Privy Council Appeal No. 86 of 1923.

Julius Carlos Clausen and others - - - - - *Appellants*

v.

Canada Timber and Lands, Limited - - - - *Respondents*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH OCTOBER, 1923.

Present at the Hearing:

LORD BUCKMASTER.
LORD SUMNER.
MR. JUSTICE DUFF.

[*Delivered by* LORD SUMNER.]

The appellants are seven members of a partnership of eight persons, formed in British Columbia on the 12th May, 1921, to carry on the business of general loggers under the name of the Toba River Logging Company, which performed in part a contract, entered into about the same date with the first respondent, the Canada Timber and Lands, Limited, for the cutting and purchase of a large quantity of timber growing on the stump, which was owned or controlled by the company. They were plaintiffs in the action, and sued the Canada Timber and Lands, Limited, for damages for breach of this contract; the eighth partner, being unwilling to be a plaintiff, was made a party as defendant, but is not concerned in this appeal. The whole question is whether a written notice, given by the respondent company to the

appellants and expressing their intention to cancel the purchase contract and a second contract supplementary to it upon which no separate question arises, was of such a character that the appellants were justified in treating it, as they did treat it, as a repudiation and in accepting it as such and thereupon bringing their action as upon a final breach.

The logging contract was expressed as a purchase and sale. The eight partners in the logging firm were made parties to it as purchasers and they contracted jointly and severally. The respondent company, contracting as vendors, were carefully protected by clauses, which bound the buyers to furnish the company with particulars of their sales over and to arrange for direct payments to be made to the company from the sub-purchasers in discharge of the purchasers' obligations. In addition to the logs themselves some logging equipment on the site of the operations, which belonged to the company, was included in the sale, and there was a provision that the ownership and right to possession in both the logs and the equipment should remain in the vendors until the purchasers should have paid the sums respectively due for the price. Work was to proceed continuously subject to excessive snow conditions. To this contract the Toba River Logging Company was not a party, nor did the purchasers contract as partners.

There were two clauses in this agreement—Nos. 21 and 25—which must be set out in full. They are as follows :—

> " 21. If default shall be made on the part of the purchasers in any of the terms, provisions, conditions or stipulations of this agreement, and if such default shall continue for twenty (20) days after notice shall be given to the purchasers by or on behalf of the vendor of its intention to cancel this agreement, then at the expiration of such twenty (20) days this agreement shall be void and of no effect and the vendor shall be at liberty to re-enter the said lands and premises or any part thereof in the name of the whole and shall retain all sums of money paid to the vendor by the purchasers under the terms of this agreement as and by way of liquidated damages for breach of this agreement and not as a penalty, and thereupon and upon such re-entry the purchasers shall deliver up the possession of the said lands and premises and all thereof and the said logging plant and equipment to the vendor, and the purchasers shall have no claim against the vendor whatsoever for or by reason of such cancellation or retainer of said moneys. The procedure provided in this paragraph for the cancellation of the rights of the purchasers under this agreement shall be concurrent with and in addition and without prejudice to and not in lieu of or substitution for any other right or remedy at law or in equity which the vendor may have for the enforcement of its rights under this agreement or its remedies for any default of the purchasers in the conditions herein.
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> " 25. No purchaser shall be entitled to assign this agreement nor any part thereof nor his interest therein except upon the written consent of the vendor previously obtained."

The partners continued at work through the logging season of 1921. A considerable quantity of timber was felled, and relations with the respondent company do not appear to have

been otherwise than friendly. About Christmas—it is said, owing to the snow, but possibly for other reasons also—operations were suspended and seven of the partners came down to Vancouver, leaving one in charge of the camp. During this suspension the plaintiffs quarrelled with the defendant Norton. On the 25th January, 1922, an action was begun for dissolution of the partnership, and on the 27th February an order was made in the action declaring the partnership dissolved as from the date of the writ and appointing a receiver to get in all the property of the firm and to sell any logs or other assets belonging to the firm, subject to the approval of the Court.

The future of the logging contract was, of course, a matter of concern during January and February of 1922 to all the parties to it, and interviews took place about it between the appellants or their solicitor and the solicitor to the Canada Timber and Lands Limited, a Mr. Burns.

At first Mr. Burns was willing to help the contending partners to settle their differences so that the business could go on, if desired, by forming a limited liability company to do the actual work, the parties to the existing contract remaining bound to the respondent company as they then were. He pointed out, however, that if the partnership dissolved his clients must then pursue their own interests and would give a contract to whichever party might suit them best as purchasers from their own point of view. It was even arranged that rival proposals should be made and remitted to the respondent company at Toronto. This was at the beginning of March. On the 13th March Mr. Burns sent to the present appellants the following notice :—

"J. C. Clausen and Associates,

"Lund P.O., B.C.

"Take notice that default on the part of the purchasers under that agreement dated the 15th day of June, 1921, and made between Canada Timber and Lands, Limited, as vendor, and J. C. Clausen, W. T. Norton, R. Buttorff, P. D. Cain, A. Brossman, W. J. Blundell, Charles Clausen and Andrew Clausen as purchasers, has been made in respect of the condition or stipulation contained in paragraph No. 25 of the said agreement to the effect that no purchaser shall be entitled to assign the said agreement nor any part thereof nor his interest therein except upon the written consent of the vendor previously obtained, such default consisting in the dissolution of the partnership of the purchasers and the vesting of the assets of the partnership in the receiver thereof.

"And take notice that the vendor intends to cancel the said agreement, as well as the second agreement made the said 15th day of June, 1921, by reason of such default at the expiration of twenty days after seven days from the mailing of this notice, in accordance with paragraphs 21 and 23 of the said agreement.

"And take notice that this notice is given without prejudice to the position taken by the vendor under said agreement that the said agreement has been determined and abandoned by the purchasers by reason of such dissolution and appointment of Receiver.

"Dated at Vancouver, B.C., this 13th day of March, A.D. 1922.

"BURNS AND WALKEM,

"Solicitors for Canada Timber and Lands, Limited."

The present appellants, through their solicitors, lost no time in replying as follows :—

"936, ROGERS BUILDING,
"VANCOUVER, B.C.
"*March 17th*, 1922.

"Messrs. Burns and Walkem,
"Barristers and Solicitors,
"Vancouver, B.C.

"Attention Mr. Burns.

"DEAR SIRS,

"*In re Clausen and others and Canada Timber and Lands, Limited.*

"Mr. J. C. Clausen and his associates in the Toba River Logging Company have handed to us your letter containing the twenty-day notice of cancellation of the contracts between the Canada Timber and Lands, Limited, on the one part and J. C. Clausen and others of the other part, dated the 15th day of June, 1921.

"On behalf of the said Julius C. Clausen, Rex Buttorff, Charles Clausen, Andrew Clausen, Alexander Brossman, Philip Cain and William John Blundell, we beg to advise you that we deny absolutely that any assignment or vesting of interest has occurred as alleged in the said notice or any abandonment as suggested in the said notice. We consider the said notice as unjustified and without any foundation in fact.

"The notice clearly evinces the determination of the Canada Timber and Lands, Limited, not to be bound by the terms of the said contracts, and we are instructed by the above-mentioned parties to accept the said notice as a complete repudiation by the Canada Timber and Lands, Limited, of the said contracts dated the 15th of June last. You will please therefore regard this letter as an acceptance by the above-named parties, Julius C. Clausen, etc., of the said notice as a repudiation of the said contracts; the said parties will forthwith proceed to enforce their rights under the said contracts.

"Yours truly,

"PHIPPS AND COSGROVE,
"per M. COSGROVE."

The present action was then begun on the 22nd March, 1922. At the trial the plaintiffs were successful, but in the Court of Appeal of British Columbia the judgment of the trial Judge was by a majority reversed. Hence this appeal.

It is well settled that, in so far as repudiation of a contract is relied on, that is the intimation by one party to the other of an intention no longer to be bound by the terms of the contract, the intimation must be unequivocal. Difficulty often arises where the intimation has to be inferred from conduct only, whether from acts done in breach of the contract or from omissions to do that which the contract requires to be done. This, however, is not such a case. Here the intimation, such as it is, consists in a formal written notice, and the matter is therefore one of construction. No doubt the circumstances under which the notice was given are relevant, but in comparison with the terms of the document they are of small moment. The intention of the writer is to be gathered from what he says, and as his authority to bind the respondent company is unquestioned, all that is really required is to construe the document.

The writer virtually says two things: (1) "I intend to bring this contract to an end because you have assigned it without leave"; and (2) "I have taken, and I continue to maintain, the position, that you have brought the contract to an end by dissolving your partnership." As a declaration of intention the document is unequivocal. Twice over the writer says that his principals will no longer be bound by the terms of the contract. It is true that he twice over gives a reason for this intention, and in each case the reason is one, which he may have thought right but which is certainly wrong. Still, the only result is that the intention, thus declared, is one which can be accepted by the opposite party and treated as a final repudiation and as the foundation of a claim for damages for what is called an anticipatory breach.

It was not urged on their Lordships on behalf of the respondent company either that the contract had been assigned within the meaning of Article 25 or at all, or that it had been abandoned by reason either of the dissolution of partnership or of the appointment of a receiver or otherwise. In both respects the writer of the notice was strangely in error. He had not studied the terms of the contract exactly. By Article 21 what the vendors could elect to do was, not to cancel the contract twenty-seven days after mailing the notice, but to give the notice. If they once did that, their action was irrevocable, and except by a new agreement lapse of time did the rest. The contract was void when the stipulated number of days thereafter expired. If there had been such a default as the notice alleged, the giving of the notice dealt the contract its death-blow, though its last agonies might be prolonged. The writer's intention was to produce the result which his action must produce, and the statement that he intended to cancel in future was only a careless way of saying that he intended, by what he was doing then, that the determination of the contract should follow in due course and in a few days' time.

It was argued, firstly, that the intention as expressed made the document revocable, and, secondly, that it was written under a double mistake, namely, as to the effects both of the dissolution itself and of the appointment of a receiver. As the document was not revoked before the appellants had elected to treat it as a repudiation and had issued their writ, there is nothing in the first argument, but in truth on the terms of the contract it was not revocable. The giving of it was followed by the avoidance of the contract. A revocation would only have been a new offer to renew the old contract. For the second point it is enough to say that, though the writer, Mr. Burns, gave evidence, he never suggested that he had acted under any mistake. He adhered to the line he had taken, and so far he was right, for, bad as his reasons for giving the notice were, it was, as an expression of intention, equally unequivocal, whether his reasons for giving it were arrived at under a mistake of law (for there was certainly none of fact) or with a full appreciation of the unsoundness of the position taken up.

The majority of the learned members of the Court of Appeal read the document otherwise. The judgment of McPhillips, J. A., which is supported by much research and examination of authorities, may be taken as expressing their opinion. It rests, shortly, on the view that the document is equivocal and ought really to be read as a warning to the purchasers of the consequences that might follow, if they did not mend their ways and proceed with the performance of the contract while still there was time and before the day came at which, if things remained as they were, the vendors would feel obliged to exercise their rights. It is enough to say that, for the reasons above given, their Lordships have been unable to accept this construction. They think that the trial Judge was right.

Probably inadvertently, the judgment at the trial was drawn up adjudging that the plaintiffs do recover "the difference between the market price and the cost to the said plaintiffs of production of the quantities and species of timber comprised in the two contracts in the pleadings mentioned" and referring to the District Registrar "to determine the market price and the cost to the said plaintiffs of production as aforesaid." There is no reason for this particularity, and, though not necessarily wrong in any way, it may possibly be misapprehended as laying down a measure of damages different from that which the ordinary law would apply. What should be adjudged to be recovered and to be ascertained on the reference is "all damage, if any, which the plaintiffs have sustained," but this almost formal alteration should not affect the costs.

Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs here and below, and that the judgment of the trial Judge, with the above-mentioned amendment, should be restored.

In the Privy Council.

JULIUS CARLOS CLAUSEN AND OTHERS

v

CANADA TIMBER AND LANDS, LIMITED.

DELIVERED BY LORD SUMNER.

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