Privy Council Appeal No. 130 *of* 1915.

The Kochien Transportation and Tow-Boat Company (Limited) - - - - - *Appellants,*

v.

The Shanghai Dock and Engineering Company (Limited) - - - - - - *Respondents,*

FROM

HIS BRITANNIC MAJESTY'S SUPREME COURT FOR CHINA AT SHANGHAI.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH NOVEMBER, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD ATKINSON.
LORD WRENBURY.

[*Delivered by* LORD WRENBURY.]

The appellants are plaintiffs in an action in which they allege a contract made between themselves as purchasers and the respondents as contractors for the construction of a sea-going tow-boat called the "Brodie Clark," and in which they claim repayment of four instalments of purchase money which they have paid, and interest thereon. The respondents claim by counter-claim payment of the fifth and final instalment, and damages for failure to take delivery.

The first question for decision is whether there is a contract, and if so in what documents is it found, and what is their true construction.

The first document relied on is a specification whose material words for the immediate purpose are as follows:—

"*Trial Trip.*—The boat to run a satisfactory trial, and to main-
"tain an average speed of about 14 nautical miles per hour on a three
"hours run in free course water, with not less than 20 tons of coal in
"bunkers, tanks and holds to be empty."

This specification was sent on the 19th September, 1913, by the respondents to the appellants for their approval in a letter of that date.

The appellants made pencil alterations to the following effect: (1) they struck out the word "about"; (2) they

nserted a provision that all trials were to be carried out with Kashima lump coal; and (3) they added a provision for a trial when towing four lighters. The specification as so altered in pencil was never sent in any way to the respondents. No. 2 was mentioned in an altered form, as will presently appear, in a letter of the 4th October, 1913. No. 3 was never mentioned at all. The question arises upon No. 1, viz., the deletion of the word "about."

On the 29th September the respondents wrote again, naming their price and stipulating for payment in five equal instalments:—

One-fifth when contract is signed;
" " keel is laid;
" " vessel is plated;
" " vessel is launched;
" after satisfactory trial trip.

Some negotiation ensued in letters of the 1st and 2nd October, and on the 4th October the appellants wrote that they were prepared to accept the respondents' tender with certain alterations specified in that letter. The material passage is as follows:—

"On page 12, under 'Trial Trip,' the average speed to be '14 nautical miles per hour on a three hours' run in free course water, "with not less than 20 tons coal in bunkers, tanks and holds to be "empty; and in connection with the coal to be used we would like the "trials to be carried out with best Kashima lump coal, or with what is "called Miikie naval coal."

Upon the true construction of these words their Lordships are of opinion that there are here named two conditions, viz.: (1) the average speed to be 14 nautical miles and (2) the coal to be such as named. The words "to be" and the introduction of the word "and" before the stipulation as to the coal, compel, in their judgment, this construction. The point is that the word "about" is dropped. Upon this construction the plaintiffs were imposing the condition that the speed should be not "about 14 nautical miles," but "14 nautical miles." It is not material to consider whether the plaintiffs deliberately intended this modification, or whether the respondents understood that they so intended. Their Lordships are not prepared to answer either of these questions in the affirmative; but the parties must be bound by the true meaning of their words, and if the appellants upon the true construction made, and if the respondents accepted, the condition, they must be bound by it.

In a subsequent letter of the 8th October the respondents speak of this letter of the 4th October as the plaintiffs' acceptance of their offer. It plainly was not an acceptance at all. It contained new terms.

The letter of the 4th October, in addition to the sentence quoted above, contained certain further conditions, three in number, thus making five in all.

On the 6th October the respondents wrote in reply. They travelled through the conditions, dealing in order with the second (that as to the coal), the third, the fourth, and the fifth. They said nothing at all as to the first (that as to the word "about"). If it were material, which it is not, their Lordships would infer that they did not notice the omission of the word "about," and were not conscious that the plaintiffs' initial words in the sentence quoted were not mere quotation from the specification, but were operative words of condition. It remains that they did not on the 6th October accept the first condition of the 4th October, and there was so far no contract.

No further letter from the plaintiffs intervened between the respondents' letter of the 6th October and another of the respondents dated the 8th October. These two letters together amounted to this: "We accept your conditions 2, 3, 4, and 5. Your letter of the 4th October made a contract [which plainly it did not]. The first instalment is due on entering into the contract. Please pay the first instalment." In this their Lordships can find no contract. The first condition had been made and not accepted.

On the 13th October the appellants wrote the last letter in the series: "We beg to acknowledge receipt of your letter of the 6th instant . . . . we note that you agree to the various alterations and additions made in the specification referred to in our letter of the 4th instant." In their Lordships' opinion this can only mean: "We are satisfied with the agreement you have expressed to our alterations and additions," being as it was an agreement to conditions 2, 3, 4, and 5, with the omission of condition 1. It is impossible that the appellants should by those words impose upon the respondents the acceptance of condition 1, when, in fact, they had never accepted it.

It results that in their Lordships' judgment there is a contract. It is found in the documents to which they have referred. And as regards speed, the word "about" stands as in the specification.

Upon the evidence the boat can run 13·5 or 13·6, which in their Lordships' opinion is "about 14." The trial trip under the contract has never been run, but the appellants have not proved that if it were run the contract speed would not be maintained. The appellants were not at the date of the writ entitled to reject the vessel on the ground of speed. It is not for their Lordships to say what may be the rights if and when the contractual trial trip shall have been run and its result ascertained.

On the 30th September, 1914, the appellants rejected the boat on two grounds, the first of which was:—

> "1. Trial trip being unable to give an average speed of 14 nautical miles per hour on a three hours run."

This ground of rejection cannot be maintained.

The appellants further contend that they were entitled

to reject the boat as being in other respects not according to contract. The words of the specification material in this respect are as follows :—

"The tug to be built and fitted out and equipped as hereinafter "specified. Hull, engines, and boilers in accordance with Lloyd's "requirements for their highest class for sea-going boat. . . . .

"*Scantlings:* to Lloyd's highest class for sea-going tow-boats. . . . .

"*Frames:* Of angles $3\frac{1}{2}'' \times 3'' \times \cdot 32$ spaced 2″ apart.

"*Bulkheads:* Four watertight bulkhead plates ·30 to ·26 stiffened "with angles to Lloyd's requirements. . . . .

"*Side-stringer:* Of plates ·30 thick connected to shell by 3″ × 3″ "× ·32."

In their Lordships' opinion these stipulations mean that the boat is to be built to Lloyd's requirements as modified by specified measurements if and when given in the specification. The frames are specified as to be $3\frac{1}{2}'' \times 3'' \times \cdot 32$ and are so constructed. If Lloyd's rules require $4'' \times 3'' \times \cdot 32$ that measurement must yield to $3\frac{1}{2}'' \times 3'' \times \cdot 32$ being the measurement specified in the specification. This disposes of the appellants first contention ; that as to the frames.

Secondly, Lloyd's rules require two side-stringers. The specification requires only one. The specification prevails.

Thirdly, as to the bulkheads. The appellants' objection to the after-peak bulkhead is abandoned. As to the engine-room bulkhead, there is a conflict as to whether a certain structure is a 'tween deck or not. If it is, the construction is according to contract. If it is not, the construction is not. Lloyd's have refused the appellants' request to survey. No expert is called from Lloyd's and the matter is undetermined. As to the boiler-room bulkhead, the appellants say it is not "stiffened with angles to Lloyd's requirements." Assuming this to be so, it remains that on the 10th March, 1914, the respondents wrote : "The vessel is according to Lloyd's requirements, but, as the rules are a little ambiguous in their reading, we are quite prepared to send the plans to London for their approval, and will be very pleased to carry out any alterations they stipulate." There was difficulty in inducing Lloyd's to act at all in the matter. On the 17th June the respondents wrote suggesting steps which might induce Lloyd's to overcome their disinclination, and concluded by saying : "We are, of course, still prepared to give you a vessel in keeping with Lloyd's and your own requirements, and should the above suggestion meet with your approval we will arrange accordingly." There was no such delay as to show that the respondents refused to perform. The result of this is that the vendor was prepared, if the vessel was not according to contract, to make it according to contract. The alteration to the boiler-room bulkhead, if it were necessary, would cost about 145 taels, and that to the engine-room bulkhead about 85 taels. The contract price for the boat was 114,250 taels. In these facts their Lordships find no justification for rejection of the vessel.

The appellants' letter of the 30th September, 1914, rejected the boat on a second ground, in the words :—

"2. Classification not being obtainable from Lloyd's."

It suffices to say that there was no term in the contract that it should be obtainable.

In their Lordships' opinion, the plaintiffs' claim to recover the four instalments paid cannot be maintained in this action.

As regards the counter-claim: the fifth instalment is payable "after satisfactory trial trip." This event has not happened. The contractual trial trip has never been held. It follows that the counter-claim fails. The order under appeal dismissed the plaintiffs' claim. The appeal from so much of the order must be dismissed and the order affirmed. It further ordered the plaintiffs to pay the fifth instalment. The appeal from this part of the order must be allowed. The plaintiffs must pay the costs of the claim. The defendants must pay the costs of the counter-claim. A set-off should be allowed. There should be no costs of the appeal. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

THE KOCHIEN TRANSPORTATION AND TOW-BOAT COMPANY (LIMITED)

v.

THE SHANGHAI DOCK AND ENGINEERING COMPANY (LIMITED).

DELIVERED BY

LORD WRENBURY.

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