Privy Council Appeals Nos. 49 *and* 50 *of* 1919.

Grant Smith and Company and McDonnell, Limited - - *Appellants*

v.

The Seattle Construction and Dry Dock Company - - - *Respondents*

The Seattle Construction and Dry Dock Company - - - *Appellants*

v.

Grant Smith and Company and McDonnell, Limited - - *Respondents*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JULY, 1919.

Present at the Hearing:
LORD BUCKMASTER.
LORD PARMOOR.
LORD WRENBURY.

[*Delivered by* LORD BUCKMASTER.]

Two appeals are brought in this case: the one by the appellants, seeking to reverse the judgment of the Court of Appeal of British Columbia awarding against them and in favour of the respondents the sum of $44,500, as to $10,000 for rent of a dry-dock, and as to $34,500 as damages for breach of contract; the other by the respondents asking to increase the amount awarded to the sum of $85,000, thereby restoring the judgment of the Trial Judge, who decreed that sum in their favour.

The appellants in the principal appeal are contractors in a large way of business, and, in May of 1914, they were engaged in the construction of a breakwater in the harbour of Victoria, British Columbia, for the Dominion Government. In order to carry out this work it was determined to construct the foundation

by concrete caissons, the dimensions of which, according to the appellants' statement were to be 30 feet high, 80 feet long, and 40 feet wide, the weight being 2,300 tons. To place these in position the appellants proposed to employ a floating dry-dock on which the caissons were to be built, two at a time, the dry-dock being then submerged sufficiently to allow the caissons to float off, when the dry-dock would be raised and the operation re-commenced.

The respondents, the Seattle Construction Company, possessed a dry-dock which appeared suitable for the operation. It was 325 feet long with 100 feet beam and 14 feet depth. Upon each side and running its full length were walls 10 feet wide and 30 feet high, with machinery for admitting and excluding the water and operating the dock. It was made of wood and had been in use since the day of its construction in 1893, having been purchased by the respondents in July, 1913. Negotiations for the hire of this dock took place in April, 1914, between Mr. Paterson, the president of the respondent Company, and the appellants' manager, Mr. Bassett. In the end, these negotiations resulted in the grant of a lease from the respondents to the appellants of the dry-dock for a period of two years at a rental of $15,000 per annum, payable monthly in advance. The lease was dated the 20th May, 1914, and as the whole dispute depends upon the measure of the obligation thereby accepted by the appellants, it is desirable to set out in full the relevant clauses. These are clauses numbers 2, 3, 4, 6 and 7.

"2. The lessee will take delivery of said dry-dock at the plant of said lessor in Seattle, Washington, and for the purpose of this lease, the seaworthiness of said dry-dock, and its fitness for the work contemplated by said lessee, are hereby admitted by the lessee.

"3. The lessee agrees to have said dry-dock insured for the benefit of said lessor in some Company or Companies satisfactory to the lessor, in the sum of not less than seventy-five thousand ($75,000.00) dollars, against both marine and fire risks, and to pay the premiums on such insurance and keep the same in full force during the term of this lease, or of any extensions thereof.

"4. Said dry-dock shall be used by the lessee in its construction work on caissons and other similar work, at or near Victoria, British Columbia. Said dry-dock shall not be used by said lessee, nor shall such use be permitted by it, in dry docking for ship repair work or other similar work in competition to the business of the lessor or other companies engaged in similar business.

"6. The lessee further covenants to re-deliver said dry-dock to said lessor at its plant in Seattle, Washington, upon the termination of this lease, in as good condition as the same was in at the time of its delivery to said lessee hereunder, except for natural wear and tear.

"7. In the event said lessee makes default in the payment of said rent, or any part thereof, as the same becomes due and payable under the terms hereof, or makes default in any of the other covenants or obligations of the lessee hereunder, then said lessor shall have the right to retake possession of said dry-dock and terminate this lease, but without prejudice to its right to recover from said lessee rentals for the entire term, and all damages, sustained by the lessor by such breach or breaches of the covenants of the lessee herein."

It was intended to use the dry-dock in the Esquimalt harbour, part of the harbour of Victoria, but not in the Royal Roads. It is stated by the appellants, and not disputed, that this harbour is a harbour of particularly quiet water, and very favourable for the work that was contemplated.

Delivery was given of the dock at Seattle, it was successfully navigated from Seattle to the harbour; but the contemplated insurance was never effected, and without its protection the appellants proceeded to use the dock in connection with their operations. For this purpose they built a further structure in the form of a gantry on each side of the walls of the dock, and placed upon this structure a travelling crane. The first two of the caissons were then built one on each side of the dock; owing to their weight, there were signs that the timbers in the centre of the dock were giving way and rising under the pressure—a difficulty which the appellants remedied by placing in the centre some 819 tons of gravel. Further difficulties seem also to have occurred owing to the sagging of the transverse struts in the hull. But it is unnecessary to consider these matters in detail. On the 31st January, 1915, the process of submerging took place under the charge of Mr. Kennedy—an expert operator who had worked on the dock before its transfer to the appellants.

This operation appears to have begun successfully, but ended in disaster. For some reason that it is not easy exactly to define, the dock listed as it went down. The uppermost wall, which was thus inclined at an angle, broke off. The whole success of the operation was destroyed and the dock lost beyond hope of recovery.

In these circumstances the respondents, on the 2nd September, 1915, took proceedings to recover against the appellants the rent due under the lease, and claiming $150,000 damages for loss of the dock, or, alternatively, $75,000 for breach of the covenant to insure. They based their claim largely upon the alleged negligent use by the appellants, and they did not in terms rely upon the claim for re-delivery of the dock at the end of the term—an omission no doubt explained by the fact that the term had not expired by effluxion of time when the proceedings began.

The main answer of the appellants was based upon a charge of fraud against Mr. Paterson. They said that he had falsely and fraudulently represented the capacity of the dock and the use to which it had formerly been put, and further that with a dishonest purpose he concealed from them material facts which, in the circumstances, it was his duty to disclose. This charge was expressly negatived by the learned Judge who heard the evidence, and stated his opinion in these words:—

> "I have no hesitation in saying that Mr. Paterson's statement about the dock's capacity and the likelihood of her doing the proposed work, were the honest statement of belief actually entertained by him at the time, and in fact strongly adhered to at the trial."

This question was again investigated by the Court of Appeal, who supported the finding in this respect of Mr. Justice Clement.

Mr. Justice Galliher said :—

> "I am unable to find fraud. The evidence to establish fraud should be clear and convincing, and I cannot say that this is so."

and with his judgment Mr. Justice Martin agreed. Mr. Justice McPhillips took the same view, and expressed his conclusion as follows :—

> "The appellants laid fraud in the case, and evidence was laid to support this ; but it was not found by the learned Trial Judge, and I entirely agree with the learned Judge."

These opinions were not merely an echo of the judgment of Mr. Justice Clement. They depended upon the complete review of the evidence and a careful and new investigation of all the circumstances. It would be contrary to the established practice of this Board—a practice based upon principles designed to secure finality in litigation and to promote the ends of justice—to re-investigate a question of this description, when a man has successfully defended his honour and character before his own Courts.

The Counsel for the appellants fairly recognised this difficulty, but sought to avoid it by asking their Lordships' attention to further evidence which was not placed in argument before either of the Courts. The concession of the respondents that this evidence might be seen enabled the appellants to avail themselves of its use. Apart from such concession, their Lordships would have been compelled to reject its admission. The concession, though generous in form, was of little value to the appellants in substance. The further evidence upon which he relied consisted merely of an entry in a book to the effect that an attempt made on the 13th March, 1914, to dock a vessel known as the "A.G. Lindsay" had failed. It had been stated at the trial that this record had been lost, and the appellants asserted that they had only discovered it in the respondents' office after the hearing. Whatever weight that assertion might have possessed had it been urged as a reason for re-hearing, it cannot influence their Lordships' mind in determining the value of the evidence which they are called upon to examine. It amounts to nothing beyond the fact that, for a reason unknown, under circumstances unexplained, an attempt on a particular day to use the dock for the "A.G. Lindsay" had failed. Such a statement is wholly insufficient to cause a review of the charge of fraud. With the failure of this charge all complaint as to the stability and utility of the dock for its contemplated purpose ends, since clause 2 not only negatives any suggestion of a warranty of fitness, but makes the appellants themselves admit that it was fit.

The rest of the appellants' case depends upon the argument that, as the term had not expired, the time for re-delivery of the dock had not arisen at the date of the writ, and it was therefore impossible to claim damages for its loss. If the claim of the respondents depends merely upon a covenant to deliver at the expiration of the lease by effluxion of time this contention ought, in their Lordships' opinion, to prevail.

The statement of claim was not and could not have been based upon any breach of a covenant so construed, nor could amendment remedy this defect. But their Lordships do not think that it need be so regarded. It is admitted that the dock is lost past recovery; it is also established that the appellants have not paid the rent due under the lease, nor have they effected the insurance provided by clause 3. These breaches gave the respondents the right to retake possession of the dock and terminate the lease; and though no actual attempt to take possession was made, the institution of these proceedings, with a claim for rent up to the writ and subsequent damages, is in itself sufficient evidence of the lessors' intention in this respect.

The appellants have not, indeed, suggested that the lease is still on foot; nor, even if it were possible to establish that position, could it have been done without payment of the rent and repair of the breach of the broken covenant to insure. So regarded, the covenant for re-delivery has arisen and might have been properly included in the statement of claim though the form leaves much to be desired in this respect. The substance to which their Lordships look is, however, a claim for the value of something that has been lost in circumstances rendering the appellants contractually responsible for its value, and this can be maintained. Though Mr. Justice McPhillips' judgment in the Court of Appeal is not, as reported, quite clear upon this matter, it appears that this was its true effect. He says:—

> "As to the rent, it cannot be allowed for a longer period than up to the time of the commencement of action, the respondent then electing to have damages assessed as of that date (the action was brought before the expiry of the demise)."

and with this conclusion their Lordships agree.

The judgment of Mr. Justice Galliher with which the Chief Justice agrees, is confined to the question of value and to the construction of the covenant to insure, and this can be better dealt with in considering the merits of the cross-appeal.

This cross-appeal challenges the judgment of the Appeal Court on two grounds: the one that the value of the dock, placed at $35,400, is insufficient; and the other that the covenant to insure was broken, and that its breach resulted in the loss of the total $75,000.

Upon the first point all the judges in the Court of Appeal are in agreement as to the value. Their judgments depend upon the fact that Mr. Paterson, on behalf of the appellants, on the 1st May, 1914, made for the purpose of customs an affidavit as to the value, stating that to the best of his knowledge and belief the value of the floating dry-dock was $34,500. Attempts were made to expain that this affidavit was given for the purpose of customs, so that the value would consequently be only modestly estimated. Such arguments naturally found no favour before the Court of Appeal, and cannot prevail before their Lordships.

There remains only the question raised by the respondents as to the breach of the covenant to insure. That it is broken is

common ground. The respondents say, first, that it was impossible of performance, and secondly, that had it been effected, it would not have covered the loss.

With regard to the impossibility of its performance, few words need be said. There is no phrase more frequently misused than the statement that impossibility of performance excuses breach of contract. Without further qualification such a statement is not accurate, and indeed, if it were necessary to express the law in a sentence, it would be more exact to say that precisely the opposite was the real rule. But it is unnecessary to examine this matter, since no question of impossibility can arise in the present case. The appellants did indeed attempt to obtain a policy of insurance, and they failed to do so, largely owing to the fact that the additional structure which they added to the dock caused the insurance company to decline ; but there is nothing to show that higher rates would not have effected the insurance, and the covenant contains no limitation to suggest that insurance is only to be effected at the current premium.

It is then urged that the policy was only intended to cover the risks by voyage from Seattle to Victoria and any other journeys by sea which, in the course of their use of the dock, the appellants thought fit to make. Their Lordships do not accept this view of the covenant. It must be read in connection with the subject-matter of the lease and the terms in which it is framed. The subject-matter of the lease was undoubtedly a dock, which it was contemplated by both parties was to be used in the Victoria harbour, and though it might have been possible that it could have been taken elsewhere, yet the terms of the covenant, which provide that the insurance shall be kept on foot throughout the whole period of the lease, and not merely effected from voyage to voyage, in their Lordships' opinion negative the view that it was only against risk in its journeyings by sea that the insurance was to be taken out. There is no statement in the covenant as to the form of policy that is to be used ; it must, therefore, be assumed to be an ordinary policy applicable to such a structure both in course of transit and in course of use. It was to insure against "marine risk," which cannot be better described than as against "the hazards of the sea." If while in dock, either while the caissons were being built or while the dock was being submerged, owing to any marine risk the dock had been lost, this loss the policy would have covered : but in truth no such risk or peril caused its destruction. The harbour was peculiarly quiet, and it is plain that it was no conditions of wind or wave that caused the dock to capsize. It was destroyed because of its own inherent unfitness for the use to which it was put—an unfitness which the appellants have prevented themselves from raising by reason of their own covenant.

It is not desirable to attempt to define too exactly a "marine risk" or a "peril of the sea," but it can at least be said that it is some condition of sea or weather or accident of navigation producing a result which but for these conditions would not have

occurred. To use the words of Lord Herschell in *Wilson* v. *The Owners of the Cargo of the "Xantho"* (12 A.C. at p. 509) :—

> "I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. . . . There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure."

The words there occurred in a bill of lading, and the claim arose with regard to the loss of goods covered by the document. But Lord Herschell points out (p. 510) that the phrase has no different meaning whether it occurs in the insurance of the ship or of the goods. In 1912 A.C. 561, in the case of *E. D. Sassoon and Company* v. *The Western Insurance Company*, a store of opium was lost in a hulk moored in a river by the percolation of water through a leak caused by the rotten condition of the boat. The decay was so covered by copper sheathing that, although the vessel was properly inspected, it was not and it could not be detected. It was held by this Board that the loss was not a loss within the phrase "perils of the sea and all other perils," and Lord Mersey, in delivering the opinion of the Board, states (at p. 563) :—

> "There was no weather nor any other fortuitous circumstance contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea."

Their Lordships can see no difference between the circumstances of this case and the principle there enunciated. It is just as though a vessel, unfit to carry the cargo with which she was loaded, through her own inherent weakness, and without accident or peril of any kind, sank in still water. In such a case recovery under the ordinary policy of insurance would be impossible. An insurance against "the perils of the sea or other perils" is not a guarantee that a ship will float, and in the same way in the present case had such a policy been effected it would not have covered a loss inevitable in the circumstances due to the unfitness of the structure, and entirely dissociated from any peril by wind or water. The measure of the damage for breach of the covenant, therefore, is purely nominal and the cross-appeal must fail.

As, therefore, both the appellants and the respondents have failed in their independent appeals, their Lordships will humbly advise His Majesty that both should be dismissed, and that no costs should be granted in either case.

In the Privy Council.

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