

Saskatchewan Court of Appeal

[1923] 1 W.W.R. 59, [1923] 1 D.L.R. 402

Fujita and Company, Limited (Plaintiff) Respondent v. Northern Fruit Company, Limited (Defendant) Appellant

Haultain, C.J.S., Turgeon, McKay and Martin, J.J.A.

Judgment: December 20, 1922

Counsel: *G.H. Yule*, for defendant, appellant.
A.G. MacKinnon, for plaintiff, respondent.

Haultain, C.J.S. concurred with Martin, J.A.:

Turgeon, J.A.:

1 This action was brought by the respondents, who are wholesale dealers in fruit, against the appellants, for loss and damage which they claimed to have sustained by reason of the failure of the appellants to accept and pay for a carload of oranges shipped to them by the respondents pursuant to an alleged contract.

2 The respondents contend that the existence of the contract in question can be proved by reference to certain correspondence, and to certain memoranda signed by brokers, bearing dates beginning August 23, 1920, and ending September 25, 1920.

3 If we assume that these written documents are sufficient to establish a contract between the parties (and this is extremely doubtful), we then have a contract for the sale of the oranges completed not later than September 25, the material terms of which are that the respondents are to ship to the appellants one car of Jap oranges at \$1.20 per bundle, F.O.B. Japan, the shipment to be made "on first boat before November 15, 1920.

4 Oranges are a seasonal commodity and the time of their arrival is of importance to traders.

5 On September 27, 1920, the respondents sent the brokers in Regina a formal contract, executed by themselves as sellers and which they desired to have the appellants execute as buyers. This contract was forwarded by the brokers to the respondents at Saskatoon in a letter dated October 7, 1920. The contract thus submitted to the appellants for their signature begins with this statement: "We have sold this day to you the following goods at the price and terms mentioned below." It then sets out the following terms, which, in my opinion, modify materially, and to the prejudice of the appellants, the previous undertaking to ship these oranges "on first boat before November 15th, 1920:"

If seller cannot arrange space on steamer leaving Japan on or before November 15th, seller's earlier contract on stated date, seller may cancel sale or postpone shipment until next steamer leaving Japan on or after November 15th and if

space still unavailable sale shall be cancelled. If seller unable to ship goods sold owing to strikes, car shortage or any other event or condition of affairs beyond the seller's control this contract to be cancelled.

6 This proposed contract also contained the following provision:

The terms of this contract are herein stated in their entirety and it is understood that there is no verbal contract or understanding either previous or subsequent to date of this contract.

7 The appellants refused to sign this contract and returned it to the brokers with the following letter, dated October 12, 1920:

Mutual Brokers of Regina,
Regina, Sask.

Dear Sirs: —

Your circular of the 7th regarding Jap Oranges. We return your contract as it is all one sided. We believe the day has passed when deals of this kind should be signed by the jobbers. In any case we do not wish to purchase goods from Fugati.

Yours truly,

Northern Fruit Co., Ltd.

8 This letter is a clear intimation by the appellants that they intend to consider their contractual relations with the respondents as at an end. In my opinion they were justified by the circumstances in taking that attitude, and the respondents thereupon lost any rights which they might have been entitled to claim as sellers, under the previous correspondence. After the rejection of the proposed contract expressed in the above letter, the respondents proceeded to ship a carload of oranges to the appellants, which the appellants refused to accept, and the respondents now seek to recover damages against them for this non-acceptance, alleging a breach of the originally proposed contract, which contract, they say, is evidenced sufficiently to satisfy *The Statute of Frauds* by the correspondence which took place before their formal contract with its material variations was submitted to the appellants.

9 In my opinion they cannot do this, for the reasons given at length by Kay, J. in *Bristol Aerated Bread Co. v. Maggs*, 44 Ch. D. 616, 59 L.J. Ch. 472, which I think are applicable to the facts of this case. To hold otherwise would, I think, work injustice to the buyers. Upon receipt of this formal contract signed by the sellers they were certainly justified, it seems to me, in assuming that it was on the terms of this signed contract and on these terms only that the sellers were willing to ship the oranges. And in that case it follows, I think, that they were free to consider their negotiations with the sellers as at an end and to look elsewhere for their supply of oranges. Otherwise they would be left in doubt as to whether they were to get their oranges at all, or to remain merely with a possible action for damages against the sellers for their failure to ship the carload on the terms originally proposed.

10 I think the appeal should be allowed with costs, the judgment in the Court below set aside and the respondents' action dismissed with costs.

McKay, J.A. concurred with Turgeon, J.A.:

Martin, J.A.:

11 This is an appeal from the judgment of the District Court Judge of the judicial district of Saskatoon. The learned trial Judge gave judgment in favour of the plaintiff for the sum of \$404.30 as damages for the non-acceptance by the defendant of a car of Japanese oranges, such amount representing the difference between the selling-price of the oranges and the amount realized for the car after the refusal of the defendant to accept the same.

12 On August 23, 1920, the Mutual Brokers of Regina, Ltd., sent a circular letter to various buyers of fruit in the province of Saskatchewan, which letter, in part, was as follows:

If you have not already placed your order for Jap oranges this season, we will be glad to have same at once on an S.A.P. basis. We have not yet received definite prices, but we expect the price will be \$1.20 for early deliveries and \$1.10 per bundle for late deliveries with the ocean freight rate \$10.00 per ton as against \$18.00 last year.

13 The manager of the defendant company after the receipt of this letter ordered by telephone from the Mutual Brokers of Regina, Ltd., on September 7, 1920, "a car of Japanese oranges out of the first boat for shipment before November 15th from Japan subject to approval of price." On September 20, the manager of the Mutual Brokers of Regina, Ltd., having been advised of the price at which the plaintiff was prepared to ship the oranges, by telephone message to the manager of the defendant company at Saskatoon acquainted him of the price, and this price was approved of by the defendant's manager. On the same day an acknowledgment of the order in writing was mailed to the defendant "subject to confirmation," which meant that the order was subject to confirmation by the plaintiff. The acknowledgment of the order contained the following statement: "One car Jap oranges at \$1.20 per bundle F.O.B. Japan shipment to be made from first boat *before* November 15th." The order was then transmitted by the Mutual Brokers of Regina, Ltd. to one Donald H. Bain, a representative of the plaintiff at Regina, who in turn, by letter dated September 22, 1920, notified the plaintiff at Vancouver as follows:

We have this day sold for your account to the Northern Fruit Company, Saskatoon, Sask., one minimum carload Japanese oranges at \$1.20 per bundle, prices F.O.B. Japan. Terms usual. Shipment from first boat about November 15th.

14 The order as sent to the plaintiff by its representative Donald H. Bain was confirmed by the plaintiff. The plaintiff's confirmation of the order was communicated to the Mutual Brokers of Regina, Ltd., and then communicated by the Mutual Brokers to the defendant by a notice in writing, dated September 24, which was in the following terms: "We are pleased to advise you that we have received confirmation of your valued order as follows: 'One car of Jap oranges.'"

15 In my opinion there never was a completed contract between the plaintiff and defendant for the purchase of the car of oranges in question; the parties at no time being *ad idem*. The order of the defendant, as stated in the evidence of the manager of the Mutual Brokers of Regina, Ltd. was, "a car of Japanese oranges out of the first boat for shipment *before* November 15th from Japan subject to approval of prices." This was confirmed in the acknowledgment of the order sent by the Mutual Brokers to the defendant on September 20. The representative of the plaintiff at Regina, one Donald H. Bain, later notified the plaintiff at Vancouver of the sale of the carload of oranges to the defendant, and in that letter stated "from first boat *about*

November 15th.” This was not in accordance with the terms of the defendant’s order, but is the order which was approved of by the plaintiff. The time of the shipment of the oranges was very material to the defendant, and its order that the oranges be shipped prior to November 15 was never accepted in terms by the plaintiff. As far as the evidence shows, the defendant had no knowledge of the variation of the terms of its order, and it no doubt thought, as it would be justified in thinking, that the strict terms of its order would be communicated by the Mutual Brokers of Regina, Ltd. and by Donald H. Bain to the plaintiff. The defendant was not aware of the variation of the terms of its order until it was asked by letter to sign a contract with the plaintiff for the purchase of a carload of oranges, which contract is dated September 27, 1920, and which contract contained the following provisions:

If seller cannot arrange space on steamer leaving Japan on or before November 15th, seller’s earlier contract on stated date, seller may cancel sale or postpone shipment until next steamer leaving Japan on or after November 15th and if space still unavailable sale shall be cancelled. If seller unable to ship goods sold owing to strikes, car shortage or any other event or condition of affairs beyond the seller’s control this contract to be cancelled. ...The terms of this contract are herein stated in their entirety and it is understood that there is no verbal contract or understanding either previous or subsequent to date of this contract.

16 On receipt of the above contract for signature the defendant immediately notified the Mutual Brokers of Regina, Ltd. that it would not sign the contract. The defendant was justified in its refusal, because, as stated above, the offer of the defendant to purchase the carload of oranges had never been accepted in terms by the plaintiff, and because the contract submitted for the defendant’s signature was not an acceptance of the offer to purchase.

17 The appeal should be allowed with costs, the judgment in the Court below set aside and the action of the plaintiff dismissed with costs.