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Court : House of Lords

Decided On : Jul-17-1922

Judge : Lord Dunedin, Lord Viscount Haldane, Lord Viscount Cave, Lord Parmoor &Amp; Lord Wrenbury

Appeal No. : [1922] UKHL 4

Appellant : Pollock and Co.

Respondent : Macrae

Judgement :

Lord Dunedin.-The appellants in these conjoined appeals are makers of internal combustion engines suitable for installation in fishing boats, and carry on business in Glasgow. They have as agents in Stornoway a firm of Bain Brothers, who own fishing boats, and who had had supplied to them a pair of twin engines suitable for a fishing boat. In connexion with this order Mr Pollock, a partner of the appellants' firm, was in Stornoway in the month of December 1917. Messrs Bain had urged the respondent to give the appellants an order, and with that view introduced Mr Pollock to him. The result of an interview was that Mr Pollock wrote out and the respondent signed a letter in the following terms:-

“Stornoway, 11.12.17.

“Messrs W. and S. Pollock and Co., Glasgow.

“Dear Sirs,-I have pleasure in ordering from you a twin screw set of model ‘K’ Clyde 35/40 B.H.P. marine paraffin motors for my boat ‘Queen of the North.’ The motors to be all complete as per the specification of Messrs Bain, Morrison, and Co. for their boat the ‘Tubal Cain.’ The motors to be installed into my boat and left working for the sum of 950 (Nine hundred and fifty pounds) stg. Terms 100 cash now, one-third when you start manufacturing, one-third on delivery, and the balance after trial run. Delivery May 1918. I provide carpenter work, andc., as your usual specification.-Yours truly, D. MACRAE.”

There is a controversy, which will be afterwards alluded to, as to what exactly happened between Pollock and the respondent after the letter was written out, but on 18th December the appellants' firm wrote the following letter:-

“18th December 1917.

“D. Macrae, Esq., Fish Salesman, Stornoway.

“Dear Sir,-We thank you very much for your esteemed and valued order dated 11th inst., which you handed to our Mr W. C. Pollock, while he was in Stornoway, for one twin screw set of model ‘K’ Clyde 35/40 H.P. marine paraffin motors for your fishing boat the ‘Queen of the North.’ We beg to hand you herewith, as arranged, our quotation and specification for these engines which is the same as has been sent to Messrs Bain, Morrison, and Co., Stornoway, for their fishing boat the ‘Tubal Cain.’

“We beg to advise you that the crankshafts for your motors have now been ordered, and application has been made to the Fishery Board for Scotland for Class ‘A’ certificate to enable the work to be completed as fast as possible. You very kindly promised our Mr Pollock to send us on your cheque for 100 by the end of the week, and we have no doubt this matter has escaped your notice.

“Thanking you very much for this order, and assuring you at all times of our very best and most prompt attention.-Yours faithfully, for W. and S. POLLOCK and COMPANY, A. M'PHERSON.”

On 22nd December the appellants renewed their request for the immediate payment of the 100. This was followed on the 24th by a letter from the respondent to the appellants:-

“Stornoway, 24th December 1917.

“Messrs W. and S. Pollock and Co., Glasgow.

“Dear Sirs,-I have received your specification for boat ‘Queen of the North,’ and I find that the motors are carriage forward, which I will not agree to. I take no responsibility until the motors are installed in the boat. Of course, I agree with the rest of the specification, so I herewith return specification to be corrected. As soon as I get it back I shall send you my cheque for 100 stg. as agreed upon. I clearly understood that the motors were to be delivered here by you and you said nothing to the contrary.

“I shall be pleased to hear from you by return.-Yours faithfully, D. MACRAE.”

The appellants answered on 27th December by a letter in which they noted that the respondent had agreed to all the terms of the specification except the matter of carriage forward, and gave a long explanation of how Messrs Bain had paid for the carriage of their engine. They again applied for the 100. To this the respondent answered on 3rd January 1918, enclosing a cheque for 100 and making no further reference to the question of carriage. From that time forward, at least, both sides considered the bargain as complete, and the appellants went on with the manufacture of the engines. Complaints were made as to delay, but eventually the engines were dispatched from the works on 11th July 1918. On 26th July the respondent paid the third instalment of the price, the former instalments having been duly paid. Mr Pollock thereafter visited Stornoway and saw to the installing of the engines, which was completed just at the end of October. On the 1st of November the respondent telegraphed that the port engine was most unsatisfactory and that the cylinder head leaked badly. The appellants agreed to put in a new cylinder head, and kept pressing the respondent to pay the balance of the contract price. The new cylinder head was put in, and Mr Pollock again went to Stornoway and made a trial of the port engine. There is controversy as to how the

engine behaved on that trial, but after Mr Pollock left the engine was again tried, and according to the respondent never worked satisfactorily. Eventually, the crew left the boat and the engine was no more used.

A long correspondence ensued which it is unnecessary particularly to specify. The appellants all along insisted on payment of the balance of the price, asserted that the engines were satisfactory, and, further, that, if they were not, they would make them good under the guarantee. They contended that they were not liable for any damages owing to the engine's behaviour. The respondent, on the other hand, contended that he was not bound to pay the balance of the price till he had a satisfactorily working engine, which he had never got, and that the appellants were liable for the damage which he had suffered by the loss of the fishing season through the boat being unworkable owing to the defect of the engine. Eventually the appellants raised an action for payment of the balance of the price, which was followed by the respondent raising an action concluding for a sum which, taking into account the extinguishment of liability for any balance, represented a total damage of 1885, alleged to be caused by breach of contract. The actions were not conjoined but were tried together; a proof was allowed in each; and the proof in each was by joint minute held as available in the proof of the other.

The first question as to which the parties were not agreed was as to what exactly was the bargain. The respondent contended that the bargain was formed by the letter of offer of 11th December 1917 already quoted, followed by a verbal acceptance there and then by the appellants' partner, Mr Pollock. The respondent further said that the word “specification” in the letter must be read in the ordinary sense of a specification as to the machinery, and cannot be held to import any counter-stipulations on his part. The appellants, on the other hand, contended that the contract was not finally concluded till the letter of 3rd January 1918, when the respondent gave way on the point of the payment of the carriage, he having previously expressed in his letter of 24th December 1917 his approval of the specification in other respects. The appellants further contended that, as the specification approved of was the specification in the letter of the 18th December, it included the conditions of tender and guarantee, and that under the conditions and guarantee the appellants are not liable for the damages sued for. The

quotation and specification was a document composed of two double sheets, one inserted inside the other, bookwise, and fastened together by small clamps. The outer one, which served as the cover, was printed on the first and third sides; the outer or first side contained the title, with a blank which was filled up by typewriting setting forth the order and the purchaser. The third side contained the printed conditions of tender and guarantee. The inner sheet, which was entirely typewritten, contained the specification, in the ordinary mechanical sense, of the engine, together with the price, terms of payment, and conditions of installation, delivery, and guarantee.

The paragraphs as to terms of payment and guarantee were as follows:-“Terms of payment.-100 cash with the order, one-third of the balance when we advise you that we have started manufacturing the engines, one-third when the engines have been delivered f.o.b. Glasgow, and the balance after the trial run at Stornoway. Guarantee.-Twelve months for the motors as per guarantee set out in the conditions of tender.”

The conditions of tender included the following:-“2. Whilst we undertake to do our best to execute every order within the promised time, we do not accept responsibility for any direct or indirect losses which may arise if the completion is retarded by faulty castings or forging, strikes, lock-outs, non-delivery of material or parts by other manufacturers, or any other unforeseen circumstances, as no provision against the same is made in our price.” “5. All goods are supplied on the condition that we shall not be liable for any direct or consequential damages arising from defective material or workmanship, even when such goods are supplied under the usual form of guarantee.”

The guarantee was as follows:-“Provided the terms of payment are fulfilled by the purchaser, the works guarantee within a period of twelve months from the date of invoice to repair by itself or replace free of charge, delivered f.o.b. Glasgow, any defective parts caused by bad material or workmanship. The works, however, decline any responsibility for defects resulting from wear and tear, overloading, improper care and treatment, neglect, incorrect foundation work, use of other kinds of lubricants and fuels than those specified by us, or to wear and tear owing to

sandy and unclean water. … Apart from the above guarantee the works sell their engines under the condition that they are free from any claims arising through the breakdown of any parts or stoppages of the engines, or from any consequential damages arising from same, direct or indirect."

The parties were also in controversy as to the actual behaviour of the engine.

The Lord Ordinary held that the conditions of tender and guarantee were part of the contract, and that, though the port engine was full of defects, yet, in respect of the stipulations in the conditions of tender and guarantee, the appellants were not liable in damages, and that, though they could have been forced to remedy the defects, proper opportunity for so doing was not given them by the respondent. He accordingly gave decree for the balance of the price in the action at the appellants' instance, and assoilzied the appellants in the action at the respondent's instance.

On a reclaiming note the Second Division, by a majority, Lord Salvesen dissenting, recalled the Lord Ordinary's interlocutors. They held that the contract did not incorporate the conditions of tender and guarantee, and that the engines as supplied were radically defective and disconform to contract. They therefore assoilzied the respondent from the conclusions of the action at the appellants' instance, and found him entitled to 500 damages in the action at his instance against the appellants.

It is necessary first to determine what was the contract, and here I am not able to agree with the majority of the Second Division. It seems to me that the letter of the 24th of December clearly showed that the respondent did not consider the matter as settled until he had approved of the specification. This attitude is accepted by the appellants in their letter of the 27th, when they argued upon the one unsettled point of cost of carriage; and the matter is only finally clinched when the respondent gives in about the carriage and pays the 100 which is the stipulated payment to be given with the order. This being so, it follows, I think, that the conditions of tender and guarantee were embodied in the contract. They were all obviously sent together, and I have no doubt they were attached so as to form one document. The respondent attempted to say that the outer sheet was loose and that he paid no attention to it. But certain pencil markings in his own hand show

that, when he came to criticism, he had both documents before him in book shape, and it seems to me highly improbable, if he had thrown aside the outer sheet on receipt, that it got back again into its proper place when there was occasion to look into the exact terms with a view to criticism. On this matter, accordingly, I agree with the Lord Ordinary and Lord Salvesen.

Taking it, however, that the documents form part of the contract, it is necessary to settle what they effectuate. The usual function of a specification is, as its name denotes, to specify exactly what the seller is to deliver to the buyer. It is also usual that it should contain clauses protecting the seller from the effect of causes over which he has no control, and which may hinder or render impossible the performance of the contract. Such are strike clauses, clauses as to the supply of material from other sources, clauses as to the effect of weather, such as frost, andc. But it is not usual that it should in addition contain conditions which amount to a counter-stipulation on the part of the buyer that he will forgo the ordinary remedies which the law gives him in the event of breach of contract. Such conditions to be effectual must be most clearly and unambiguously expressed, as is always necessary in cases where a wellknown common law liability is sought to be avoided. Illustrations of the necessity may be found in numerous cases where carriers have sought to limit or avoid their liability, and a particular instance may be given in the case decided a short time ago by your Lordships of London and North-Western Railway Co. v. Neilson . Reading the clauses in this light, I am of opinion that, although they excuse from damage flowing from the insufficiency of a part or parts of the machinery, they have no application to damage arising when there has been total breach of contract by failing to supply the article truly contracted for.

Accordingly, it becomes necessary to consider exactly what the defects were of the engine supplied. Now, the engine contracted for was a twin engine, i.e., an engine which had two effective sets of cylinders, each set actuating a separate shaft and propeller. As to the starboard engine, there was no practical complaint; as to the port engine, there was complaint. As originally supplied it was at least in one respect admittedly defective, in that it had a cylinder head which was porous and admitted of leakage from the water jacket. The defects, however, did not end

there, and were complained of after a new cylinder head had been supplied. Lord Ormidale, after pointing out that, if one engine was defective, the whole installation was rendered ineffective, sums up the points on which the engines were said to be disconform to contract as follows:-“Very many objections were taken at the trial, some of which were applicable to both engines. It was said, inter alia, (1) that the engines were not twins, (2) that the motors were not of the ‘enclosed’ type, (3) that the propellers were not of the specified dimensions, (4) that the motors were not fitted with an oil pump for forced lubrication, (5) that neither engine was capable of developing 35-40 h.p., and (6) that the piston clearance of the port engine was excessive.”

I agree with Lord Ormidale in rejecting (1) as unfounded and (3) as eventuating in no proved damage. The others remain, and I cannot do better than quote Lord Ormidale's words, because they express exactly the result at which I have arrived after a study of the evidence:-“It is not easy, and I shall not attempt, to define how much each of the remaining defects contributed to the unsatisfactory working of the port engine, but there can be no doubt that that engine was not up to contract and did from the first and throughout its use work so inefficiently as to be quite unreliable and of little value, and that through no fault of the defender. He had no interest to get anything but the best results from it, and, although he personally knew nothing about the working and running of motors and had not very skilled assistance to rely on, he was able to get satisfactory work from the starboard engine.”

The Lord Ordinary has described the port engine as full of defects, and I think that this is a correct description. I agree with the views expressed by the Lord Ordinary with regard to the piston clearance of the port engine and the failure of the pursuers to supply an oil pump for forced lubrication. I consider that the engines were clearly not of the enclosed but only of the semi-enclosed type. I think that the evidence as to the horse power is not quite satisfactory, because it is, on the part of the respondent, based purely on calculation and not on the result of a practical test. At the same time I am bound to say that the eminence of the witnesses who gave this evidence, and who were not shaken in cross-examination or contradicted by other experts, is such as to raise grave doubts in my mind as to the sufficiency

of the horse power, but I feel relieved from forming a decisive judgment on this point because it was not want of horse power which made the engines inefficient. The remaining defects were such that, as Lord Ormidale says, the engines never worked satisfactorily. Now, when there is such a congeries of defects as to destroy the workable character of the machine, I think this amounts to a total breach of contract, and that each defect cannot be taken by itself separately so as to apply the provisions of the conditions of guarantee and make it impossible to claim damages. I am quite satisfied on the evidence that the engine never really did work as an engine should, and that in consequence the respondent lost much of his fishing season, besides losing the usefulness of his boat as a sailing boat.

Holding, therefore, that no excuse can be found in the special terms of the conditions of tender and the guarantee, what is the law to be applied to the facts? I think it is settled by the 11th section of the Sale of Goods Act. The defects here are such that the respondent might have refused to accept the engine and repudiated the contract; he did not do so, but elected to keep the engine and claim damages.

There has not been much decision on the subject in Scotland, and for a very obvious reason. It must always be remembered that section 11 (2) of the Sale of Goods Act made radical alteration in the law of Scotland. The law as it stood before that time is succinctly and authoritatively stated by Lord President Inglis in the case of M'Cormick and Co. v. Rittmeyer and Co. :-“When a purchaser receives delivery of goods as in fulfilment of a contract of sale, and thereafter finds that the goods are not conform to order, his only remedy is to reject the goods and rescind the contract. If he has paid the price, his claim is for repayment of the price, tendering re-delivery of the goods. If he has granted a bill for the price, his claim is for re-delivery of the bill in return for the offered re-delivery of the goods. If any portion of the goods has before their rejection been consumed or wrought up so as to be incapable of re-delivery in forma specifica, then the true value (not the contract price) of that portion of the goods must form a deduction from the purchaser's claim for repayment of the price. The purchaser is not entitled to retain the goods and demand an abatement from the contract price corresponding to the disconformity of the goods to order, for this would be to substitute a new and

different contract for that contract of sale which was originally made by the parties, or it would resolve into a claim of the nature of the actio

quanti minoris, which our law entirely rejects. Just as little is the purchaser entitled, while rescinding the contract, to retain the goods in security of the claim of damages for breach of contract."

There was a certain exception to, or rather a case of non-application of, these rules, from the nature of the article of supply, e.g., machinery in situ where defects could only be ascertained by continued working. This is laid down in the case of Pearce Brothers v. Irons by the same Judge, but the distinction was swept away by the statute. The statute gives a clear option. There was some argument in the Court below, though it was not repeated at your Lordships' bar, as to whether there was here room for holding that the claim for damages was barred by repudiation having been put forward, as was found in the case of Electric Construction Co. v. Hurry and Young . The Judges of the Second Division thought that case did not apply on the facts here; but that case has been more than once doubted-e.g., by Lord Kyllachy in Croom and Arthur v. Stewart and Co. -and I may say at once that I think it was wrongly decided. I agree with Lord Kinnear, who dissented from the judgment which reversed the judgment of Lord Low. I need not do more than say that I adopt entirely his reasoning, which will be found on page 324 of the report. In the same case Lord Kinnear lays down, I think quite correctly, the standard of damages when the buyer elects to keep the goods. He says (p. 325):-"I presume that the claim should be measured by the difference between the value of the machine actually supplied and the value which it would have had to the defenders if it had been in all respects conform to contract."

That brings me to the question of damage. Taking Lord Kinnear's rule, What was the damage suffered by the respondent having to face the fishing season with this insufficient engine, not absolutely useless, for he could get to the fishing sometimes and by slow degrees, but quite inefficient as compared to the engine as it ought to have been? The Lord Justice-Clerk, acting as a juryman would act, has cut down the sum sued for to a sum of 783, 6s. 8d., to which he has given effect by assoilzieing from the conclusions of the action for the balance of the price

of 283, 6s. 8d., and giving a decree in the action of damages for 500. The estimate is necessarily rough, but I see no reason why your Lordships should interfere with it. I at one time had doubts as to whether it was right to assoilzie from the conclusions for the price, but, looking at the terms of section 53 (1) of the Sale of Goods Act, coupled with the interpretation of the clause as to the meaning of warranty in Scotland, 62 (1) ad fin., I have come to be of opinion that the course taken by the Second Division was allowable and should not be altered.

I have purposely omitted all reference in the matter to English authorities. The law of Scotland was different from that of England in several particulars before the passing of the Sale of Goods Act. It was assimilated to the law of England in some particulars, e.g., the passing of the property by the contract, but the assimilation was not made complete,

and there are still extant a good many differences. Examples of some of them will be found in the judgment of Lord Chelmsford in the case of Couston, Thomson, and Co. v. Chapman .

I think the appeal fails and should be dismissed with costs, and I move accordingly.

I am authorised to state that my noble and learned friends, **Viscount Haldane**, **Viscount Cave**, and **Lord Parmoor** concur in this judgment.

Lord Wrenbury.-I also concur.