Co.* (5); *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (6). That in our opinion is this case. That the defendants would have undertaken to pay damages for failure to deliver the wheat in question f.o.b. cars in the contingency which arose, or that the plaintiffs would have been so unreasonable as to ask them to assume such a risk, we regard as practically inconceivable. Had the impossibility of shipment to Vancouver, which actually happened, been anticipated, we are satisfied that the defendants would have insisted upon, and the plaintiffs would have acceded to, a provision either that the contract in so far as performance of it was thus rendered impossible should be abrogated, or that there should be a reasonable extension of the time stipulated for delivery.

(1) [1863] 3 B. & S. 826.
(2) [1903] 2 K.B. 740.
(3) [1891] 2 Q.B. 488, at pp. 491-2.
(4) [1912] 106 L.T. 378.
(5) [1918] 1 K.B. 592, at p. 605.
(6) [1916] 2 A.C. 397, at p. 404.

There may be some ground for Mr. Bennett's contention that the authorities holding that under a contract for the sale and delivery of goods f.o.b. a vessel the purchaser is bound to have a ship ready to receive the goods at the designated place of shipment do not govern such a case as this. The number of owners having ships open for charter is large; here Canadian Pacific Railway Co's cars were the only available means of carriage. There is a dearth of English authority on the question immediately under investigation. But the weight of American authority appears to favour the view that under a contract for the sale of a quantity of goods to be delivered during a specified period "f.o.b. cars" at the place where the vendor carries on business, which is silent as to the duty of providing such cars, he is not under an obligation to supply them, but is required only to be ready to load them when supplied. *Evanston Elevator and Coal Co.* v. *Castner* (1); *Hocking* v. *Hamilton et al* (2); *Chicago Lumber Co.* v. *Comstock* (3). A case closely in point where that view prevailed in regard to the respective obligations of vendor and purchaser is *Baltimore and Lehigh Ry. Co.* v. *Steel Rail Supply Co.* (4). See also *Marshall* v. *Jamieson* (5), and *Pullan* v. *Speizman* (6)—both cases in which the principle of the decisions on contracts f.o.b. ships was applied. But it is probably unnecessary to determine this interesting question in this case, and there are undoubtedly cases of contracts similar in their general character to that now before us in which special circumstances impose upon the vendors the obligation of procuring cars, as was held in *Vancouver Milling and Grain Co.* v. *Alberta Pacific Elevator Ry.* (7). While it may be that, apart from s. 31 of the Sales of Goods Act, it was the duty of the defendants, as the parties to the contract who were at the point of shipment, to take all proper measures to secure cars from the railway company to receive the wheat sold to the plaintiffs, under the circumstances of this case that was the utmost obligation they assumed in respect of procuring carriage for the wheat and

(1) [1905] 133 Fed. Rep. 409.
(2) [1893] 158 Pa. 107.
(3) [1896] 71 Fed. Rep. 477.
(4) [1903] 123 Fed. Rep. 655.
(5) [1878] 42 U.C.Q.B. 115.
(6) [1921] 51 Ont. L.R. 386.
(7) [1912] 2 W.W.R. 526 at p. 529.

1924
VANCOUVER MILLING AND GRAIN CO. v. C.C. RANCH CO.
Anglin C.J.C.

that duty, if incumbent upon them, the evidence shews was fully discharged. They did not assume the further obligation of warranting that the railway company over which they had no control would provide the cars they should demand.

It is entirely clear from the evidence that failure to comply literally with the provisions of the Grain Act was not the cause of cars not being available. Had those provisions been carried out to the letter it is more than probable that the defendants would have had fewer cars available to receive their wheat than they actually obtained.

With Mr. Justice Stuart we regard the making to the order of the Bank of Hamilton of the bills of lading for the four cars of wheat that were shipped as of no significance. Both parties clearly regarded that method of carrying out the provision,

> eighty per cent of the price to be advanced against the bills of lading,

as within the contemplation of the contract.

That the contract contemplated that the vendors should retain the right of stoppage *in transitu* until their drafts against the bills of lading had been taken up has no bearing on the questions of the incumbency or the extent of any duty in regard to the procuring of cars.

The case at bar is distinguishable from *Blackburn Bobbin Co.* v. *T. W. Allen & Sons Ltd.* (1), relied on by Mr. Bennett. There the customary mode of conveyance for the goods contracted for was unknown to the purchasers; here the purchasers were aware that shipment on cars of the Canadian Pacific Railway Co. was the only possible means of performance. That shipment was what was contracted for and both parties knew that unless cars from that railway company were available it could not be made, and that the railway company alone could provide the cars—the vendors could not. Though large enough to include it, the words of the contract were not used with reference to the contingency that happened. The parties contemplated the availability of cars as the foundation of what was to be done under the contract. *Nickoll & Knight* v. *Ashton, Ed-*

(1) [1918] 1 K.B. 540; [1918] 2 K.B. 467.

ridge & Co. (1). There was a failure of something which was at the basis of the contract in the mind and intention of the contracting parties. *Horlock* v. *Beal* (2), per Lord Shaw. The occurrence (i.e. the lack of cars) caused the foundation of the contract to disappear and with it the contract itself vanished. *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (3).

For these reasons the appeal fails.

IDINGTON J.—The appeal herein arises out of an action brought by the appellant against respondent on a contract of which the essential features appear in the broker's note which reads as follows:—

"C" No. 2466.
Phone S. 4849. Broker's Bushels.....

W. E. McGAW & CO.
Grain Brokers

Vancouver, Sept. 11, 1922.

I hereby confirm the following trade:
Sold to Vancouver Milling & Grain Company, Ltd.
From C. C. Ranch Company Ltd.

Cars.	Bushels	Grade	Kind of Grain	Price
	30,000	Basis 1° Wht. at 83 cents per bushel f.o.b. cars, Cayley, Alta. 2° and 3° to apply to Wpeg. spreads date of inspection. 80 per cent cash to be advanced against Bills of Lading. Shipment to be made during September and October.		

Contents of cars.....
Seller pays brokerage.
Time 8 p.m.

W. E. McGAW & Co.,
Per W. E. McGaw.

The appellant carried on business in Vancouver and the respondent carried on its farming business near Cayley, a station on the C. & E. branch of the Canadian Pacific Railway Co.

On the 21st September the respondent sent a telegram to the appellant at Vancouver, saying

wire instructions for shipping wheat whether export or ordinary.

and received in answer same day a telegram saying

bill all cars to our advice domestic rate.

This arose out of the fact that the rate of export was a lower freight rate than for domestic use at Vancouver.

The respondent shipped accordingly and, as I read the evidence, was ready and willing to ship the entire amount

(1) [1901] 2 K.B. 126, at pp. 132, 139.
(2) [1916] 1 A.C. 486, at p. 512.
(3) [1916] 2 A.C. 397, at p. 406.

1924

VANCOUVER MILLING AND GRAIN CO. v. C. C. RANCH CO.

Idington J.

agreed upon within the term specified in said contract, but was met by the insuperability of getting cars from the Canadian Pacific Railway Co. upon which to ship the same as desired.

The said railway was the only possible road by which to ship from Cayley to Vancouver.

In the earlier part of the period for the shipment the respondent was impeded by reason of weather conditions and only got about seven thousand bushels shipped before the scarcity of cars prevented further shipments and finally the said railway company refused entirely to ship any grain from the said Cayley station to Vancouver for a period from the 19th of October to 30th thereof, and only got one car through on the last day of October.

The question is thus raised whether or not there is, under such circumstances, to be implied in the case of such a contract as in question herein, a condition that the parties are freed from liability for breach thereof when caused solely by such unexpected obstacles in the way of its fulfilment.

The appellant argues there is not and claims damages from respondent for breach of said contract.

It is met in many ways. Amongst others, as pointed out by Mr. Justice Stuart, the contract did not as framed expressly limit shipments thereunder to be made to Vancouver.

In this I think there is considerable force and especially when, as it turned out, cars could have been got for shipments easterly as far as Fort William.

There is, however, much in the surrounding circumstances of the contract, leading to the reasonable conclusion that the parties both seem to have assumed that Vancouver was the point of destination intended.

After all is that assumption not rested upon implied conditions? And is the implied condition of impossibility of due fulfilment, anticipating in such event a release from all responsibility for damages, arising alone from that cause any less a reasonable implication in the contract.

Much was said in argument by counsel for the appellant as to a large number of cars having at an early stage left Cayley; but two complete answers seem to me to exist to such contention.

In the first place it is far from being fully demonstrated by the evidence that on a fair distribution of said cars any single farmer in the district served from the Cayley station, could by any means have got more than respondent got and availed itself of.

In the next place it seems to have been fairly demonstrated by the evidence adduced on behalf of respondent, that of the four elevators at Cayley each got a fair proportion of the cars supplied there to carry away the grain had therein, and that the respondent had as many bins continuously filled therein as it could reasonably be expected to have kept filled for such a dubious emergency as confronted shippers of grain for Vancouver.

Incidentally I may remark, in passing that phase of the case, that there did not seem to me to be any weight in the argument that a shipper situated as respondent was ought to have signed a formal demand such as the law provides in way of foundation for enforcing a fair distribution of the cars available.

Any one trying that on, when all those concerned were agreed to a fair distribution of cars, and were getting it, unless indeed from the friendly spirit exhibited towards the manager of respondent he may have got a trifle more than he was strictly entitled to, would have aroused hostility and gained nothing.

Mr. Justice Stuart and Mr. Justice Beck have each written very fully and ably presenting the case for the respondent on behalf of the majority of the Court of Appeal whose judgment is now appealed from herein, and cited authorities bearing on the questions raised, all of which I need not repeat herein. But the following citations of authority by Mr. Justice Beck are the most recent brought to our attention and seem amply to justify the conclusion the court below reached. See *Krell* v. *Henry* (1); *Reigate* v. *Union Manufacturing Company* (2); *Nickoll & Knight* v. *Ashton, Edridge & Co.* (3); *Jackson* v. *Union Marine Insurance Company* (4), and the older well known leading case of *Taylor* v. *Caldwell* (5).

(1) [1903] 2 K.B. 740.
(2) [1918] 1 K.B. 592 at p. 605.
(3) [1901] 2 K.B. 126.
(4) [1873] L.R. 8 C.P. 572.
(5) 3 B. & S. 826.

1924

VANCOUVER MILLING AND GRAIN CO. v. C. C. RANCH CO.

Idington J.

I am also impressed by Mr. Justice Stuart's reference to the Alberta Sales of Goods Act, referring evidently to the following from s. 31 of c. 146:—

> Where in pursuance of a contract of sale the seller is authorized or required to send goods to the buyer, delivery of the goods to a carrier whether named by the buyer or not for the purpose of transmission to the buyer shall *prima facie* be deemed to be a delivery of goods to the buyer. (2) Unless otherwise authorized by the buyer the seller shall make such contract with the carrier *on behalf of the buyer* as may be reasonable having regard to the nature of the goods and the other circumstances of the case.

I have from the consideration of the foregoing and other authorities, and the relevant evidence herein, reached the conclusion that this appeal should be dismissed with costs.

DUFF J.—The interpretation of f.o.b. contracts has most frequently occurred where carriage from the f.o.b. point was to take place by water. In such a case, in the absence of express or implied agreement to the contrary, it is the duty of the buyer to furnish the ship, and, the ship being furnished, it is the duty of the seller to deliver the goods on board the ship at his own expense,

> upon the terms of a reasonable and ordinary bill of lading or other contract of carriage;

per Hamilton L.J. *Wimble* v. *Rosenberg* (1). The obligation to deliver and to enter into a contract of carriage is obviously conditional upon the ship being furnished and a contract of carriage being possible. No breach of the seller's obligation arises if the ship is not notified, or if, the ship being notified, receipt of the goods is refused. The contract which has given rise to this litigation contemplated shipment by the Canadian Pacific Railway Co., and I think also that it contemplated shipment to Vancouver, although this last is really not material. The critical question is: Did the seller enter upon an obligation to deliver—that is, to deliver effectively—to the railway company, and to enter into a contract of carriage with the railway company, even though the company should decline to furnish cars or to enter into such a contract? There appears to be no basis for such an obligation. None is expressed, and none can be implied when the words of the contract are read in the light of the uniform interpretation of similar words in contracts of sale contemplating delivery on board ship.

(1) [1913] 3 K.B. 743 at p. 757.

Mr. Bennett relied upon a number of American authorities as inconsistent with this conclusion, but on this subject American authority is divided. Without passing upon the relative weight of the decisions which could be cited respectively against and in support of Mr. Bennett's contention, it is sufficient to say that the American authorities yield no decision resultant. They are collected in Professor Williston's book on Sales, in the edition of 1924, at p. 599. Canadian authority, so far as it goes, supports the view just expressed. *Pullan* v. *Speizman* (1); *Marshall* v. *Jamieson* (2). It does not necessarily follow, it should be observed, that under the contract in question it was the duty of the purchaser to provide cars. Upon that point no opinion is expressed.

In this view it is quite unnecessary to consider whether the circumstances of this case bring it within the principle of those cases in which, commercial frustration of the contract having resulted from impossibility of performance by the contemplated means, non-performance has been held to be excused. Here, the respondent company has done everything it was called upon to do in the circumstances. The question whether the failure of the railway company to provide cars would afford an excuse within the principle mentioned might have arisen if the contract sought to be enforced in this action had been a contract f.o.b. Vancouver.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Bennett, Hannah & Sanford.*
Solicitors for the respondent: *Ballachey, Burnet & Spankie.*

(1) 51 Ont. L.R. 386.
(2) 42 U.C.Q.B. 115.