

E. S. & A. Robinson, Limited - - - - - *Appellants*

v.

The Wayagamack Pulp and Paper Company, Limited - - *Respondents*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC
(APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 26TH JULY, 1929.

Present at the Hearing :

VISCOUNT DUNEDIN.

LORD DARLING.

LORD WARRINGTON OF CLYFFE.

MR. JUSTICE DUFF.

SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal by the plaintiffs in the action from a decision of the Court of King's Bench (in appeal) of the Province of Quebec, Canada, dated the 20th April, 1927, by which a judgment of the Superior Court for the District of Three Rivers in the said Province in favour of the plaintiffs, dated the 24th of December, 1925, was set aside and the action dismissed with costs.

The plaintiffs are paper merchants and manufacturers of paper goods carrying on business in the city of Bristol, England.

The defendants are paper manufacturers carrying on business at Three Rivers in the Province of Quebec.

The action was instituted on the 11th October, 1921, and the plaintiffs therein prayed the Court to declare executory in the Province of Quebec a judgment against the defendants in favour of the plaintiffs rendered on the 13th May, 1921, by the King's Bench Division of the High Court of Justice, England

and to condemn the defendants to pay to the plaintiffs the sums of £30,013 10s. 1*d.*, the amount awarded to the plaintiffs as damages by the English judgment, and £283 10s., the taxed costs of the English judgment, representing in Canadian currency a total sum of \$147,446.41, with interest from the 11th October, 1921, and costs.

The Code of Civil Procedure of the Province of Quebec contemplates and recognises an action brought upon a judgment rendered out of Canada. Article 210 of the said Code provides that : " Any defence which was or might have been set up to the original Action may be pleaded to an Action brought upon a judgment rendered out of Canada."

Both parties at the trial of the case produced evidence as to the merits, and the learned Judge upon such evidence gave judgment in favour of the plaintiffs, declaring the English judgment executory and condemning the defendants to pay to the plaintiffs the sum of \$147,446.41, with interest, from the date of demand and costs. The judgment included a sum of £141 16s. 7*d.* claimed in respect of the alleged inferior quality of certain of the goods delivered by the defendants and a sum of £283 10s. 0*d.* in respect of the taxed costs of the proceedings in England.

The learned Judges of the Court of King's Bench on appeal also decided the case upon the merits, and they came to the conclusion, Tellier, J., dissenting, that the appeal should be allowed and the action dismissed.

The action was based upon seven alleged contracts for the delivery by the defendants to the plaintiffs of a total quantity of 2,300 tons of Kraft paper.

It was alleged by the plaintiffs that it was the duty of the defendants under each and all of the above-mentioned contracts to deliver the goods within two or three months after specifications in respect thereof had been sent by the plaintiffs, and in any event to complete delivery by the end of 1916.

It was further alleged that in breach of their obligation the defendants had delivered within the year 1916 945.8 tons only, leaving 1,354.2 tons undelivered, and that consequently the plaintiffs were entitled to recover damages in respect of such failure to deliver.

The dates, quantities and prices of the seven contracts, upon which the plaintiffs relied, were as follows :—

Date.	Quantity.	Price.		
		£	s.	d.
(1) July 23rd, 1915, for	50 tons at	13	10	0 per ton.
(2) Sept. 2nd, 1915, „	250 „	13	10	0 „
(3) Oct. 15th, 1915, „	250 „	13	15	0 „
(4) Oct. 25th, 1915, „	750 „	14	10	0 „
(5) Jan. 11th, 1916, „	250 „	19	0	0 „
(6) Jan. 19th, 1916, „	500 „	20	0	0 „
(7) Jan. 28th, 1916, „	250 „	20	0	0 „

There is no doubt that delivery of the goods under the first four contracts had to be made during the year 1916.

The defendants contended that they were not bound to deliver the goods which were the subject matter of the other contracts, viz., the 5th, 6th and 7th, within the year 1916, and that the performance of these last-mentioned contracts was to follow in point of time the performance of the first four contracts.

The plaintiffs, on the other hand, contended that the 5th, 6th and 7th contracts were simply in respect of additional quantities to be delivered in accordance with the terms of the previous contracts, and that delivery of the goods covered by these contracts should have been made by the end of 1916.

It was stated during the course of the argument and not disputed that specifications in respect of the whole of the contract quantities, except 50 tons, were sent by the plaintiffs to the defendants in or before April, 1916.

Specifications for 38 tons were given in August, 1916, and for the remaining 12 tons specifications were sent in November, 1916.

Consequently it was contended by the plaintiffs that the specifications were sent in due time, and that the defendants should have delivered the goods in accordance with the specifications within a reasonable time after the receipt of the specifications and at any rate not later than the end of the year 1916.

For the consideration of this part of the case it is necessary to refer to the correspondence between the parties or their agents by which the contracts were made or confirmed.

The Canadian Board & Paper Company, Limited, of London, were acting as agents in England for the defendants until the early part of the year 1916, when they were succeeded by the Hodge Sherriff Paper Company.

No question arises in respect of the first contract, inasmuch as the 50 tons, which were the subject of this contract, were delivered; but it will be advisable to refer to the correspondence relating thereto, as it has some bearing upon the terms of the subsequent contracts. It is as follows:—

July 22nd, 1915.

DEAR SIRs.

We confirm our offer to Mr. Todd of a small contract for 50 tons Wayagamack Kraft, quality, etc., as samples left with us, at £13 10s. 0d. per ton, net f.o.b. Montreal, for sheets and reels. We understand that your mills do not encourage substances below 20 × 30 17/18-lbs. 480s, but that you would be prepared if we wish to deliver a certain proportion down to 20 × 30 16-lbs. 480s.

Yours truly,

E. S. & A. ROBINSON, LTD.

Messrs. The Canadian Board & Paper Company, London.

23rd July, 1915.

Messrs. E. S. & A. Robinson, Ltd., Bristol.

DEAR SIRs.

Reference A/AF.

We thank you for your favour of July 22nd, confirming offer given to our Mr. Todd for a contract of 50 tons Wayagamack Kraft, quality as sample left with you, at £13 10s. 0d. per ton net, f.o.b. Montreal, for sheets

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and reels. Also you wish to have the right to specify a small portion of it in 20 × 30 — 16 lbs. 480 sheets, and the bulk to be in 20 × 30 — 17/18 lbs. 480 sheets. We are sending the contract out to the Mill by to-day's mail, and will let you have formal confirmation on receipt at the Mill.

Yours faithfully,
THE CANADIAN BOARD & PAPER COMPANY.
KARIKMARY,
Manager.

K. S.

All quotations are subject to acceptance by our mills, and good only for one week unless otherwise stated.

All orders and contracts are subject to our usual contract conditions, including delays in manufacture and shipment due to fires, strikes, lockouts, delays in transit or any other cause beyond our control.

All orders are subject to usual variations of 5 per cent. either above or below ordered substances.

Claims will only be considered in respect of excess over such percentage. No claims of any kind allowed unless notified within 3 days of landing or delivery and opportunity given us of verifying same.

23rd July, 1915.

Messrs. E. S. & A. Robinson, Ltd., Bristol.

We hereby acknowledge receipt of your Contract of the 22nd July by letter, No., as follows:—Subject to Mill's acceptance.

Amount: 50 tons. Size: Sheets and reels. Colour and quality: Unglazed Kraft.

Specifications to follow.

Freight and ordinary marine insurance to be covered by us and charged on invoices. War risk insurance to be covered by you.

This will receive our immediate and careful attention.

Price: £13 10s. 0d. per ton net, f.o.b. Montreal.

Terms: 60 days' draft from date of shipment.

Yours faithfully,
THE CANADIAN BOARD & PAPER COMPANY.

The second contract for 250 tons was made in September, 1915, by means of the following letters:—

A/AF. September 1st, 1915.

DEAR SIRs,

We are prepared for you to enter us a Contract for a further 250 tons Wayagamack Kraft, to be specified and delivered as we require, on the same terms as the orders now on hand.

Your confirmation in due course will oblige,

Yours truly,

E. S. & A. ROBINSON, LTD.

Messrs. The Canadian Board & Paper Company, London.

2nd September, 1915.

Messrs. E. S. & A. Robinson, Ltd., Bristol.

Reference A/AF.

DEAR SIRs,

We beg to acknowledge receipt of your favour of September 1st, advising us that you are prepared to enter into a contract for a further 250 tons Wayagamack Kraft on the same terms as the orders now in hand. We are sending this contract to the Wayagamack Mill and will let you have confirmation on receipt.

You state this contract to be specified and delivered as you require it. Of course, this is a little too vague. We take it that the contract would

be for specifications during this and next year and are sending it out to the Mill under this understanding.

Yours faithfully,

THE CANADIAN BOARD & PAPER COMPANY,
KARIKMARY,
Manager.

2nd September, 1915.

Messrs. E. S. & A. ROBINSON, Ltd., Bristol.

We hereby acknowledge receipt of your Contract of the 1st instant No. as follows: Subject to Mill's acceptance.

<i>Amount.</i>	<i>Colour and Quality.</i>
250 tons.	Un glazed Kraft Brown.

(Specifications to follow.)

This will receive our immediate and careful attention.

Price: £13 10s. 0d. per ton net, f.o.b. Montreal. Mill to prepay freight and marine insurance and charge same to you on invoice. War risk insurance to be covered by buyers.

Terms: 60 days' draft from date of shipment.

Yours faithfully,

THE CANADIAN BOARD & PAPER COMPANY,
H. SMART.

The material correspondence relating to the third and fourth contracts is as follows:—

11th September, 1915.

Messrs. E. S. & A. ROBINSON, Ltd., Bristol.

DEAR SIRS,

Re WAYAGAMACK M. G. PAPER.

We understand from our representative that you would be prepared to increase the present Wayagamack contract of 250 tons to 500 tons provided you would have the option of taking a portion of the contract (not exceeding half) in M. G. paper at an advance of 10s. per ton, our regular standard colour, but also a proportion if required in stripes. We, of course, cannot say whether this proportion would be accepted by the Wayagamack, as the price they gave us for M. G. was £15 f.o.b., whilst your offer would be £14.

Kindly let us know whether the above understanding of our representative is correct, and we shall then communicate with the Wayagamack Company and let you have their reply. If you wish so, we can write and get a cable reply, or if there is no hurry we can get a reply by letter.

Our representative also mentioned that you touched the subject of possibly wanting some portion of such a contract for American or Canadian requirements. Our offers, of course, have been f.o.b. Canadian port, and it never entered our mind that you would want some of this paper on the other side. We have therefore to make it quite clear that we are only authorised to quote f.o.b. prices for export, and not for consumption either in the States or in Canada. If you wanted to make a purchase from the Wayagamack for Canadian or American requirements, we would first have to get a quotation from them, which no doubt would be very considerably higher than the present quotation which we have given you.

Yours faithfully,

THE CANADIAN BOARD & PAPER COMPANY,
KARIKMARY,
Manager.

A/AF.

15th October, 1915.

DEAR SIRS,

We hereby formally confirm arrangement made with Mr. Todd a couple of days ago whereby we are to take our purchase of 11th September (B 306—2021)T

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of 250 tons of Wayagamack Kraft at your increased price of £13 15s. 0d. per ton net, f.o.b. Montreal or St. Johns, for substance 16-lbs. 20 × 30 480s and up Unglazed, with the understanding that we should probably be only able to have very little, if any, M. G. finish against this contract.

We also formally confirm our purchase of a further 1,000 tons on the same terms as the above, but it is understood that we are to have the option, if we care to exercise it, of taking out an appreciable portion of this 1,000 tons in M. G. finish. No definite percentage of M. G. finish has yet been arranged, but we may be glad to have somewhere in the neighbourhood of 25 per cent. of the total quantity in this finish, although, as already mentioned, we prefer not to be bound to this or any proportion.

Enclosed please find a good specification for Unglazed finish in Bag reels, which we understand you have somewhat a preference for as compared with sheets.

Yours truly,

E. S. & A. ROBINSON, LTD.

Messrs. The Canadian Board & Paper Co., Ltd., London.

25th October, 1915.

Messrs. E. S. & A. ROBINSON, Ltd., Bristol.

DEAR SIRs,

Reference A/AF.

Referring to your letters of the 15th, 19th and 21st October, we now beg to confirm the arrangement made with Mr. Todd regarding the 250 tons of Wayagamack Unglazed Kraft at £13 15s. 0d. per ton net f.o.b., for substance 16 lbs., 20 × 3", 480s upwards, it being understood that not more than 10 per cent. would be specified in substance 16 up to 18 lbs., but the balance 18 lbs. upwards.

Regarding your further offers of 1,000 tons of October 15th and a further 500 tons of October 19th, we have communicated with the Mill and they are only prepared to take at present another 750 tons to be specified over 1916, the price to be for Unglazed 16 Double Crown upwards, £14 10s. 0d. net f.o.b. up to 10 per cent. to be taken in Double Crown 16. The Mill also stipulates that out of the 250 and 750 tons, together 1,000 tons, they must have specifications of not less than 35 per cent. in reels. Regarding M. G., the Mill would prefer not to get any M. G., but if you wish us to give you some M. G. the Mill will take up to 200 tons, which would have to come out of the above 1,000 tons, and the price for these 200 tons would be £15 10s. 0d. net f.o.b.

To be quite clear, we now want to state that altogether we would accept from you the following contracts:—

July 22nd 50 tons at £12 10s. 0d. net f.o.b. 50.

Sept. 1st 250 tons at £13 10s. 0d. ,,

Oct. 15th 250 tons at £13 15s. 0d. ,,

All of these Unglazed.

Oct. 25th 750 tons at £14 10s. 0d. ,,

With the above stipulation regarding reels and M. G.

Would you kindly let us know by return whether you will confirm these contracts? If we are in a position to let you have some more tonnage later we will advise you.

Yours faithfully,

THE CANADIAN BOARD & PAPER COMPANY,
As Agents.

A/AF.

26th October, 1915.

DEAR SIRs,

WAYAGAMACK KRAFT.

We are sorry to get your letter of the 25th inst., as we expected to hear that our order of 15th October for 1,000 tons was booked on the basis

of £13 15s. 0d. per ton, along with the 250 tons of the same date at this price. We rather understood from Mr. Todd that the larger order would be more acceptable to your Mills. We suppose the explanation is partly to be found in the limited quantity your Mills have to offer, and if you are satisfied that your proposal is the best arrangement you can make for us, we confirm the 750 tons at your increased price of £14 10s. 0d. per ton net, f.o.b., but at our interview with Mr. Todd we gathered the impression that, although our offer of a further 1,000 tons must be submitted to your Mills, this was probably only a matter of formality. E. S. & A. Robinson, Ltd.

Messrs. The Canadian Board & Paper Company.

28th October, 1915.

Messrs. E. S. & A. ROBINSON, Ltd., Bristol.

Reference A/AF.

DEAR SIRs.

WAYAGAMACK KRAFT.

We beg to thank you for your favours of 26th and 27th October, and we beg now to enclose order confirmation for 250 tons contract 5th October and 750 tons 25th October.

Regarding the orders placed before the 1st September, we find that against the contract of 50 tons 22nd July at £13 10s. 0d. you have actually sent us orders for 91½ tons, and in accordance with your letter we are booking these 91½ tons against the first contract of 50 tons at the price of £13 10s. 0d.

Regarding exchange, as intimated in our letter of 26th October, we will take the difference of exchange on the first two contracts of 22nd July and 1st September, but on the last two contracts of 15th October and 25th October, we regret very much that we are unable to comply with your request, as we have got to charge exchange on all business taken after 1st September, and we really could not re-open the matter again with the Mill. We certainly feel it would be a mistake.

Yours faithfully,

THE CANADIAN BOARD & PAPER COMPANY,
KARIKMARY,

As Agents, Manager.

K. S.

28th October, 1915.

Messrs. E. S. & A. ROBINSON, Ltd., Bristol.

Subject to Mill's acceptance and their ability of getting shipping space.

We hereby acknowledge receipt of your Contracts of the 15th inst. for 250 tons and 25th inst. for 750 tons, No. as follows:—For Account of the Wayagamack Pulp & Paper Company, Ltd.

250 tons. Specifications to follow. Unglazed Kraft Brown for delivery during 1916 at £13 15s. 0d.

750 tons. Do. at £14 10s. 0d.

(At least 350 tons of above 1,000 tons to be in reels for Bag making.)

With option of 200 tons in M. G. at £15 10s. 0d. (ex above 1,000 tons).

Not more than 10 per cent. to be specified in substance of D. C. 16-lbs., 480s.

This will receive our immediate and careful attention.

Price: Per ton as above, f.o.b. Montreal, plus difference in exchange between \$4.866 to the £ and current rate at due date of payment. Mill to prepay marine and war risk insurance and charge same on invoice.

Terms: 60 days' draft from date of shipment.

Our responsibility regarding shipment is limited to our ability of getting shipping space.

Yours faithfully,

THE CANADIAN BOARD & PAPER COMPANY,
KARIKMARY,

As Agents.

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3rd November, 1915.

Messrs. E. S. & A. ROBINSON, Ltd., Bristol.

Reference A/AF.

DEAR SIRS,

We thank you for your letter of October 29th. You are quite right in your understanding that the Wayagamack Contract has been definitely arranged, and our acknowledgment of October 28th should, therefore, not state "subject to Mill's acceptance."

Yours faithfully,

THE CANADIAN BOARD & PAPER COMPANY,
As Agents,
KARIKMARY,
Manager.

The fifth contract apparently was negotiated verbally, and it was confirmed by the following letters:—

13th January, 1916.

Messrs. E. S. & A. ROBINSON, Ltd., Bristol.

DEAR SIRS,

On behalf of The Wayagamack Pulp & Paper Company, Ltd., Three Rivers, P. Q., Canada, we have pleasure in notifying you that we are authorised to accept your verbal contract for 250 tons Unglazed Kraft Paper at £19 0s. 0d. per ton, f.o.b. the Canadian port, plus difference in exchange below \$4.86 2/3 to the £. (It is understood that should exchange go above \$4.86 2/3 the amount above that rate will be credited to you.)

Terms: Draft at sight 1½ per cent. cash against documents.

Minimum substance: 20" × 30", 18-lbs., 480s. with the privilege of specifying up to 10 per cent. in 20" × 30", 16-lbs., 480s.

Will you kindly send us your official order to cover all these points at your earliest convenience, and much oblige

Yours faithfully,

W. H. S.

W. S. HODGE.

In reply please refer to A/U.

14th January, 1916.

DEAR SIR,

We thank you for your letter of the 13th inst., which correctly sets out the arrangement entered into between us, and we hereby confirm the contract accordingly, to be specified and delivered as we require, following existing contracts.

Yours truly,

E. S. & A. ROBINSON, LTD.

Mr. W. S. Hodge.

A. P. BURT.

Messrs. The Canadian Board & Paper Company, London.

The defendants' contention that the performance of this and the two subsequent contracts was to follow in point of time the performance of the previous contracts, and that it was not intended that they should be performed in 1916, is based upon the expression "to be specified and delivered as we require, following existing contracts."

It is to be noted that this sentence occurs in the plaintiffs' letter of the 14th of January, 1916. The letter of the 13th January, 1916, from Mr. Hodge to the plaintiffs, is in itself an acceptance of the contract, and it does not contain any condition that the performance of that contract should be postponed until the previous contracts had been fulfilled in 1916.

If the plaintiffs' letter of the 14th January, 1916, had been merely a confirmation of the terms of the contract as stated in Mr. Hodge's letter of the 13th January, the time for performance

would have been a reasonable time after the receipt by the defendants of the specification or specifications sent by the plaintiffs in respect of the contract.

In their Lordships' opinion, on the construction of these letters it is not reasonable to hold that the plaintiffs, when using the expression "to be specified and delivered as we require, following existing contracts," intended to provide that the fifth contract should not be performed until the previous contracts had been fulfilled or until 1917, as contended by the defendants. Their Lordships have no doubt that the real meaning of the above-mentioned sentence in the plaintiffs' letter means "to be specified and delivered as we require as in existing contracts." This construction is confirmed by two letters dated the 20th January, 1916, and 22nd January, 1916. These letters show that the plaintiffs desired to increase the quantity of the fifth contract from 250 tons to 500, but that Mr. Hodge declined on the ground that "we are completely sold out for 1916." This goes to show that it was within the contemplation of the parties that the contract No. 5, confirmed by the letter of the 13th January, 1916, should be performed during the year 1916.

It appears that Mr. H. L. Taylor, a representative of the plaintiffs, was in Canada in January, 1916, and on the 20th January, by a letter addressed to the defendants at Three Rivers, he accepted an offer for a further 500 tons Kraft, which may be called the sixth contract.

The portions of the letter material to this part of the case are as follows:—

Fresh Order: I accept your offer (on behalf of my firm) of a further 500 tons Kraft as before supplied, at £20 stg. per ton, f.o.b., usual terms, and specifications will be sent forward from Bristol through your London agent in the usual way. I understand that your London agent is now Mr. W. S. Hodge, care of the Bank of Montreal, London, and have advised my firm to get in touch with him at once.

I shall be glad to hear from you regarding the small reels at your earliest convenience, and if you should be writing me during the next two or three days, will ask to do so to Queen's Hotel, Toronto.

The reply was dated 21st January, 1916. The material parts are as follows:—

Fresh Order: We confirm sale of 500 tons of unglazed Kraft, same quality as specified on previous Contracts, at £20 stg. per ton of 2,240 lbs., f.o.b. cars, Three Rivers. £ stg. = \$4.86½. Specifications to come forward through our English representative, Mr. W. S. Hodge.

With regard to the small reels which we discussed, we also confirm arrangement in this connection, *i.e.*, should you desire to take what is offering in this direction we will make up to your specification, down to 7/8 wide and from 9" in diameter up to 24" at same price as your new contract, *i.e.*, £20. If your firm desires to close with us in this offer, we would make the arrangement that we are to have standard weights for this business. The weights would be 25, 27½, 30, 35, 40, 45, 50, 55, 60, 65, 70, 75, 80, 85, and 90 lbs., based on 24 × 36—480 sheets, and any intermediate weights that we should have could be shipped with the nearest standard weights *i.e.*, a 52-lb. paper would be shipped as 50 and 54-lb. paper as 55 lbs. We are forwarding to Bristol various weights, which we trust will be satisfactory and enable us to secure business.

This letter was directed to Mr. Taylor at New York and then re-directed to various addresses in Canada, but it was not received by him in Canada and it did not reach the plaintiffs in England until May. It was acknowledged by the plaintiffs in the letter of the 2nd May, 1916, which was as follows :—

2nd May, 1916.

DEAR SIRS,

Your letter of 21st January last to the undersigned, which we note has been travelling to various addresses in Canada and the U.S.A., has reached us this week, and we beg to thank you for same.

We have to call your attention to the fifth paragraph respecting the matter of the fresh order for 500 tons placed with you when the writer visited your Mill.

We note you state "f.o.b. cars, Three Rivers," but to this we cannot agree, as the paper was bought on usual terms, and this was distinctly stated in our letter sent by the writer, confirming the transaction. Nothing was said by you at the time regarding any other arrangement, but the whole of our conversation was based on the idea that the new business, apart from the matter of price, would be carried through on the terms already prevailing. We wrote your Mr. W. S. Hodge regarding this on 22nd February last, pointing out that this particular order had been placed with you on the same basis as all other orders, and that we were not prepared to accept any alteration. Mr. Hodge advises us that the letter had been sent forward to you, and no doubt the matter has now been put right, but we thought it as well to now mention it so that there should be no possibility of misunderstanding.

Respecting the small reels referred to in the latter part of your letter, we are glad to hear about these samples came to hand some time since, and we have been expecting to hear definitely from you regarding them.

We believe we could do a good trade in these small reels, and we are sending the Hodge-Sherriff Company to-day a trial order for one ton in coils, 1½" wide, 9" diameter, substance 24 × 36 30-lbs. We should like you to ship these to us at the earliest possible date, and if they prove—as we quite anticipate—a useful purchase, we hope to be able to place orders for considerable quantities with you.

Your careful attention to this order will be much appreciated.

Yours truly,

E. S. & A. ROBINSON, LTD.

The Wayagamack Pulp & Paper Company, Ltd.

Three Rivers, P. Q.

It is to be noted that no time for delivery of the goods was stated in the sixth contract ; but the contract was made upon usual terms and the specifications were to be sent forward from Bristol through the defendants' London agent in the usual way. The obligation, therefore, upon the defendants would be to deliver the goods in accordance with the contract a reasonable time after the specifications sent by the plaintiffs were received, provided that such specifications were sent in a reasonable way and at reasonable times.

The seventh contract was made by Mr. Taylor with Mr. Sherriff, acting as agent for the defendants, and confirmed in a letter dated the 28th January, 1916, from Mr. Taylor to Messrs. Hodge-Sherriff Paper Company in Toronto. The letter is as follows :—

Return address : Holland House, New York.

28th January, 1916.

Messrs. HODGE-SHERRIFF PAPER COMPANY, Toronto.

DEAR SIRs,

I beg to confirm the arrangement made verbally with Mr. H. Sherriff to-day respecting Wayagamack Kraft as follows. You book as on behalf of that firm a further 250 tons of Kraft at £20 per ton of 2,240 lbs., usual terms. This in addition to the 250 tons booked by Mr. Hodge in England from us early this month, and the 500 tons bought by myself at the mills last week.

Specifications will be sent forward in usual way.

Yours faithfully,

H. L. TAYLOR.

It was alleged by the defendants that Mr. Sherriff had no authority to make this contract and that Mr. Sherriff made this plain to Mr. Taylor, and that the so-called order given by Mr. Taylor on the 28th January, 1916, was accepted by the defendants only on the condition that it should be confined to what were called "side runs," which the defendants might be able to cut to sizes that the plaintiffs might make use of.

It will be convenient to deal with this point at once.

Their Lordships are not able to adopt the defendants' contention in this respect. There is no mention of "side runs" in Mr. Taylor's letter of the 28th January, 1916. On the contrary, the terms of that letter clearly indicate that the contract was in respect of goods similar to the goods covered by the previous contracts, viz. "Kraft" paper.

Moreover, on the 16th February, 1916, the Hodge-Sherriff Paper Company in London sent to the plaintiffs the following letter :—

We learn from our Toronto House that Mr. Taylor has now succeeded in placing a further 250 tons of Unglazed Kraft Paper with our Mill at £20 per ton, thus bringing the tonnage which he secured during his visit to Canada up to 750 tons. Perhaps you will kindly let us know your official order number covering this new contract, so that we may keep our records in order.

This letter obviously refers to the contract which was confirmed by Mr. Taylor's letter of the 28th January, 1916. It makes no mention of "side runs"; on the contrary, the subject matter of the contract is described as "unglazed Kraft paper."

The letter from the Hodge-Sherriff Paper Company obviously was written in consequence of information sent to them from their "Toronto House," and it was mentioned in the said letter that the tonnage which Mr. Taylor secured during his visit to Canada was thus brought up to 750 tons. The letter or cable from the "Toronto House," upon which the letter of the 10th February, 1916, was based, has not been produced.

The above-mentioned letters, therefore, show that there was a concluded contract for 250 tons of Kraft paper on the usual terms.

The evidence of Mr. Sherriff, to which their Lordships' attention was drawn, even if admissible, is by no means sufficient to counteract the plain meaning of the letters.

It was not until the 31st May, 1916, by a letter of that date, that the defendants, through their agents in England, raised the point that this contract of 250 tons was "to take care of the present side runs which are now going back to the beater room." This allegation was forthwith denied by the plaintiffs in their letter of the 3rd June, 1916, in which they said :—

As regards Mr. Taylor's last purchase of 250 tons being for the narrow coils, there was never the least suggestion to this effect, and we cannot help expressing great surprise about it. It is quite certain that if there had been any, it would have been referred to in Mr. Taylor's letter No. 73, which indeed states "specifications will be sent forward in the usual way."

It is true that about 14 tons of "narrow runs" were specified by the plaintiffs, of which about $2\frac{1}{2}$ tons were delivered, but it was admitted by the learned Counsel for the defendants that if the above-mentioned letters of the 28th January, 1916, and 16th February, 1916, represented the terms of the contract between the parties, the plaintiffs would be within their rights in making such specification.

Their Lordships, therefore, are of opinion that the seventh contract was not restricted to "side runs," as alleged by the defendants, but that the above-mentioned letters of the 28th January, 1916, and 16th February, 1916, contain the terms of the contract concluded between the parties.

In connection with the time for delivery of the goods there is another point to which reference should be made.

Mr. Hodge, in his letter of the 22nd January, 1916, to the plaintiffs, refused their request to increase the quantity of their recent contract (which was No. 5) on the ground that they were completely sold out for 1916. It was argued for the defendants that this went to show at all events that the subsequent contracts viz., six and seven, were not to be performed during the year 1916. It must, however, be remembered that Mr. Hodge was writing as the agent in England of the defendants in Canada, and his authority to sell goods for delivery in 1916 may have been exhausted, whereas the two subsequent contracts for a total quantity of 750 tons were negotiated by Mr. Taylor with the defendants or their agents in Canada. As already mentioned, the terms of these two contracts go to show that the delivery of the goods was to be on the usual terms on specifications to be sent through the London agent of the defendants. If the defendants had at any time determined not to enter into any more contracts for delivery in 1916, they had obviously changed their minds at the time when the two last-mentioned contracts were made.

On this part of the case, therefore, their Lordships are of opinion that the plaintiffs' contention is right, and that the fifth, sixth and seventh contracts were really no more than contracts for additional quantities of goods, at increased prices, to be delivered on the usual terms as set out in the previous contracts.

Specifications were sent by the plaintiffs in accordance with the contracts for the whole quantity comprised in them and at reasonable times.

The obligation, therefore, upon the defendants was to deliver the goods in the manner provided by the contracts within a reasonable time after the specifications were received, and at any rate within the year 1916. The defendants did not perform that obligation, and they are liable for damages for non-delivery, unless they are relieved from such liability by reason of any of the other defences raised in the case, which it will now be necessary to consider.

The terms of the contracts as regards delivery were f.o.b. Montreal, in a Canadian port. By these terms it would be the plaintiffs' duty to provide shipping space for the goods.

But the absolute obligation on the plaintiffs to provide shipping space was varied by reason of the defendants undertaking a certain responsibility in respect thereof. This variation may have been made by reason of the difficulties created by the war, but it is not necessary to go into this matter in detail, because the position is made clear by the letter of the 28th October, 1915, from the agents of the defendants to the plaintiffs. It was therein stipulated that the contracts referred to were subject to the defendants' ability of getting shipping space, the concluding sentence of the letter being, "Our responsibility regarding shipment is limited to our ability of getting shipping space."

It appears to their Lordships that it was arranged between the parties that the obligation of the plaintiffs under the f.o.b. contracts to provide shipping space should not be insisted upon, and the position was that the defendants, though not absolutely bound to find shipping, undertook to do their best to obtain shipping for the goods, the subject matter of the contracts. The defendants alleged that they did their best to get shipping space, but they were unable to obtain it for the goods which were not delivered to the plaintiffs.

One reason for this inability, they alleged, was that the plaintiffs refused to furnish a copy of their licence to import the goods, in default of which, it was alleged, the shipping companies refused to accept the said goods for transport. The licence for importation was required because of the proclamation prohibiting the importation of paper into the United Kingdom which appeared in the "London Gazette" of the 15th February, 1916, and the Regulations as to licences for importation issued on the 25th February, 1916, and the supplementary Regulations of the 22nd of May, 1916.

Correspondence with reference to the licences passed between the plaintiffs and the agents of the defendants in March and April, 1916. The material letters are as follows:—

Messrs. E. S. & A. ROBINSON, Ltd.

14th March, 1916.

DEAR SIRS,

With regard to your licence to import. It is necessary for us to show the Canadian Pacific Railway and the various shipping Companies who

may be carrying goods, that the importers have the requisite authority. Will you kindly send us by return mail a copy of your permit, so that we may forward this to The Wayagamack Pulp & Paper Company, Ltd., by next mail.

We are sorry to put you to this trouble, but owing to the stand taken up by the shipping companies it is absolutely necessary.

Your prompt attention will very much oblige in order to ensure prompt service.

Yours faithfully,
HODGE-SHERRIFF PAPER COMPANY.
W. S. HODGE.

DEAR SIRs,

15th March, 1916.

In reply to your letter of the 14th inst., we fail to see how a copy of our import licence is going to be of any assistance to the Shipping Companies. The fact that we are able to produce a licence now is obviously no guarantee for the future. We take it that practically all licences are in more or less constant use, which means that the balance will gradually become less, week by week, and sometimes almost daily. We are prepared to give our guarantee that we will clear promptly any goods which we ask you to bring forward on our account. Such an undertaking is obviously of more value than copy of permit, which may no longer exist on the arrival of the consignment.

Further, it will no doubt happen that some consignments on our account will not be cleared under our licence, but we shall arrange to clear them under other licences.

Yours truly,
E. S. & A. ROBINSON, LTD.
A. P. BURT.

The Hodge-Sherriff Paper Company, Ltd., London.

3rd April, 1916.

Messrs. E. S. & A. ROBINSON, Ltd.,
1, Redcliff Street, Bristol.

DEAR SIRs,

Will you kindly furnish us by return mail with information as to the Licence N., the quantity said Licence covers, the date upon which it expires, and the date upon which it was issued. With this information we can ourselves send over the copy which the transportation companies on the other side are requesting, and although we quite agree with you that this copy is not going to be of any practical service to them, yet at the same time it will probably enable us to give you better service to acquiesce in their demand rather than enter into a long correspondence on the subject.

Yours faithfully,
HODGE-SHERRIFF PAPER COMPANY.
Per W. G. HODGE.

10th April, 1916.

Messrs. E. S. & A. ROBINSON, Ltd.,
1, Redcliff Street, Bristol.

DEAR SIRs,

We do not appear to have received a reply to our letter of April 3rd. Will you kindly let us have a typewritten copy of your Licence at your convenience. You will understand that it is not ourselves or our principals who require this, but the position is that the Railway Companies on the other side will not move goods unless we are able to show them a copy of the Importer's Licence.

Yours faithfully,
HODGE-SHERRIFF PAPER COMPANY.

In reply please refer to A/WB.

12th April, 1916.

DEAR SIRs,

We are in receipt of your two letters of the 10th inst.

As regards delivery at Montreal, we are prepared to take delivery there on the terms you mention of any portion which you cannot deliver f.o.b., but naturally we prefer the latter.

With regard to licence : we fail to see the use of our giving the information asked for by your letter of the 3rd inst. To begin with, we ourselves have several licences. Again, much of the paper we have specified from you will be imported by us under our customers' licences, and it is impossible to say at this stage even how many licences will be concerned. It consequently follows that we are not in a position to give you the other details asked for, and if we were it would not assist you or the Transportation Companies in the least. Neither would it be any protection or guarantee for them. So long as we guarantee clearance of the paper upon its arrival in England, which we repeat we are prepared to do, that is all which concerns the Transportation Companies. Such a guarantee from us is worth something ; knowledge of the particulars asked for would be worth nothing !

Yours faithfully,

E. S. & A. ROBINSON, LTD.

A. P. BURT.

Messrs. The Hodge-Sherriff Paper Company, Ltd., London.

The question of the production of licences or copies thereof to the shipping companies in Canada at that time seems to have been dropped, and it appears that about 69 tons were in fact shipped during May, 1916, and that the plaintiffs took delivery thereof.

The question was raised again by a letter of the 1st of August, 1916, which was described as a circular letter, sent by the agents of the defendants to the plaintiffs, which was as follows :—

London,

1st August, 1916.

Messrs. E. S. & A. ROBINSON, Ltd.,

Redcliffe Street, Bristol.

DEAR SIRs,

We understand that most of the licences granted by the Paper Commission expired on the 30th June. If this is so in your case, we shall be glad if you will be good enough to let us know the exact date and also the number and date of your licence, and what quantity of Kraft Paper you can import under this and also its time limit. We shall be glad if you will let us have this information by return mail, so that in the event of our mill being able to ship paper to you no time will be lost.

While on the subject, we might point out that, owing to shipping difficulties which are entirely beyond the control of our mill, it is possible that shipments prepared at a certain date may not go forward until a later sailing, and might mean that the goods would arrive at the British port after the expiration of your licence. We have to inform you, therefore, that our mill cannot accept any responsibility owing to circumstances over which they have no control, and that all responsibility must be accepted by you, and if a shipment should arrive at a British port after the expiration of your licence it would be necessary for you to make arrangements with the Paper Commission to have the goods passed, if necessary, by an Emergency Licence.

Yours faithfully,

HODGE-SHERRIFF PAPER COMPANY.

D. B.

The plaintiffs replied on the 2nd of August, 1916, as follows:—

2nd August, 1916.

Ref. : A/ME.

DEAR SIRS,

We are in receipt of yours of the 1st inst. *re* Import Licences.

It appears to cover similar points to those which you raised in your April letters, and with which we dealt then. It would not be of any use to you for us to take the trouble to give you the information you ask.

We again make it clear that we hold ourselves responsible to import the paper we have ordered from you for delivery in this country. In fact, the position appears to be cleared by the second part of your letter, which states that you cannot accept any responsibility should paper arrive in this country after the expiration of our licence. This is so obvious that we cannot think why you should have taken the trouble to write it. Moreover, we have never suggested that you should accept any responsibility in connection with licence.

We have no desire that you should concern yourselves at all in the question of our licences, but what we are deeply concerned with is to have delivery of our orders for Wayagamack Kraft as per our recent interview with Mr. Sherriff and previous interviews with Mr. Hodge, correspondence, etc.

Yours truly,

E. S. & A. ROBINSON, LTD.

A. P. BURT.

The Hodge-Sherriff Paper Company, London, E.C.

No answer was sent to this letter by the defendants' agents. The plaintiffs adhered to the position taken up by them, and although they sent no further information as to their licences, it appears that about 175 tons of paper were shipped during the month of August and 232 tons during September, 1916, of which the plaintiffs duly took delivery.

On consideration of the correspondence and the evidence their Lordships are of opinion that the defendants have not proved that they were prevented from obtaining shipping space for any goods, which they were ready and willing to deliver, by reason of the plaintiffs refusing to furnish copies of the licences as alleged by the defendants.

Their Lordships have come to a similar conclusion with respect to the defendants' allegation that they were prevented from delivering the goods, which were in fact not delivered, by reason of their inability to obtain shipping space. The evidence shows undoubtedly that there was more difficulty in obtaining shipping space in 1916 by reason of the war than in times of peace, but the defendants have failed to prove that the shipping difficulties prevented the delivery of any consignment of goods with which the defendants were ready to fulfil the plaintiffs' contracts.

The price of paper had risen considerably, and the correspondence passing between the defendants and their agents from February, 1916 to February, 1917, is very material and significant in connection with this question. It is not necessary to set out in detail this correspondence.

Their Lordships, upon a consideration thereof, are of opinion that the defendants were shipping goods to fulfil more recent

and high-priced orders in preference to the older and lower-priced contracts, such as the plaintiffs' contracts. The capacity of the defendants' mills was about 400 tons per week during the material time, and their Lordships are satisfied that the defendants, if they had so desired, could have complied with the specifications which were sent by the plaintiffs during 1916, and that it has not been proved that shipping space could not be obtained by the defendants for any of the goods which the defendants were ready and willing to deliver in respect of the plaintiffs' specifications.

There is another matter which is material to the consideration of this part of the case. The plaintiffs were pressing for deliveries in accordance with their specifications; the defendants were alleging that a cause of the non-delivery was the difficulty in obtaining shipping space.

In order to obtain control of the goods, the plaintiffs stated, in a letter of the 5th April, 1916, to the agents of the defendants, that as already mentioned if difficulties in connection with shipping prevented the defendants from despatching the paper to the United Kingdom, they were prepared to take delivery of the paper and pay for it in Montreal.

On the 10th April, 1916, the defendants' agents wrote to the plaintiffs as follows:—

10th April, 1916.

Messrs. E. S. & A. ROBINSON, Ltd.,
1, Redcliff Street, Bristol.

Reference A/U.

DEAR SIRS,

Do we understand that it will be satisfactory to you if we ship your specifications to your order at Montreal, and not f.o.b. Montreal, and that you guarantee not to offer same for sale either in Canada or in the United States? Kindly let us know whether we have interpreted your wishes correctly.

Yours faithfully,

HODGE-SHERRIFF PAPER COMPANY.

W. S. HODGE.

And the plaintiffs replied on the 12th April, 1916, as follows:—

As regards delivery at Montreal, we are prepared to take delivery there on the terms you mention of any portion which you cannot deliver f.o.b., but naturally we prefer the latter.

On the 24th May, 1916, the agents for the defendants wrote to the plaintiffs with a suggestion as to averaging the price under the contracts. They added a significant passage, which was as follows:—

We ourselves admit that your particular case is on a different footing, as you have agreed to take goods delivered Montreal if it should be impossible for us to put goods f.o.b. Montreal; therefore it is of course impossible for our Mill to plead shipping difficulties for reducing your contract.

This may have been merely the opinion of the agents for the defendants, and it may be an admission which they had no authority to make. It is, however, worth a reference, inasmuch as, in their Lordships' opinion, the view which the agents for the defendants took was a correct one.

On the 30th May, 1916, the plaintiffs wrote to the agents for the defendants a letter which places this matter beyond all doubt. The material parts are as follows :—

In reference to your letter of the 24th inst., and our conversation with Mr. Hodge on Friday, we now confirm definitely that in order to relieve your Mills of any insurmountable difficulty about shipping, we are prepared for them to make our orders in rotation according to date, and deliver same in weekly or fortnightly quantities to some address our representative, Mr. J. W. Pinkham, 73, Boustead Avenue, Toronto, will give in Canada—probably Montreal, and it is understood that we have not the right to sell any of it for delivery in Canada.

Of course, we still wish you to avail yourselves on our behalf of every possible opportunity under the Shipping Contract you have at rate of 63s. per ton. This is, of course, most important, and we rely upon your very best assistance in this direction.

You will understand we are making a big concession by taking the responsibility of storing a considerable quantity of this paper in Canada, and we do so upon the distinct understanding that all of it will be made by September.

On the 23rd June, 1916, the Toronto agents of the defendants wrote to the plaintiffs that—

Our Mill will now do their utmost to fill the balance of your orders as rapidly as possible, and they hope that 200 tons monthly will be the minimum quantity they will be able to undertake. Of this quantity, they will, whenever it is possible to do so, ship some portion direct to Bristol. The balance will be addressed to yourselves, care of the Terminal Warehouse at Montreal, as arranged.

It is not necessary for the plaintiffs to prove that the defendants were under contract to deliver to the plaintiffs' order in Montreal. The question at present under consideration is whether the defendants were prevented from fulfilling their contracts by reason of the difficulty in obtaining shipping space for the goods. In this connection it is sufficient for the plaintiffs to show that they were willing to take delivery at Montreal of such goods as could not be shipped, on terms and conditions as to their ultimate destination which had been arranged.

In spite of the defendants having the opportunity of performing their contracts in the above-mentioned manner, they did not avail themselves of it, and the natural conclusion is that the defendants did not do so because they were not ready to deliver the goods.

That this is the right conclusion is confirmed by the letters and cables which passed between the defendants and their agents in January and February, 1917, after the plaintiffs had intimated their intention to take action in respect of the defendants' breach of contract, which go to show that even then the defendants were not in a position to perform their contracts.

Their Lordships are of opinion that, so far from the defendants proving that they were prevented from delivering the plaintiffs' goods by reason of the difficulties in obtaining shipping space, it has been demonstrated that the real cause was that the defendants were not ready and willing to comply fully with the plaintiffs'

specifications until it was too late and when the time for performance of the contracts had expired.

For the above-mentioned reasons their Lordships are not able to agree with the conclusions of the majority of the learned Judges of the Court of King's Bench, and they are of opinion that the plaintiffs are entitled to damages caused by the non-delivery alleged by them.

The learned Judge who tried the case awarded damages on the basis of the difference between the prices stated in the contracts (other than the first, which was fully performed) and the market price on the 31st of December, 1916. It was argued on behalf of the defendants that this was not the correct measure of damage, and that the plaintiffs could not recover more than the actual loss of profit proved and the expenditure incurred.

Reliance was placed upon clause 1073 of the Civil Code of Lower Canada, which is as follows :—

Les dommages-intérêts dus au créancier sont, en général, le montant de la perte qu'il a faite et du gain dont il a été privé ; sauf les exceptions et modifications contenues dans les articles de cette section qui suivent.

The English translation is as follows :—

The damages due to the creditor are in general the amount of the loss that he has sustained and of the profit of which he has been deprived, subject to the exceptions and modifications contained in the following articles of this section.

In view of the facts of this case their Lordships are of opinion that the measure of damages adopted by the learned Judge was correct, and that it is not inconsistent with the above-mentioned clause of the code.

The learned Counsel for the defendants relied upon the further point that there were difficulties in manufacture and with regard to raw material, but their Lordships think it unnecessary with regard to this matter to say more than that it has not been proved that any such difficulties were the cause of the defendants' failure to deliver the goods to the plaintiffs.

Their Lordships see no reason for differing from the decision of the learned Judge who tried the suit as to the right of the plaintiffs to recover the sum of £141 16s. 7d., which they had to pay by reason of the deficiency in quality of goods delivered to Messrs. Huber & Co., and the sum of £283 10s. 0d., the taxed costs of the proceedings in England.

For the above-mentioned reasons their Lordships are of opinion that the appeal should be allowed, that the judgment of the Court of King's Bench should be set aside, that the judgment in favour of the plaintiffs given by the learned Judge who tried the suit should be restored, and that the defendants should pay to the plaintiffs their costs of this appeal and of the appeal to the Court of King's Bench, and they will humbly advise His Majesty accordingly.

In the Privy Council.

E. S. & A. ROBINSON, LIMITED,

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THE WAVAGAMACK PULP AND PAPER
COMPANY, LIMITED.

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