WN Hillas & Co Ltd v Arcos Ltd [1932] Int.Com.L.R. 07/05

House of Lords before Lords Tomlin, Warrigton of Clyffe, Thankerton. Macmillan; Wright. 5th July 1932

Lord Tomlin. My Lords,

On the 28th July, 1931, the Court of Appeal ordered a judgment in the Appellants' favour against the Respondents for £30,000 damages with costs to be set aside and directed judgment to be entered for the Respondents.

The action was one in which the Appellants sought to make the Respondents liable in damages for breach of a contract for the sale and purchase of Russian softwood timber for delivery in 1931 alleged to have been constituted by a document in writing signed by the representatives of the parties on the 21st May, 1930, and a letter dated the 22nd December, 1930, written by the Appellants to the Respondents and purporting to exercise an option expressed to be conferred by Clause 9 of such document.

The writ was issued on the 30th January, 1931. The case was set down in the Commercial List. The breach alleged in the heads of claim was that the Respondents had on the 20th December, 1930, contracted to sell to a third party the whole of the softwood timber which the Respondents should import into the United Kingdom during the Russian timber season of 1931 and by letter dated the 24th December, 1931, had repudiated the option.

The only defence set up by the Points of Defence was that the agreement contained in the document of the 21st May, 1930, had been cancelled by mutual consent in the month of July, 1930, and that there was therefore no option open to the Appellants when the letter of the 24th December, 1931, was written.

The action was tried in May, 1931, by Mr. Justice Roche with a City of London special jury. The question left to the jury was whether the option contained in Clause 9 of the document of the 21st May, 1930, was subsisting in the month of December, 1930, or whether it had been cancelled. The jury found for the Appellants.

It was agreed that the question of the amount of the damages should be left to be determined by Mr. Justice Mackinnon at a future date as Mr. Justice Roche was about to go on circuit, and after hearing argument on some points of law not material for the present purpose Mr. Justice Roche gave judgment for the Appellants for an amount to be assessed with costs and directed that if the Respondents desired to appeal their time should be extended until one month after the amount of damages had been ascertained and the judgment containing the amount so ascertained drawn up. The jury was then discharged.

No formal judgment embodying the conclusions of Mr. Justice Roche was drawn up.

In June, 1931, the matter was proceeded with before Mr. Justice MacKinnon for the purpose of having the damages assessed.

At this hearing before Mr. Justice MacKinnon the Respondents for the first time raised the point that there was no contract at all, contending that the document of the 21st May, 1930, did not contain a sufficient description of the goods to be sold to enable them to be identified, and that it in fact contemplated in the future some further agreement upon essential terms. No amendment was made in the pleadings putting the plea into a definite form.

The Appellants objected that it was too late for the Respondents to take the point and that in any case the point was not good.

The learned Judge held that the point was not well founded and that therefore it was not necessary to consider whether the Respondents were too late in taking it. He further assessed the damages at £30,000 and gave judgment for the Appellants for that amount with costs. A formal judgment was drawn up, the preamble of which stated that the hearing of the action had been resumed before Mr. Justice MacKinnon for assessment of damages.

The Respondents appealed. The Appellants cross-appealed upon the amount of the damages, which they regarded as insufficient. This cross-appeal was dismissed by the Court of Appeal and in that dismissal the Appellants have acquiesced.

The Respondents' appeal succeeded before the Court of Appeal, the Court being unanimously of opinion that there was no con- tract and that the Respondents were not too late in taking the point. Accordingly, by the formal order of the Court of Appeal, the judgment in the Appellants' favour was set aside and judgment was directed to be entered for the Respondents with costs, other than the costs of the issue of cancellation, which were given to the Appellants.

It is of this order that the Appellants complain before your Lordships' House.

Before examining the relevant documents it will be convenient to explain the respective positions of the parties and the circumstances of the Russian softwood timber trade as appearing from the evidence.

The Appellants are an English company carrying on in this country the business of timber merchants, the governing director being Mr. William Newland Hillas.

The Respondents are an English limited company through which the Russian Soviet Government conducts its trading operations in this country.

Russian softwood timber is of at least two kinds, viz., whitewood and redwood. Of these kinds there are various qualities. Quality is to some extent dependent upon the districts in which the timber is grown.

Some timber is sold sorted into qualities, other timber is sold unsorted.

Again, the timber is prepared for market in a great number of different sizes.

The kinds, qualities and sizes which a purchaser requires must to some extent determine the port from which any consignment to him is shipped.

The timber is cut in the winter for the following season, and in January the Respondents first prepare stock notes giving estimates of the quantities which will be available at the various ports of shipment of the different kinds, qualities and sizes of timber. From time to time supplementary stock notes are prepared during the season as further or better information becomes available.

The shipments begin as soon as there is open water at the ports of shipment, that is about May from Leningrad and about June from the White Sea. The shipments continue through the season. The first open water shipments are generally the most sought after.

In each year prior to 1931 an official price list was issued by the Respondents showing the prices for the different kinds, qualities and sizes of Russian softwood timber for the current season.

As, however, on November 20th, 1930, the Respondents sold the whole of the output of the 1931 season to the Central Softwood Buying Corporation the only list issued for 1931 was the list (referred to in the proceedings as the yellow list) of the c.i.f. prices at which the Central Softwood Buying Corporation as sole selling agents were free to sell the 1931 output to the public.

The document of the 21st May, 1930, is in the following terms : -

" Heads for the Purchase of Russian Goods.

We agree to buy 22,000 standards of Softwood Goods of fair specification over the season 1930 under the following conditions:—

(1) On all purchases made under this present contract buyers to receive a bonus of 7 per cent. on the f.o.b. value, and a similar allowance on all previous contracts made by buyers for 1930 shipment.

If, however, buyers increase their purchase up to 30,000 standards the bonus to be 7½ per cent. on the f.o.b. value.

(2) All 1930 purchases to be invoiced as per new revised schedule on the usual c.i.f. terms, less 2½ per cent. discount for cash, or four months acceptances, at buyers option; except 50 per cent. of the purchases prior to 20th May, 1930, on which buyers are only entitled to a 70 per cent. reduction between the old official prices and the new revised prices.

(3) No extras to be charged on account of size of steamer for goods ordered to ports where 900 standard steamers can be shipped if ordered before 15th September.

Goods to be shipped together with goods for other receivers. Small outports usual extras.

(4) Payment: Buyers undertake to pay on the usual trade terms, viz., 2½ per cent. discount for cash, or four months bills, at buyers' option.

(5) If buyers should be unable to meet all the bills drawn as per the foregoing paragraph, or part of them, for a proportion of the unsold goods, sellers agree to renew such bills but not for a period of more than three months.

(6) Buyers to arrange shipping dates and loading in- structions according to the readiness of the goods purchased.

(7) Buyers shall have the option of increasing this contract up to 50,000 standards under the same terms for shipment during the season, subject to the goods being unsold.

(8) Should sellers at any time during 1930 reduce their new scale prices, or give any advantage to any one buyer, which in effect constitutes a general reduction in cost prices, such reduction shall be made applicable to all purchases which buyers have made during the year.

This shall also particularly apply to any reduction that may be made by sale later in the season to the existing Syndicate, or sucessors, or their nominees.

(9) Buyers shall also have the option of entering into a Contract with sellers for the purchase of 100,000 Stds. for delivery during 1931. Such contract to stipulate that whatever the conditions are, buyers shall obtain the goods on conditions and at prices which show to them a reduction of 5 per cent. on the f.o.b. value of the official price list at any time ruling during 1931. Such option to be declared before the 1st January, 1931.

(10) A clause to be drawn up later regarding the question of consignment of up to 25,000 standards.

(11) This agreement cancels all previous agreements."

On the 22nd December, 1930, the Appellants, being at that time aware of the contract of the 20th November, 1930, wrote to the Respondent a letter containing the following passage :-

" We beg to give you formal notice that we hereby exercise the option conferred upon us under our agreement with you for the purchase of 100,000 standards of soft wood of fair specification for delivery during 1931. The terms of this option are set out in Clause 9 of this contract of which one part still bears date 21st May, 1930."

Now, the plea of cancellation having been negatived by the verdict of the jury, it is plain that the letter of the 22nd December, 1930, together with the earlier document of the 21st May, 1930, constituted a binding contract unless upon the true construction of these documents the essentials of a contract were absent or there was nothing more than what has been called an agreement to make an agreement, that is, something which in law is no agreement at all.

Commercial documents prepared by business men in connection with dealings in a trade with the workings of which the framers are familiar often by reason of their inartificial forms confront the lawyer with delicate problems.

The governing principles of construction recognised by the law are applicable to every document and yet none would gainsay that the effect of their application is to some extent governed by the nature of the document.

On the one hand the conveyance of real estate presenting an artificial form grown up through the centuries and embodying terms of art whose meanings and effect have long since been deter- mined by the courts, and on the other hand the formless document the product of the minds of men seeking to record a complex trade bargain intended to be carried out both fall to be construed by the same legal principles and the problem for a Court of Construction must always be so to balance matters, that without violation of essential principle the dealings of men may as far as possible be treated as effective and that the law may not incur the reproach of being the destroyer of bargains.

The principles are not in dispute. It is in the application of them to the facts of a particular case that the difficulty arises and the difficulty is of such a kind as often to afford room for much legitimate difference of opinion and to present a problem the solution of which is not as a rule to be found by examining authorities.

In the present case one or two preliminary observations fall to be made.

First, the parties were both intimately acquainted with the course of business in the Russian Softwood timber trade and had without difficulty carried out the sale and purchase of 22,000 standards under the first part of the document of the 21st May, 1930. Secondly, although the question here is whether clause 9 of the document of the 21st May, 1930, with the letter of the 22nd December, 1930, constitutes a contract the validity of the whole of the document of the 21st May, 1930, is really in question so far as the matter depends upon the meaning of the phrase " of fair specification."

Thirdly it is indisputable having regard to Clause 11, which provides that "this agreement cancels all previous agreements" that the parties intended by the document of the 21st May, 1930, to make and believed that they had made some concluded bargain. The case against the appellants is put on two grounds.

First it is said that there is in clause 9 no sufficient description of the goods to be sold and

Secondly it is said that clause 9 contemplates a future bargain the terms of which remain to be settled.

As to the first point it is plain that something must necessarily be implied in clause 9. The words *" 100,000 standards "* without more do not even indicate that timber is the subject matter of the clause. The implication at the least of the words *"of softwood goods*" is in my opinion inevitable and if this is so I see no reason to separate the words "of fair specification" from the words "*of softwood goods.*" In my opinion there is a necessary implication of the words "*of softwood goods of fair specification"* after the words "*100,000 standards*" in clause 9.

What then is the meaning of "*100,000 standards of softwood goods of fair specification, for delivery during 1931 "?*

If the words "of fair specification" have no meaning which is certain or capable of being made certain then not only can there be no contract under clause 9 but there cannot have been a contract with regard to the 22,000 standards mentioned at the beginning of the document of the 21st May, 1930. This may be the proper conclusion but before it is reached it is I think necessary to exclude as impossible all reasonable meanings which would give certainty to the words. In my opinion this cannot be done.

The parties undoubtedly attributed to the words in connection with the 22,000 standards, some meaning which was precise or capable of being made precise. Lord Justice Scrutton laid stress upon the evidence of Mr. Hillas as indicating a different view on, the part of the parties. I am unable to think that upon a question of construction such evidence if directed to the intention of the parties was admissible at all. In fact, I think Mr. Hillas' evidence was misunderstood. It really amounted in my opinion to nothing more than a statement as to how the parties would in the first in- stance proceed just as on a purchase of property at its fair value the parties would no doubt first endeavour to reach agreement as to the fair value.

Reading the document of the 21st May, 1930, as a whole and having regard to the admissible evidence as to the course of the trade, I think that upon their true construction the words "*of fair specification over the season, 1930*," used in connection with the 22,000 standards, mean that the 22,000 standards are to be satis- fied in goods distributed over kinds, qualities and sizes in the fair proportions having regard to the output of the season 1930, and the classifications of that output in respect of kinds, qualities and sizes. That is something which if the parties fail to agree can be ascertained just as much as the fair value of a property.

I have already expressed the view that Clause 9 must be read as " *100,000 standards of fair specification for delivery during 1931* " and these words I think have the same meaning, *mutatis mutandis* as the words relating to the 22,000 standards. Thus, there is a description of the goods which if not immediately yet ultimately is capable of being rendered certain.

The second point upon Clause 9 that it contemplates a future agreement remains to be considered.

The form of the phrases ' the option of entering into a "contract" and "such contract to stipulate that" upon which stress has been laid by the Respondents seems to me unimportant. These phrases are but an inartificial way of indicating that there is no contract till the option is exercised. The sentence that such contract is to stipulate that whatever the conditions are the buyers are to obtain the goods at a certain reduction is more difficult. The words " whatever the conditions are " being governed by the word " that " which follows the words " to stipulate " must be intended to be part of the contract. If so the word conditions cannot mean terms of the contract, but must connote some extrinsic condition of affairs and the condition of affairs referred to is I think the conditions as to supply and demand which may prevail during 1931.

Upon this view of the matter it cannot I think be said that there is nothing more than an agreement to make an agreement.

It was also urged as a minor point that there was no provision as to shipment and that this was an essential of such a contract.

I am not prepared without further consideration to accept the view that in the absence of a provision in relation to shipment there can be no contract in law in such a case as the present.

In my opinion, however, the point does not arise here. Clause 9 is one of the clauses containing the conditions upon which the sale of the 22,000 standards is made. This fact together with the presence of the word "also" in Clause 9 satisfies me that upon the true construction of the document the sale conditions in relation to the 22,000 standards are so far as applicable imported into the option for the sale of the 100,000 standards and in particular that Clause 6 relating to shipping dates and loading instructions is so imported.

Reference was made in the course of the arguments before your Lordships and in the judgments in the Court of Appeal to the unreported case before your Lordships' House of ***May & Butcher Limited v. the King***.

In the agreement there under consideration there was an express provision that the price of the goods to be sold should be subsequently fixed between the parties. Your Lordships' House reached the conclusion that there was no contract, rejecting the Appellants' contention that the agreement should be construed as an agreement to sell at the fair or reasonable price or alternatively at a price to be fixed under the arbitration clause contained in the agreement.

That case does not in my opinion afford any assistance in deter- mining the present case the result of which must depend upon the meaning placed upon the language employed.

My Lords, it is only after anxious consideration that I recommend to your Lordships a conclusion upon the construction of the relevant documents contrary to that unanimously reached by the Court of Appeal. This is my justification for having stated my reasons at some length.

This conclusion renders it unnecessary to determine whether the point as to there being no contract in law was open to the Respondents when they first took it, but as the matter was dealt with by the Court of Appeal and was argued before your Lordships I desire to say that herein I agree with the conclusion of the Court of Appeal, though I should not be prepared without further consideration to accept all that was said in that Court with reference to what need or need not be pleaded. I may add that in my opinion whenever an amendment in the pleadings is allowed in the course of an action, the appropriate alteration in the formal pleadings should always be insisted upon.

It was further urged on behalf of the respondents before your Lordships that if there was a contract still it was one upon which only nominal damages should have been awarded, first, because the Respondents were free to give to other customers an equal or greater reduction in price, and, secondly, because there was no adequate material upon which the damages could be assessed.

Neither of these grounds appears to me to be well founded.

With regard to the first ground I think the phrase " *the official price list at any time ruling during 1931* " makes plain that the reduction given is from the general operative price and not from a merely nominal price which is not being adhered to in actual practice.

With regard to the second ground the absence of material was due in part to the fact that the Respondents had broken their contract and had not therefore issued an official list for 1931 in the same form as in earlier years, and in part to the fact that they abstained from placing before the Judge the stock notes for 1931 or other information which they alone could furnish as to the output for 1931. The learned judge did the best he could with the material before him and I cannot think that those to whose default the deficiency of material was due can complain of the result on the ground of such deficiency.

I do not think that the learned judge made any error in principle in assessing the amount of the damages.

In the result therefore I am of opinion that the appeal should be allowed and that the judgment of the Court of Appeal should be reversed and that of the Court of first instance should be restored with costs here and below.

I beg to move your Lordships accordingly.

Lord Thankerton. My Lords,

I have had the privilege of considering the opinion which has been delivered by my noble and learned friend on the Woolsack, and in which he has fully narrated the material facts of this case and the terms of the document of 21st May, 1930.

Subject to some doubts that I have felt as to the proper construction of the words " of fair specification " and as to which I desire to add some observations, I find myself in entire agreement with the construction which my noble and learned friend has put upon the document of 21st May, 1930, and I also agree with his conclusion that it is open to the Respondents to maintain that there was no concluded agreement.

The question on which I have had doubt is whether the words " *of fair specification*," on their proper construction, will enable the subject to be identified by the Court. In other words, do they provide a standard by which the Court is enabled to ascertain the subject matter of the contract, or do they involve an adjustment between the conflicting interests of the parties, which the parties have left unsettled and on which the Court is not entitled to adjudicate.

Does the phrase mean a specification which is fair as between the interests, on the one hand, of the seller in respect of the stock of wood, comprising various kinds of wood and various qualities and sizes, available for sale in the season of

1931, and, on the other hand, the interests of the buyer in respect of the requirements of his trade during that season ? Or does the phrase mean a fair selection from the seller's stock of wood available for sale in that season? If the former construction be the proper one, I would be of opinion that the Court would not be entitled to adjudicate between the opposing interests of the two parties. If the latter construction be the proper one, the ascertainment of a fair selection from the seller's available stock is within the province of the Court; in that case the Court is applying a standard which is provided by the contract, and is thereby merely identifying the subject matter of the contract.

While I have had considerable doubt on this question of construction, I am affected by the consideration that the contract is a commercial one and that the parties undoubtedly thought that they had concluded a contract, and I have come to the conclusion, in agreement with the noble Lord, that the second alternative construction above stated is the proper one and that there was here a concluded contract. I therefore concur in the motion proposed.

Lord Wright. My Lords,

The determination of this case turns on the true construction of the document of the 21st May, 1930, the full terms of which are already before your Lordships, or, to state the problem more precisely, the true construction of a part of that document, namely, Condition 9. This is a question of law on which evidence is not relevant, except to the extent clearly stated by Lord Dunedin in ***Charrington v. Wooder***, 1914 A.C. at p. 82, where the words " *fair market price* " were to be construed.

" Now, in order to construe a contract the Court is always entitled to be so far instructed by evidence as to be able to place itself in thought in the same position as the parties to the contract were placed, in fact, when they made it — or, as it is sometimes phrased, to be informed as to the surrounding circumstances. As Lord Davey says in the case of Bank of ***New Zealand v. Simpson*** *(2), quoting from a decision of Lord Blackburn's, ' The general rule seems to be that all facts are admissible (to proof) which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used.' "*

The effect in the present case of that class of evidence, which was not very precisely given, may thus be summarised. The Appellants, who were plaintiffs in the action, are a company carry- ing on business as timber merchants and importers on a large scale in this country: the Respondents are an English limited company, who handle in the British Islands as agents for Exportles of Moscow the timber exported from Russia for these islands. This timber is flipped from a number of ports, in particular amongst others Leningrad and the White Sea ports : the timber is manufactured at various mills in the different districts in Russia and is of various kinds, in particular white wood and red wood, and varies to some extent according to the district where it was grown : it is sawn up at the mills in various lengths and in various scantlings of each length, so that a very complex range of descriptions is involved. The programme of the year's manufacture is prepared early in the year in the form of stock notes, which contain specifications of the different descriptions, lengths, scantling, intended to be produced, distinguished according to regions, mills and shipping ports. The actual sawing proceeds principally in the spring and summer, and shipment is made during the season, that is the period over which shipment is possible by reason of the ports being ice free; shipment begins at what is called first open water or F.O.W., which is at Leningrad about May in each year, and, in the White Sea, about June, and no doubt there is competition among buyers for early shipments. Shipping ends with the close of navigation at Leningrad about January and, in the White Sea, about November. Each year the shippers, or the Respondents, have published an official price list specifying prices for each description and scantling, with the various ports of shipment and on a c.i.f. basis for destinations primarily of a range of East Coast ports, but subject to variation in respect of freight if buyers designate other British Ports. As goods are ready, or becoming ready, for shipment, stock notes are prepared and notice of readiness may be given to buyers so that they can give final shipping instructions.

By letter dated the 22nd December, 1931, the Appellants claimed to exercise the option under Condition 9 of the agreement of the 21st May, 1930, but the Respondents repudiated their right on the ground that the agreement, including the option, had been can- celled. The Respondents had in fact by a contract made on the 20th November, 1930, with the Central Softwoods Corporation Limited, sold to that company their entire production for the British Islands for the 1931 season, minimum 500,000, maximum 600,000 standards, and had bound themselves not to ship during that season to the British Islands otherwise than under the contract. The question now to be considered was not raised by the Respondents until the hearing as to damages before MacKinnon. J., who continued the trial of the action after a Special Jury directed by Roche J. had decided against the Respondents' contention that the agreement of the 21st May, 1930, had been cancelled : until then it had been neither pleaded nor submitted by the Respondents that the agreement was not binding. That contention, however, which was rejected by MacKinnon J., who entered judgment for the Appellants for £30,000 and costs, found favour on appeal with the Court of Appeal, who ordered judgment to be entered for the Respondents. From that decision the matter now comes before your Lordships' House.

The document of the 21st May, 1930, cannot be regarded as other than inartistic, and may appear repellent to the trained sense of an equity draftsman. But it is clear that the parties both intended to make a contract and thought they had done so. Business men often record the most important agreements in crude and summary fashion : modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects, but, on the contrary, the Court should seek to apply the old maxim of English law, " *verba ita sunt intelligenda ut res magis valeat quam pereat*." That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the con- tractual intention is clear but the contract is silent on some detail. Thus in

contracts for future performance over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain: with that implication in reserve they are neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage. Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced, if the fair meaning of the parties can be extracted.

The document in question is expressed to be " *Heads for the Purchase of Russian Goods."* Clause 11, the final clause, is-- This agreement cancels all previous agreements." It is signed by R. N. Hillas and J. Axenoff, who are admittedly in fact agents for the Appellants and Respondents respectively : it does not other- wise define the parties, but there can be no doubt on a fair construc- tion who the parties are. The first paragraph runs : " We (that is, the Appellants) agree to buy 22,000 standards of softwood goods of fair specification over the season 1930, under the following conditions:" the conditions then follow in Clauses 1 to 11. The first six conditions deal primarily with the purchase of 22,000 standards. Clauses 1, 2 and 3 deal with price, which is to be according to the new revised schedule for 1930 purchases, subject to certain, bonuses and discounts: the parties were in fact referring to the Schedule issued by the Respondents. Clauses 4 and 5 deal with terms of and other matters relating to payments: Clause 6 deals with shipping dates in these general terms— ' *Buyers to arrange shipping dates and loading instructions according to the readiness of the goods purchased."* The contract is clearly an instalment contract " *over the season 1930*," since the whole quantity could not be delivered in one shipment; it is obvious that the parties either cannot or do not desire to fix precise dates for the plurality of shipments which is contemplated; hence they leave the apportionment of these shipments over the period to be determined as circumstances require, first, by the readiness of the goods, including no doubt ports of shipment, which will depend on the position of the Respondents, who accordingly will have to declare it from time to time, and secondly, on the action of the Appellants, who on receiving these declarations will be entitled to a reasonable time on each occasion in which to give the necessary shipping instructions in accordance with which the Respondents will have to provide tonnage, because it is a c.i.f. contract. Such matters may require, as the performance of the contract proceeds, some consultation and even concessions between the sellers and the buyers, but there is no uncertainty involved because, if there eventually emerge differences between the parties, the standard of what is reasonable can, in the last resort, be applied by the law, which thus by ascertaining exact dates makes precise what the parties in the contract have deliberately left undefined. Hence in view of this legal machinery id certum est quod certum reddi potest. It is easy to find parallels in the authorities where even greater vagueness or elasticity appears in the contract, thus, in ***Jackson v. Rotax Motor & Cycle Co.,*** 1910, 2 K.B. 937, there was a contract for the sale of a large quantity of motor horns, delivery as required : the Court of Appeal found no difficulty in " reading this as a contract in which deliveries are to be made as and when required by the purchasers." In the ***Dominion Coal Co. v. Dominion Iron & Steel Co.,*** 1909, A.C. 293, the Privy Council found no difficulty in construing a contract as being for the sale by the coal company of coal reasonably suitable in quality to the extent that the same could be obtained by the reasonable and proper working of the designated mines over a period of many years and directing an assessment of damages. As to price, that is specifically fixed in this contract by the clauses which have reference to the Respondents' new revised schedule supplemented by a further provision in Clause 8 that the Appellants were to have the advantage of any beneficial terms granted to any other buyers which directly or in effect reduced the price paid or consideration given for the goods in 1930. Clause 7 gave an option to the Appellants of increasing the contract quantity to 50,000 for shipment during the (sc. 1930) season under the same terms. That option was, in fact, exercised up to 40,000 standards. Clause 10 has reference to a prospective consignment to the Appellants as agents for sale on commission: but as that scheme did not eventuate, it may be disregarded.

I have, so far, said nothing about the words " *of fair specification* " : the only relevant question is whether these words were too vague or uncertain to give effect to the contractual intention of the parties, and I merely observe here that no one has suggested that any difficulty was experienced in 1930 in applying these words to the actual delivery from time to time of the different installments that made up the 40,000 standards. I shall discuss these words more fully when I turn, as I now do, to consider Condition 9, which is the crux of this case.

That condition must not be construed as if it stood by itself : it is an integral part of the whole agreement: the option under it is given as one of the conditions under which the Appellants agree to buy the 22,000 standards, and is part of the consideration for their agreeing to do so. It is accordingly a binding offer, which the Appellants are entitled, by accepting before the 1st January, 1931, to turn into a contract if other objections do not prevail. Some confusion has been imported, as I think, into the question by dwelling on the exact words—" the option of entering into a contract," and it is said that this is merely a contract to enter into a contract, whereas in law there cannot be a contract to enter into a contract. The phrase is epigrammatic, but may be either meaningless or misleading. A contract de praesenti to enter into what, in law, is an enforceable contract, is simply that enforceable contract, and no more and no less : and if what may not very accurately be called the second contract is not to take effect till some future date but is otherwise an enforceable contract, the position is as in the preceding illustration, save that the operation of the contract is postponed. But in each case there is eo instanti a complete obligation. If, however, what is meant is that the parties agree to negotiate in the hope of effecting a valid contract, the position is different. There is then no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing : yet even then, in strict theory, there is a contract (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal, unless a "jury think that the opportunity to negotiate was of some appreciable value to the injured party. However, I think the words of Condition 9 in this case simply mean that the Appellants had the option of accepting an offer in the terms of Condition 9, so that when it was exercised a contract at once came into existence, unless indeed the terms of the option embodied in the clause were not sufficiently certain and complete : before considering this matter I

ought to deal with a further contention based on a construction of the second paragraph of Clause 9, which is in these terms : *" such contract to stipulate that, whatever the conditions are, buyers shall obtain the goods on conditions and at prices which show to them a reduction of 5 per cent. on the f.o.b. value of the official price list at any time ruling during 1931."*

It is argued that these words read with the preceding paragraph confirm the view that the option was merely for the preparation and agreeing of a formal contract, because the words " *whatever the conditions are* " mean " *whatever the conditions of the contract are*." Such an argument involves adding the words "*of the contract,"* which are not expressed, and on other grounds I do not think that it is correct. I think the word " conditions " refers to conditions affecting other people in the trade, primarily as regards price, and such analogous advantages as are dealt with in Condition 8 in connection with the 1930 season. What the Appellants are stipulating is that they are to have, throughout the year 1931, such conditions of this character and such prices as will secure to them in any event a clear 5 per cent. advantage over other buyers who might compete. On a fair reading of the words, I think the contract is clear and complete in its stipulations as to price. It was contended that no official price list might be issued in 1931, so that the contract price was in that way uncertain and contingent.

But in past years in the conduct of this business it had been an invariable practice of the Respondents to issue such a list: the evidence and finding in the present case are that an official price list was issued in 1931; indeed it is difficult to see how the Respondents could carry on the business unless it was issued. I think that as regards the definition of the machinery for fixing the price there is sufficient certainty here for a business transaction: the issue in 1931 of the official price list is not a mere contingency but a practical certainty: it is unnecessary to consider what would have been- the legal position if the Respondents had ceased to carry on business or had been dispossessed by war or revolution. Such considerations are not relevant to determining whether there is a good contract or not, but relate to such questions as frustration or breach of the contract. The description of the goods offered to be sold in 1931, in Clause 9, is also in my judgment sufficient in law. I so hold simply as a matter of construction, having regard to the context. " 100,000 standards," divorced from the rest of the agreement, no doubt would be too uncertain : abstractly they might be incapable of any definite meaning. But the definition comes from the context: the agreement is headed as being for the purchase of Russian goods which to this extent must define the 100,000 standards; the words 50,000 standards in Clause 7 have clearly to be read as embodying the same description as in the first paragraph of the agreement, that is, standards of softwood goods of fair specification and, in my judgment, the same description must apply to the 100,000 standards in Clause 9, not as a matter of implication but of construction. Hence the 100,000 standards are to be of Russian softwood goods of fair specification. In practice, under such a description, the parties will work out the necessary adjustments by a process of give and take in order to arrive at an equitable or reasonable apportion- ment on the basis of the Respondents' actual available output, according to kinds, qualities, sizes and scantlings; but, if they fail to do so, the law can be invoked to determine what is reasonable in the way of specification, and thus the machinery is always available to give the necessary certainty. As a matter of strict procedure, the sellers would make a tender as being of fair specification, the buyers would reject it and the Court or an arbitrator decide whether it was or was not a good tender. It is, however, said that in the present case the contract quantity is too large, and the range of variety in descriptions, qualities, and sizes, is too complicated to admit of this being done. But I see no reason in principle to think such an operation is beyond the powers of an expert tribunal, or of a judge of fact assisted by expert witnesses. I cannot find in the Record any evidence to justify this contention of the Respondents even if such evidence be at all competent. On the contrary it seems that a prospective specification for the 500,000 or 600,000 standards which formed the subject of the con- tract of the 20th November, 1930, between the Respondents and the Central Softwood Corporation, Limited, was agreed between these parties at Moscow in a few days, which appears to confirm that the ascertainment of a fair specification of Russian softwood goods, even for a very large quantity and over a whole season, is not of insuperable difficulty to experts. Accordingly I see no reason to think that, as regards the quality and description of the goods, the contract is either uncertain or incomplete. Nor can it justly be objected that, though a fair and reasonable specification may not be impossible of ascertainment, the reasonable specification is impossible. The law, in determining what is reason- able, is not concerned with ideal truth, but with something much less ambitious, though more practical.

There still remains the question of shipping dates or times or ports of delivery. I think here again, as matter of construction, Clause 9 is to be read as embodying Clause 6, which therefore I think applies equally to the 100,000 standards as to the 40,000 standards. I have explained my view of the operation and effect of that clause. If I were wrong in that, I should still regard the matter as sufficiently dealt with by the term which the law would imply in such a case, viz., that the deliveries are to be at reason- able times: Section 29 (2) of the Sale of Goods Act, 1893, applies, I think, to a contract such as this where delivery is to be by instalments, equally with a contract under which there is only to be a single delivery, and imports the standard of reasonable time, which by Section 56 of the same Act is a question of fact, no doubt to be determined in view of all the relevant circumstances, however complicated. In my judgment the contract is neither uncertain nor incomplete as regards times of delivery or shipment.

In the result I arrive at the same conclusion as MacKinnon J., viz., that the contract is valid and enforceable and that the Appellants are entitled to recover damages from the Respondents for its repudiation. The judgment of the Court of Appeal was otherwise. Apart from their conclusion that Condition 9 was no more than an arrangement to negotiate in the future terms of a new contract for 1931, they held that in any view Condition 9 was un- certain and incomplete. Scrutton L.J. held that "C*onsidering the number of things left undetermined, kinds, sizes and quantities of goods, times and ports and manner of shipment .... which had in this case to be determined by agreement after negotiation*," the option clause was not an enforceable agreement. With respect to the learned Lord Justice, and for the reasons I have already

explained, I cannot agree with that conclusion. He seems to base his conclusion in part at least on the evidence of Mr. Hillas as to how in working out the contract in practice there would be mutual concessions and arrangements. I do not question that, as I have already explained, this would be so, but I prefer the statement of the Learned Lord Justice at another part of his judgment that witnesses "*were not entitled to construe the agreement or give their opinion as to how it could or ought to be worked.*" The conclusion of Scrutton L.J. would in very many cases exclude in law the possibility of business men making big forward contracts for future goods over a period, because in general in such contracts it must be impossible, as I have already indicated, to specify in advance all the details of a complicated performance. Indeed, Greer L.J. ex- pressly states the view that such contracts are impossible in law, though he regrets the conclusion. He holds *"that if there are any " essential terms of a contract of sale undetermined, and therefore to be determined by a subsequent contract, there is no enforceable contract ";* he adds that the Courts have not power to make for parties a contract which in its view it is probable they would have made if there had been further negotiation to deal with matters not already decided. This latter proposition stated in general terms may be correct, but I have already explained why, in my judgment, this contract was complete and enforceable without further negotiation. It must always be a matter of construction of the particular contract whether any essential terms are left to be determined by a subsequent contract.

When the Learned Lord Justice speaks of essential terms not being precisely determined, i.e., by express terms of the contract, he is, I venture with respect to think, wrong in deducing as a matter of law that they must therefore be determined by a subsequent contract; he is ignoring, as it seems to me, the legal implication in contracts of what is reasonable, which runs throughout the whole of modern English law in relation to business contracts. To take only one instance, in ***Hoadly v. M'Laine,*** 10 Bing. 482, Tindal C.J. (after quoting older authority) said : " *What is implied by law is as strong to bind the parties as " if it were under their hand. This is a contract in which the parties are silent as to price and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth."* It is unnecessary in my judgment to multiply illustrations of this principle, which goes far beyond matters of price. After all the parties being business men ought to be left to decide what degree of precision it is essential to express in their contracts if no legal principle is violated. The learned Lords Justices (for Romer L.J. took the same view) relied, I think, mainly in regard to this aspect of the case on an unreported decision of this House in the appeal of May and Butcher against the King, which Scrutton L.J. thought compelled him to decide as he did. There was there a contract for the sale of certain goods, somewhat in- elegantly called " tentage, " with an option to buy further quantities at prices to be agreed upon between the parties when the material was ready for sale. Scrutton L.J. had taken the view in the Court of Appeal that there was an effective intention to contract to sell and buy, on the terms that if the parties did not agree the price it was by implication to be a reasonable price; but he was in a minority in the Court of Appeal and this House held that there was no binding contract there till prices had been agreed. A somewhat similar decision on another contract was given in the Court of Appeal in the case of ***Loftus v. Roberts,*** 18 T.L.R. 532, where the rule was summed up as being " Promissory expressions reserving an option as to performance do " *not create a contract.*" No one would dispute such a rule, and its application to the instrument then before the House, has been finally determined in that case, but in my judgment the Court of Appeal were not justified in thinking that this House intended to lay down universal principles of construction or to negative the rule that it must be in each case a question of the true construction of the particular instrument. In my judgment the parties here did intend to enter into, and did enter into, a complete and binding agreement, not dependent on any future agreement for its validity. But in any event the cases cited by the Court of Appeal do not, in my judgment, apply here, because this contract contains no such terms as were considered in those cases; it is not stipulated in the contract now in question that such matters as prices or times or quantities were to be agreed. I should certainly share the regret of the Lords Justices if I were compelled to think such important forward contracts as the present could have no legal effect and were mere "*gentlemen's agreements*" or honourable obligations. But for the reasons given I feel constrained to dissent from their conclusions. I have only with great diffidence arrived at this conclusion, but I am supported by reflecting that I am in agreement with a learned Judge very experienced in these questions.

I need only refer shortly to two further matters. It was con- tended on behalf of the Respondents that in any event MacKinnon J. has arrived at his award of damage on a wrong principle, and that there was no evidence on which he could find other than nominal damages. The Appellants put before the Judge a specification based on the deliveries of the 40,000 standards in 1930, multiplied by 2½ times. The Respondents, though they at that time had in their possession the specification for their programme for 1931, did not lay that before the Judge, who, doing his best with the material before him, awarded damages on the Appellants' figures of specification—taking on matters of price the Respondents' official price list for 1931, but subject to a considerable abatement for contingencies of the market. As the Respondents did not give him such help as was in their power, with the full knowledge they possessed, they cannot in my judgment complain of his decision.

One other point, viz., that with reference to the pleadings, now calls for only a passing notice here. The Respondents in their defence pleaded that the agreement was cancelled; they did not raise the plea of there being no agreement enforceable in law until the enquiry as to damages and then did not amend. The Court of Appeal thought no amendment was necessary. I think that under the Rules the Respondents were bound, if they desired to deny either the agreement in fact or its sufficiency in law, to plead so expressly in the alternative to their plea that it was cancelled. But the issue has now been discussed without amendment, and I think no further evidence of fact was involved in the new plea. In any case I think this House would have had full discretion to amend.

The Appeal should, in my judgment, be allowed with costs in this House and in the Courts below and the Judgment of MacKinnon J. restored and the case remitted to the King's Bench Division.