

Canadian General Distributors Corporation - - - - - *Appellants*

v.

C. Melhado and Sons - - - - - *Respondents*

FROM

THE SUPREME COURT OF BRITISH HONDURAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 23RD JULY, 1935.

Present at the hearing :

LORD ATKIN.

LORD TOMLIN.

LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD ATKIN.]

This is an appeal from the judgment of the Chief Justice in the Supreme Court of British Honduras in an action in which the appellants, the Canadian General Distributors Corporation, were the plaintiffs and the respondents, C. Melhado & Sons, the defendants.

The action was brought to recover possession of certain property, chiefly whiskey, which the defendants had had in their possession under an agreement which is the agreement in dispute between them and the plaintiffs. There is no dispute about the property in the whiskey. The only question is whether or not the defendants were entitled to retain the property until they were paid their charges in respect of which it is claimed that they had a lien. As the case was fought in the Court below, and as it comes to this Board, the only question in dispute is on the construction of the agreement between the parties, which is contained in writing, in letters and a memorandum, the question being whether the defendants were entitled to a commission in respect of the whiskey which they delivered to the plaintiffs' order after the arrangement had been put an end to and duly put an end to by notice.

The defendants carry on business as merchants in Belize in British Honduras, and in 1929 the appellants, who appear to represent the Distillers Corporation Limited of Canada, were minded to carry on business from Belize by shipping whiskey and other liquors from Belize to destinations which are not known or expressed but which it is not very difficult to guess at, and very large quantities of whiskey were in fact shipped under the agreement.

The formation of the agreement took place in this way: A representative of the Distillers Corporation, Mr. Reitman, visited the defendants at Belize; he had no authority to complete a contract; the terms were discussed and a memorandum of terms was prepared which will be referred to in a moment. Thereupon he returned to Canada and correspondence followed between the Distillers Corporation and the defendants, and eventually a representative of the defendants visited Montreal, and the agreement was then come to.

It is desirable now to refer to the contractual documents. On 21st August, 1929, the representative of the defendants wrote a letter to the Distillers Corporation Limited.

"Dear Sirs, With reference to the memorandum of Agreement made with Mr. Frank Reitman on your behalf, dated May 11, 1929, and which we sent you under cover by letter of June 28th last, and with further reference to your letter to us of June 10th, and to recent interviews which I have had with you here in Montreal, I now beg to summarize briefly the arrangements arrived at: (1) Agreement made with Mr. Reitman on May 11, 1929, holds good"—[that is the written memorandum referred to]—"and it is clearly understood that the commissions referred to therein are based on the annual turnover from the time of receipt of your first consignment to us". . . .—"It is further understood that for any of your goods sold to customers for the re-export trade whom we obtain through our own efforts, we are to get an additional 50 cents per case over and above commissions mentioned in the above agreement. Warehouse accommodation is to be at the rate of 2½ cents per case of approximately 1½ cubic feet"—[it is agreed that 2½ cents means 2½ cents per month]—"and to be at the Government rates when stored in the Government bonded warehouses."

Then there is provision for allowing the Canadian Company half commission on business which the defendants were already doing with certain exporters of whiskey in Great Britain. Those are the only clauses to which reference need be made relative to this dispute.

That was accepted by a letter from Distillers Corporation Limited of 22nd August. That, as has been said, states "The agreement made with Mr. Reitman on 11th May, 1929, holds good." That is the document which in substance contains the terms. It is headed:

"Arrangements made with Mr. Frank Reitman for the receiving and shipping of goods from the Distillers Corporation Limited of Montreal"—"We are to attend to the bonding and shipping of goods shipped either direct to us or on bill of lading openly endorsed, and to make deliveries of goods as instructed by the Distillers Corporation Limited, such deliveries and/or shipments to be in accordance with the laws of all countries."

That was an interesting stipulation, and it may be observed that there is no allegation of any breach by either of the parties of that stipulation.

"All out-of-pocket expenses such as export duty and labour storing", [and so on, which need not be read], "are to be for account of Distillers Corporation Limited. Warehouse accommodation, for account of the Distillers Corporation Limited, when furnished by us to be at the rate of 2½ cents per case for cases of

approximately 1 ft. 6 in. cubic measurement, and when warehouse accommodation is not available in our private bonded warehouse, at rates charged by the Government. A proportion of the fee for the privilege of having a special bonded warehouse is to be borne by the Distillers Corporation Limited . . . Commission: based on annual turnover at the rate of 50 cents per case of 12 bottles on the first 10,000 cases in the year; 40 cents per case on the second 10,000 cases in the year; and 30 cents per case on quantities over and above 20,000 cases in the year. It is understood that the year shall only be computed from the time the first delivery of your goods is made to us. This commission is to cover not only goods from Canada, but all importations from Europe or any other place. We are to have the privilege of selling goods at increased prices over the prices specified by the Distillers Corporation Limited and such profit is to be for our account. Sufficient funds are to be on hand for the payment of export duties, rents, commissions, and all other charges."

The first delivery of goods was made in July, 1929, and it is from that date the year runs on which the annual turnover is to be calculated. Large shipments were in fact made thereafter until February, 1931, and on 11th February, 1931, the plaintiffs wrote a letter to the defendants:

"Dear Sirs, Owing to a joint arrangement which has been entered into between all the Canadian distilleries in connection with their export business, it becomes necessary for us to alter our selling arrangements in Belize, and we regret to advise you that we have to terminate the arrangements heretofore existing between us in connection with the sale of merchandize for export both as to Canadian products and goods imported from the Old Country, the termination to take effect as on the 28th day of February, 1931. Our business in future will be handled jointly by the Consolidated Exporters Limited, and we would be greatly obliged if you will co-operate in facilitating whatever may be involved in connection with this change. As you know, one or two of our recent consignments have been made direct to the Consolidated Exporters Limited, but we were not in a position to write you until matters at this end involving numerous meetings and conferences amongst the distilling groups were settled. We regret having to terminate the pleasant relationship which has existed between us, but you appreciate the necessity of this under the general arrangements referred to."

That notice was accepted by the defendants, and there is no question that it was duly and lawfully given. The defendants had at this time a large amount of whiskey in cases in their warehouse. They had in the meantime, while the arrangement lasted, been complying with the agreement and had from time to time made all the necessary arrangements for shipping and for delivering according to the plaintiffs' order, and they continued to deliver the stock that they had in hand from time to time to the Consolidated Exporters who were represented by Mr. Murphy. That was done in pursuance of a telegram given in June, 1931—

"In order to save time and eliminate repeated cables this will authorise you deliver free Consolidated Exporters any merchandize ex our stock requested by Murphy from time to time obtaining triplicate signed receipt keeping one for your records giving one to Murphy sending one to us immediately after each delivery confirm."

That enables their Lordships to deal with the immediate question which arises on this appeal. Eventually the plaintiffs made a demand for the whole of their stock. They were not satisfied with the accounts which the defendants had rendered and the plaintiffs eventually demanded the whole of their stock because they found that the defendants had been charging them for the period after the termination of the arrangement with the commission which they had before charged during the continuance of the arrangement. The plaintiffs said that was no longer right and they demanded the stock back. It was withheld because the defendants said they had a right to the commission and they had a lien in respect of it. Eventually it was handed over, except for a certain quantity which the defendants said was sufficient to protect their lien. Then the action was brought by the plaintiffs which involved the question, and in substance the only question, as to whether or not the defendants were right in claiming this commission in respect of the goods they dealt with after the notice that was given in February, 1931.

Now it seems to their Lordships quite plain that at the trial and in all the proceedings, including the appeal to His Majesty in Council, the parties have proceeded on the footing that the defendants were entitled after the notice to the same remuneration in respect of the stock they dealt with as they were entitled to during the operation of the arrangement. In other words, the question, and the only question, is whether or not on the proper construction of the agreement the defendants were entitled to commission in respect of stock which they did not in fact ship or sell or ship in pursuance of a sale but which they did in fact hand over to the plaintiffs or, on the plaintiffs' instructions, to the plaintiffs' nominees. That turns on the meaning of the word "turnover". It was suggested by the plaintiffs that the turnover in this agreement had reference only to cases of whiskey that had been taken into warehouse by the defendants and had been shipped in pursuance of a contract of sale; or alternatively it is said at any rate the turnover only related to the performance by the defendants of their duty of arranging for the shipment of the goods and unless the goods had in fact been shipped for export—it is better to say for re-export—by the defendants they were not to be entitled to commission at all. The learned Chief Justice did not take that view, and their Lordships see no reason to differ from the conclusion that was arrived at by the Chief Justice.

When this document is looked at it is plain that what was contemplated was that the defendants were to act in warehousing the goods, or procuring them to be warehoused in bond, they were no doubt to attend to the bonding, they were to attend to the shipping of the goods if the goods were shipped, but they were also—the words are express—

“ to make deliveries of goods as instructed by the Distillers Corporation ”, and the clause proceeds “ such deliveries and/or shipments to be in accordance with the laws of all countries ”. To begin with, as far as sale is concerned there is not a word about sale in the document from start to finish, and it would seem to be a very narrow construction of business relations if goods were shipped for instance, for re-export on consignment to some other country (which might very well happen) though there was no contract of sale at all. But the duties of the defendants were not limited to shipment. It is plain that the agreement contemplated the possibility of delivery to persons in British Honduras itself who might themselves be shippers and who might have bought in order that they might re-export. Again, there is nothing to prevent a business under which the defendants might be delivering to persons who desired to consume or sell the goods in British Honduras, or to convey the goods out of British Honduras by land. No doubt that is possible if one assumes that it is possible to cross the borders of British Honduras into Mexico and the surrounding republics.

The result of that seems to their Lordships to be this, that the business that was contemplated was the business of receiving the goods on the one hand and delivering them out again on the instructions of the plaintiffs, and when the goods had been first received and then delivered there would be a volume of business which would constitute the turnover of the business—and one of the accepted meanings of “ turnover ” is volume of business done. It appears to their Lordships to be the business which was contemplated, and, if that is so, it would appear that the defendants were entitled to claim commission in respect of the goods which they did deliver to the plaintiffs on the plaintiffs’ instructions or to the plaintiffs’ nominees on the plaintiffs’ instructions.

The result of that is that the decision of the learned Chief Justice is correct and the order that he made must stand.

It is right to point out that Mr. Harman made a point at the hearing before their Lordships that the agreement had come to an end in February, that the contractual terms of remuneration thereupon ceased to apply, and that all the defendants would be entitled to would be to recover on a *quantum meruit* for their services. All their Lordships desire to say is that was not a point made in the Court below, it does not appear to have been made in the appellants’ case, and their Lordships are of opinion that it is not open now. What the result would have been if there had been a *quantum meruit*, whether the defendants would have recovered more or less than they would recover under the claim for a fixed warehouse rent and commission it is impossible to say. The matter does not arise. The question was fought below on

the simple question of construction, and on the question of construction it appears to their Lordships that the appellants fail.

The result, therefore, is that their Lordships will humbly advise His Majesty that this appeal should be dismissed and the appellants pay the costs of the appeal.



In the Privy Council.

CANADIAN GENERAL DISTRIBUTORS
CORPORATION

v.

C. MELHADO AND SONS

DELIVERED BY LORD ATKIN.

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