Mitsui & Co. v. Brown

Between
Mitsui & Company Limited, and
Brown et al.

[1920] B.C.J. No. 116

28 B.C.R. 516

British Columbia Court of Appeal
Vancouver, British Columbia

Macdonald C.J.A., Martin, Galliher,
McPhillips and Eberts JJ.A.

Heard: April 27 and 28, 1920.
Judgment: September 15, 1920.

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1 MACDONALD C.J.A.:-- I would allow the appeal.

2 MARTIN J.A.:-- I would dismiss the appeal.

3 GALLIHER J.A.:-- The learned trial judge has found the facts in favour of the appellant, accepting the evidence of the witnesses Suga and Orr, nevertheless be gave judgment in favour of respondents. The learned judge took the view that when space could not be procured at the end of 30 days, and as no demand was made by plaintiffs at that time upon the defendants to repurchase, and no express extension of the obligation to repurchase and no implied extension could be inferred from the evidence, the plaintiffs could not succeed.

4 To satisfy myself on this latter phase of the question I have read the evidence carefully, and I am in agreement with the learned judge that the facts are as stated by Suga and Orr. Accepting those facts and considering the conduct of the parties and the nature of the transaction (one of purchase for shipment to Japan), the obtaining of space for shipment was an essential feature of the contract, as was also the agreement to repurchase. When the 30 days had expired and space had not been procured, the plaintiffs obtained information from the defendants to enable them to aid in applying for space, and from that time on we find both parties endeavouring to obtain space. When the 30 days expired the plaintiffs could have demanded that the defendants repurchase, but they did not do so. Does this fact deprive them of the right to recover? That is something that must be decided upon a review of the whole evidence. My view of that evidence, read as a whole, is that there was an implied extension of the time in which repurchase could be demanded, and that under the circumstances there was no unreasonable delay in exercising that. I do not fall in with the suggestion that the plaintiffs were playing fast and loose and delaying exercising their right because of a rising market. Their bona fides were shewn in the first place by the payment of the purchase price, $5,000,

even before the plant arrived, also by their anxiety to obtain space throughout, the constant enquiries as to this of the defendants, and their employing a [28 BCR Page519] broker on their own account to assist the defendants. To my mind, it bears the entirely opposite aspect.

5 I view the conduct of the plaintiffs as consistent with this that when it was found that space could not be procured within the allotted time there was an implied understanding that the plaintiffs would not exercise their right, but would extend the time and assist in every way, and with that extension of time, I think the evidence warrants me in concluding there would be an implied extension during which a demand for repurchase could be enforced. It would be of little use to refer particularly to the evidence. It is spread upon the appeal book, and in my view supports the conclusion I have come to.

6 As to the amount that should be recovered, I think it should be the amount paid less the price for which the plant was sold. The plaintiffs have sworn that it was sold for the best price they could get, and they were not cross-examined upon that. The defendants had been trying for months to sell it but could get no offer. They were notified that it would be sold, but they disclaimed any interest in it.

7 The appeal should be allowed.

8 McPHILLIPS J.A.:-- The learned trial judge dismissed the action, being of the opinion that the contract of sale, which had a term therein in the following words,

> "In case we cannot get shipping space to Japan within one month from the time the engine and boiler arrive here we will buy back from you at the price paid, namely, $5,000,"

was optional in its nature, and that the plaintiff did not at once, or within a reasonable time, demand compliance upon the part of the defendants with the provision for repurchase, the "shipping space to Japan" not being procurable. Looking at all the evidence and the surrounding circumstances, I cannot, with respect, arrive at the same conclusion as that arrived at by the learned trial judge. Without entering into detail, the evidence, in my opinion, fully establishes the insistence upon the part of the plaintiffs that the defendants perform their contract, and there was unquestionably a breach of contract which entitles damages being assessed against the defendants. It is true a considerable time elapsed, but it is evident that at no [28 BCR Page520] time could the defendants say that the plaintiffs excused them from their performance of the obligation to repurchase, and it is to be observed that the learned trial judge was not impressed with the evidence for the defence, and although dismissing the action, refused the defendants their costs. It is clear that the delay in pressing the defendants to comply with their contractual obligation of repurchase was all in the way of indulgence to the defendants and to admit of, if possible, the defendants effecting a sale which would discharge the liability existent from them to the plaintiffs, a liability which was in no way released by anything that took place. The correspondence which is in evidence well exemplifies the situation, and efforts were continually being made by the defendants to get the shipping space. Finally it was possible to get shipping space, but after the armistice, and when it was too late for the purposes of the plaintiffs.

9 Upon a careful analysis of the evidence it would seem to me that the only conclusion that can be come to is that the delay in the earlier insistence upon the requirement to repurchase arose from the fact that the defendants were asking for further time, firstly, to get the shipping space, secondly,

when space was capable of being got, but too late, time to effect a sale in Japan or elsewhere, which would relieve the defendants from their liability to the plaintiffs to repurchase the machinery, the defendants throughout this time admitting and agreeing that there was still existent, as there always was, the liability to repurchase. There is no evidence upon which it can be said that there was a waiver of the contractual obligation to repurchase, nor any evidence upon which any release from the obligation could be founded.

10 On November 27th, 1918, the plaintiffs wrote urging a settlement. This was followed up by a letter of December 13th, 1918, and it was only on December 14th, 1918, that a note was sounded of denial of liability, then based upon the contention that the plaintiffs had taken the matter of getting space out of their hands, the letter, in part, reading as follows:

> "Regarding the last paragraph of your letter, would say that you took the matter of getting space for you out of our hands, and gave it to [28 BCR Page521] Mr. James to attend to, consequently we feel that we are released of any obligation regarding space."

11 On February 10th, 1919, the following letter was written by the plaintiffs to the defendants:

> "We are in receipt of your letter dated the 8th, accompanied by copy of contract note with the C.P. Rly. Co. in connection with space for boiler.
>
> As you know, space for this boiler should have been submitted to us within one month after the boiler arrived here, and since then we have called your attention to the matter asking you to fulfil your obligation, but you did not do so. It is now too late to send the boiler to Japan and it is no use to take this space. We think there is no way to do but return the boiler to you.
>
> Herewith enclosed we return your letter dated Feb. 8th, also the copy of contract between yourselves and the C.P. Rly. Co.,"

and in connection with this letter, K. Suga, the manager of the plaintiffs, had this to say, in giving his evidence at the trial:

> "Now after that letter was written did you have a conversation with Captain Brown? On the same date?
>
> The some date or the next, that was the 10th of February? The 11th of February, the next day Captain Brown came to my office and he asked me to wait some time as he said I have some good prospects of selling in Japan and I want to send particulars.'
>
> THE COURT: What is that? Captain Brown said I have a good prospect to sell in Japan.' Captain Brown told me that he had good prospects to sell in Japan, so he wanted to send particulars of the boiler to Japan, so he asked us to wait some time, to wait settlement some time, so I told him, I agreed to do so, but do you buy back boiler at contract price as per agreement regardless you can sell it at Japan or not, so he hesitated and did not reply the first time and so we repeated the

> same question again and finally he said yes. So we wrote a letter confirming that conversation."

12 The letter of confirmation is in the following terms:

> "We beg to confirm our conversation had with your Captain Brown this morning.
>
> We understand that owing to the fact that Capt. Brown has good prospect to sell in Japan the boiler and engine which we bought from you, he intends to send particulars of the same to Japan; so we will wait for some time without settling this matter, as per his request, until you have exchanged communications with Japan. It is understood that you will take back the boiler and engine in question, at the contract price if you cannot dispose of the same in Japan."

13 The evidence is conclusive throughout that the time given was all at the request and for the benefit of the defendants. It all culminated in the defendants finally repudiating the requirement to repurchase, and after notice to the defendants, the plaintiffs sold the machinery for $950. The course of the trial would seem to have been that if the plaintiffs were to be [28 BCR Page522] held to be entitled to recover, that then the damages to be assessed would be the difference between the price obtained upon the sale of the machinery and the original purchase price thereof, that is, the purchase price of $5,000 would stand reduced by the amount achieved from the sale; the difference would be $4,050.

14 I must say that I am not at all satisfied that the question of damages was fully covered at the trial, yet the defendants did not adduce any evidence to shew that the sale made at $950 was not at the time a fair price. The machinery was second-hand machinery, and there was evidence that it shewed some hard usage, and all things considered, it may be that $950 was the best possible price that could have been obtained. The defendant Mahoney undertook to say that the machinery was only worth $2,000 owing to it being left unprotected for such a long time, but did not venture to say that it could be sold for $2,000.

15 The assessment of damages is always a matter of difficulty, but there is some evidence upon which the assessment may be made in the present case, also bearing in mind the Sales of Goods Act (R.S.B.C. 1911, Cap. 203, Sec. 64), i.e., the measure of the damages is the loss resulting from the breach of contract, and here that loss would seem to be the difference between $5,000, the purchase price paid, and the $950 received from the sale of the machinery (Dunkirk Colliery Company v. Lever (1878), 9 Ch. D. 20 at p. 24), a very great disparity it is true, but the market conditions were at the time far from normal, in fact, still very unsettled. I cannot refrain from saying that it is with some hesitation that I decide to pass upon the quantum of damages or venture to actually assess same, yet, if this be not done, all that can be done is to direct a new trial for their assessment. After some anxious consideration of the matter, I have concluded that the best course will be to assess them as I think, upon the evidence, the learned trial judge could have done in case he had come to the conclusion that the plaintiffs were entitled to recover as and for a breach of the contract to repurchase the machinery, the view at which I have arrived. The damages therefore would be the difference between the price realized for the machinery, viz., $950, and [28 BCR Page523] the original contract price paid by the plaintiffs to the defendants, and that is $4,050.

16 In arriving at the conclusion that the appeal should be allowed, it is in no way in disagreement with the learned trial judge's findings upon the disputed questions of fact, as the evidence upon which I proceed is the evidence referred to by the learned judge in the following terms:

> "On the facts, I accept the evidence of Mitsui [meaning Suga the manager for the plaintiffs] and Miss Orr. I think the facts are as stated by Suga and Miss Orr."

17 I have set forth some of the evidence of Suga, and I particularly rely upon, and would call attention in particular to the following statement sworn to by Miss Orr in cross-examination:

> "Now if Captain Brown denies that there were any such conversations as those what would you say? I would say that I heard him say it.
>
> Why do you say so, you were busy attending to your own business and not in a position to state accurately what conversations took place between these two men? I distinctly heard Captain Brown say -- I heard Mr. Suga ask him if regardless of selling it in Japan if he could not, would he buy the boiler back and I heard Captain Brown say distinctly he would. I cannot be mistaken in that because I clearly and distinctly remember it."

18 Upon the whole case, I am of the opinion that the appeal should be allowed and damages assessed and allowed to the plaintiffs in the amount hereinbefore set forth.

19 EBERTS J.A.:-- Plaintiffs are a Japanese company carrying on business in Japan and licensed to carry on business as a foreign company in British Columbia. Their representative in Vancouver bought a Scotch boiler from the defendants, and a memorandum in writing evidencing the sale and purchase was signed by both as follows:

> July 11th, 1918.
>
> "Messrs. Brown & Mahoney,
> 736 Granville Street,
> Vancouver, B.C.
>
> Gentlemen:
>
> We beg to confirm our purchase from you of one Scottish Marine Boiler, on the following terms and conditions:
>
> Specification: Scottish Marine Boiler seventy-eight inches (78") in diameter and eight feet (8') long with steam pressure of one hundred and sixty-five pounds (165 lbs.) together with fore and aft compound engine eight inches by sixteen inches by ten inches (8" x 16" x 10") with independent air and circulating pump and surface condenser, shaft, wheel and bearings completed with all fittings including steam pump, whistle, stack, grate and hand capstan. [28 BCR Page524]

> Certificate: Lloyd's Certificate of Inspection, certifying that the boiler is in first class condition, to be furnished.
>
> Price: At five thousand dollars ($5,000) F.O.B. Vancouver, B.C., for boiler and engine complete.
>
> This contract is made out in duplicate so if the same is found by you correct and satisfactory you will kindly return to us at your earliest convenience either copy duly signed and approved by your good selves.
>
> Mitsui & Company, Ltd., by K. Suga, Representative.
>
> Approved and accepted,
> Brown & Mahoney,
> per J. Hilton Brown."

20 It appeared from the evidence that it was common ground that it was of the essence of the transaction that such arrangements for shipping space would be secured so that the boiler might be shipped from Vancouver to Japan within a specified time, namely, "within one month from the arrival of the boiler in Vancouver." Instead of making such a stipulation a condition of the sale and purchase of the boiler, it was collaterally agreed that if such shipping space could not be obtained within such month, the defendants would re-purchase the boiler from the plaintiffs for the same price as that at which the defendants sold it to the plaintiffs. A memorandum of that agreement appears in a letter dated 10th July, 1918, from Messrs. Brown & Mahoney to Messrs. Mitsui & Co., and is in the words and figures following:

> "We beg to thank you for your order of the 10th inst. for Scottish Marine Boiler and Engine as per our letter of the 9th. We will have Lloyd's certificate supplied with same.
>
> In case we cannot get shipping apace to Japan within one month from the time the engine and boiler arrive here we will buy back from you at price paid, namely, $5,000.
>
> Please be good enough to let us have your cheque for this amount and oblige.
>
> Again thanking you, we remain."

21 The boiler arrived in Vancouver in July, 1918, was inspected by plaintiff Company through its duly-authorized agent, Mr. Suga, and accepted as up to specifications. The month from that period elapsed without success in procuring shipping space. Not only did defendants busy themselves in endeavouring to get space, but plaintiff Company instructed a shipping agent, one Mr. James, to procure space if possible, but without avail. By [28 BCR Page525] the end of August, 1918, it became necessary for the plaintiff Company to decide whether it would exercise its option to call on defendants to purchase the boiler for $5,000 and take delivery. The sole question in this action(in my view) is how long did this option last? I am of opinion, for a reasonable time (taking into con-

sideration the market conditions). The difficulty in obtaining transportation across the Pacific, the unsettled times and markets, the situation of both parties at the time the conditional contract to repurchase was entered into, are all circumstances which must be duly considered in construing the agreement. The times were extraordinary. A terrific war had been going on for four years, prices and freight were exceedingly high and transportation was difficult to obtain, and (that) by reason of such disorder business conditions were highly panicky, so that if either party was, by reason of its circumstances, entitled to call on the other for strict compliance with the conditions above specified, the plaintiff was entitled to call on the defendants to furnish shipping space within the month strictly, and the defendants to have plaintiffs (as soon as the option to force the boiler back on the defendants came into effect) exercise (if plaintiffs intended to do so at all) the option to demand repurchase promptly and decisively, so that defendants would understand that the boiler was theirs to deal with as they thought fit.

22 It follows that if nothing more had been done, if the plaintiffs had simply stood by and said nothing about the boiler for several months from the termination of the option, the plaintiffs' chances to succeed would have been very slight; but there is much more. The plaintiffs tried themselves to sell the boiler. They wrote a letter to the defendants, dated 27th November, 1918, in which they used the words:

> "Will you please advise us what you have done with the marine boiler which we have purchased from you some time ago. Kindly let us know what prospect you have of disposing of same for us."

23 It may be here noted that the armistice was signed on the 11th of November, 1918, and from that time the markets began to break. By prompt action of the plaintiffs on the termination of the option in August, 1918, in notifying defendants that they required defendants to repurchase the boiler for $5,000, [28 BCR Page526] the defendants most probably would have been in a position to resell the boiler before the armistice was signed, and so save themselves from serious loss, as the evidence shows the market price was a rising one up to that important moment. Finally finding the boiler unsaleable, they called on the defendants, in the spring of 1919, to take delivery as on a repurchase at $5,000, or pay damages for breach of contract to do so. On the defendants' refusal to recognize that position, the plaintiffs sold the boiler for $950, which they allege was the best price obtainable, and brought this action. This price in itself shews the fluctuating and uncertain conditions of the market.

24 I see nothing in my perusal of the record that plaintiffs tendered the boiler to the defendants and formally demanded the $5,000. I am of the opinion the judgment of the Court below should be affirmed and the appeal dismissed.

Appeal allowed,
Martin and Eberts JJ.A. dissenting.

Solicitors for appellants: Griffin, Montgomery & Smith.

Solicitors for respondents: Ladner & Cantelon.