Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Robert Kleinert v. *The Abosso Gold Mining Company, Limited, from the Supreme Court of the Gold Coast Colony (Privy Council Appeal No.* 12 *of* 1913); *delivered the* 28*th October* 1913.

PRESENT AT THE HEARING:

LORD DUNEDIN.
LORD SHAW.
LORD MOULTON.
SIR SAMUEL GRIFFITH.

[DELIVERED BY LORD DUNEDIN.]

This is an action for damages in respect of breach of contract.

The Plaintiff, a contractor, on 15th October 1909 entered into a contract with the Respondents, a Gold Mining Company, with regard to the removal of waste rock then lying in the waste dump at the Abosso Mine. The contract is a carefully worded document in 18 heads and contains mutual stipulations. The material clauses will be presently adverted to. Speaking generally the object of the contract was to arrange for the removal of the waste rock lying in the dump within a period of two years provided it did not exceed 50,000 tons, and to provide for the crushing of that rock, the rock so crushed by them to be put on rails and made available for sale. The contractor was to pay 4*d.* a ton for all rock removed. The Company were

[52.] J. 265. 80.—11/1913. E. & S.

to furnish electric power and machinery for crushing the rock for which service they would receive 4*d.* per ton of rock dealt with—they were to have the right to take such crushed rock by weight on paying 3*s.* per ton—and they were to allow the use of their line from the mine to the railway station and provide haulage all for a sum of 6*d.* per ton.

The Plaintiff and Appellant alleged that he made preparations for the work and began it, but that he was unable to continue it, owing to the fact that the crusher supplied by the Company worked inadequately, being able only to turn out three tons of crushed rock per hour. He further states that he called on the Defendants to put the crusher into such a state as to enable it to do adequate work, but that they did not do so.

Witnesses were examined, and it was clearly proved—

1. That the crusher supplied never did in fact turn out more than three tons per hour.

2. That though the Respondents alleged it would be capable of turning out ten tons per hour, they never put it into a condition in which it could do so.

3. That in consequence of the inadequacy of the crusher the work had to be stopped.

The learned Judge at the trial gave judgment in favour of the Defendants and Respondents upon the ground that there being no stipulation in the contract as to the amount of tons which the crusher should crush, and the Defendants having admittedly supplied a crusher, there was no default on their part, the contract had not been broken by them, and consequently that no damages could be claimed.

The rule to be applied in the construction of contracts such as this, where there are mutual stipulations is tersely expressed by Lord Blackburn, in the case of *Mackay* v. *Dick and another*

(6 App. Cas. 251) :—" . . . as a general rule " . . . where in a written contract it appears " that both parties have agreed that something " shall be done, which cannot effectually be done " unless both concur in doing it, the construction " of the contract is that each agrees to do all " that is necessary to be done on his part for the " carrying out of that thing, though there may " be no express words to that effect."

The clause in the contract dealing with the obligation to provide the crusher is the 9th, which says " All electrical power lines and other fittings " and the necessary rock breaker countershaft " and motor in connection with such power supply " shall be provided by the Company " . . . Their Lordships cannot doubt that " necessary rock breaker " must mean such a rock breaker as is reasonably adequate for the work which is in the purview of the contract. The word " necessary " only makes the meaning more abundantly clear ; but the same result would follow had that word been omitted. This interpretation is the direct result of the rule laid down by Lord Blackburn coupled with the equally well known rule that an obligation to supply any chattel for a purpose is an obligation to supply a chattel reasonably fit to fulfil that purpose. No doubt if an absolute standard of performance is required that must be specially stipulated for; but the thing supplied must in any case be reasonably fit for the purpose for which it is intended. Fitness or unfitness may come to be a question of degree but that must be decided as a question of fact.

What then was the work for which the crusher to be supplied was to be reasonably fit? In finding this out their Lordships do not propose to go outside the contract itself. In some cases it is possible to hold that a contracting party must have had in view a specific purpose not disclosed by the terms of the contract itself. But

in such a case the proof would have to be clear that the purpose was brought home to the contracting party and accepted by him as really part of the contract. The evidence here of the knowledge of the Respondents of the amount of tons of stone which the Plaintiff was under obligation to furnish to the Harbour authorities, and that this contract was made in the view of both parties in order to fulfil the other contract, seems to their Lordships to fall short of what is needful as above expressed, and they therefore disregard it entirely.

But taking the contract itself what is to be found.

First, it is a mutual contract by which the one party is entitled to remove the rock and the other is entitled to call on him to remove the rock in the waste dump subject to the limitation of 50,000 tons. The Respondents argued that the removal was merely optional on the part of the contractor. This argument is in their Lordships' view quite inconsistent with the words " agrees " to remove " in Article 1, and the phraseology as to breach in Article 13.

Second, by Clause 8 the Company is bound to supply electric power " for crushing the waste rock during the continuance of the work." Now that must mean the waste rock after removal, for it could not be crushed before it was removed ; and it is clearly within the power of the contractor to crush all the waste rock which he removes. This being so it follows that the crushing machine must be adequate in conjunction with the electric power to crush all the waste rock.

It was argued by the Counsel for the Respondents that it was not necessary that all the waste rock should be crushed. Seeing that the only market so far as apparent was for crushed rock, and that the right to use the railway line and obtain the haulage to get the

rock away from the mine applies only to crushed rock, this does not seem a very practical suggestion. But even if it were it is enough that the Plaintiff has a right to crush all the rock he removes. The appliances provided must be adequate to allow him to exercise his right in full.

Third, Clause 13 is as follows :—" In the " event of the contractor failing to complete the " removal of waste rock . . . . within a " period of two years . . . . the Company " may summarily determine the agreement." Now, in order to remove 50,000 tons in two years it would be necessary to remove 480 tons a week. Given a working week of 48 hours this would require a rate of 10 tons an hour. The mere statement of these figures shows conclusively the utter inadequacy of a machine which at its very best only turned out three tons per hour.

Their Lordships are therefore of opinion that it has been proved that the Respondants did not provide " a necessary rock-breaker," and that they thereby broke the contract.

At the conclusion of the argument the learned Counsel for the Respondents urged that inasmuch as there was evidence that a second breaker had been sent for and had arrived (though never placed in position) it was for the Appellant to show that that breaker was also inadequate. It is sufficient to say that this argument comes too late. The parties joined issue upon the adequacy of the first breaker. The Respondents contended that it was adequate upon a proper construction of the contract, whatever its shortcomings of performance as to amount might be. They further contended through their witnesses that it was good enough for the work. In both these contentions they have been held wrong. Their Lordships do not doubt that it might have been in the Defendants' power to admit the failure

of the first breaker and then to have tendered a second. But that would have to have been clearly proffered, and the proffering clearly proved. As it is there is not a single word said as to it by any of the Respondents' witnesses, and the argument has to rest on a single sentence in the cross-examination of the Appellant's manager. In their Lordships' view there is therefore in the evidence no foundation for the plea.

Their Lordships will therefore humbly advise His Majesty to reverse the judgment and send the case back in order that damages may be awarded. As the parties had agreed in the Court below that the Court of Appeal should, had they reversed the judgment of the trial Judge, assess the damages, it seems right that they should still do so. The damages to which the Plaintiff is entitled will in the present case fall under two heads:—(1), expense to which he was put in making preparations for the work which has been rendered useless by the impossibility of continuing the work; (2), loss of profit, which in the circumstances of the case he would naturally have earned. It must, of course, be understood that inasmuch as profit is only arrived at after necessary expense is provided for, the assessing tribunal will see to it that these two heads are not so stated as to really charge the same thing twice over. The contract with the Appellant and the Harbour authorities is not conclusive as against the Respondents, but is admissible as evidence of what profit the Appellant could probably have made. The Respondents will pay the costs of this Appeal, and of the proceedings in the Courts below.

In the Privy Council.

ROBERT KLEINERT

v.

THE ABOSSO GOLD MINING COMPANY, LIMITED.

DELIVERED BY LORD DUNEDIN.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1913.