

Privy Council Appeal No. 104 of 1920.

A. E. Hickman Company, Limited - - - - - *Appellants*

v.

J. Jaris Company - - - - - *Respondents.*

FROM

THE SUPREME COURT OF NEWFOUNDLAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 20TH JANUARY, 1921.

Present at the Hearing :

LORD BUCKMASTER.

LORD DUNEDIN.

LORD SHAW.

[*Delivered by* LORD BUCKMASTER.]

Their Lordships are of opinion that this appeal cannot succeed. It arises out of an alleged breach of a contract to deliver certain casks of fish by the defendants to the plaintiffs, and the only question is what was the contract. It appears that in September, 1917, the defendants contracted to deliver to the plaintiffs 2,200 casks of codfish, c.i.f. New York; 1,600 of these casks were at \$40 and 600 at \$42.50. The fish was to be delivered as required, and there was a further provision relating to the possibility of the defendants obtaining the necessary cargo space. Two hundred and fifty only of these casks were delivered on or about the 26th October, 1917, and the defendants were admittedly in arrear with the balance. Ultimately the contract was cancelled, and a new contract was made in January, 1918. That contract provided that the balance of 1,950 casks were to be shipped at once and the price was to be \$46 per cask. Three hundred and sixty only of these casks were delivered, and the balance of 1,590 were outstanding in June, 1918. It was then that discussions took place between the representatives of the plaintiffs and defendants respectively as to what further arrangements the defendants were able to make to secure the delivery of the balance. These verbal arrangements were ultimately

incorporated in a correspondence that took place between the parties in June and July of 1918, and the construction of these letters is the only material question in the present appeal. On the 4th June, 1918, the plaintiffs wrote referring to the conversation, and made this statement: "We came to understand that you agreed to deliver this amount of fish (*i.e.*, the 1,590 casks), the coming season according to our requirements, at the price of \$43 per cask, *c.i.f.* New York, and we wish you kindly to acknowledge receipt of this letter confirming same." Three further letters followed before any answer was given, and the first answer merely stated that the representative of the defendants was not at home, and consequently that no reply could be sent. Ultimately, on the 15th July, 1918, a reply was sent stating that the understanding that had been come to was that the defendants were to deliver the fish "as we have it and you"—that is the plaintiffs—"are to take delivery and arrange banker's credit when we advise you." It is quite plain that this constituted a very material variation from the statement contained in the letter of the 4th June, 1918, and if the matter had ended there all that could have been said would have been that there had been a misunderstanding as to the verbal arrangements which had been made; but the matter did not end there. On the 23rd July, 1918, the plaintiffs wrote at once saying that the agreement referred to in this letter is not clear. "However," they add, "it is well understood that you will deliver the fish as usual, after the season opens, which, as you say in your letter, will be in September." One thing that had never happened in the previous contractual relationships between the parties was that the fish should be delivered as the defendants found it convenient. It had always been either as the plaintiffs required it or immediately. "As usual," therefore, could not possibly mean what the defendants had said was the result of the verbal arrangement made between them and the plaintiffs, and they were at once faced with the view that the statement as to the correspondence was something other than that which they had put forward. On the 22nd October, 1918, the plaintiffs write and refer to the agreement to supply and ask for delivery. To this, on the 26th October, the defendants answer by saying:—

"I wish to call your attention to the fact that by your letters of the 4th June and the 23rd July, 1918, and our letter of the 15th July, 1918, we arranged in place of the old contract to which you refer in your letter, to settle the same by agreeing to deliver to you according to your requirements during the season of 1918, 1,490 casks."

It should be observed that the figures 1,490 in this letter, which appear in the certified copy of the record before their Lordships, seem to be a mistake for "1,590."

That can only mean that the discussions which had taken place about the meaning of the verbal arrangements previously made had led to those arrangements being settled between the

parties by the defendants agreeing to deliver the outstanding casks of fish as the plaintiffs required it. It might be, though this, having regard to the concurrent findings of the Courts, is immaterial, that it also did include some reference to the provision of cargo space; but beyond that it is impossible that the defendants can say that this agreement extended in their favour. They did not deliver, and it has been held by both Courts that the cargo space could have been obtained and was not, and there was consequently no excuse for non-delivery, and they were ultimately sued for breach of this contract. In the pleadings they actually set up a contract themselves in the terms stated, and ask in their counter-claim that they should have damages because it has been broken. At the trial the learned Judge found that the plaintiffs were entitled to damages on the basis of the \$43 per cask. The Court of Appeal supported that judgment. From that judgment this appeal has been brought by the defendants asking their Lordships to say that there was no contract at all, although they had been attempting to sue upon one, and consequently that the action ought to be dismissed.

For the reasons they have already given, their Lordships think that there was a contract and that that contract is the one which the Courts below have properly interpreted and upon which they have rightly acted.

In their Lordships' opinion this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

A. E HICKMAN COMPANY, LIMITED,

v.

G. JARIS COMPANY.

DELIVERED BY LORD BUCKMASTER.

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