Before Mr Justice Mathew, without a Jury

Burney and Co v Elliman Sons and Co.

This was the first Commercial cause tried under the new system. The action was brought to recover £112, the balance of account rendered for the price of goods sold and delivered. The defence was that the goods were not delivered in accordance with the contract and not suitable for the purpose required. The Defendants further counter-claimed for the return of £100 paid on account and damages for breach of contract.

Mr Robson QC in opening the Plaintiffs' case, said the Plaintiffs were iron and steel tank manufacturers, and the Defendants were the makers of the well-known embrocation. The Plaintiffs undertook to supply the Defendants with 12 tanks and the contract was contained in letters between the parties.

On May 11, 1894, the Defendants wrote the Plaintiffs asking them to tender for the supply of 12 galvanized iron tanks, as per drawing and specification. The specification contained the following words: "*The whole to be suitable for storage of turpentine, having extra cap and close riveting, and to be thoroughly tested before leaving the works, and a certificate sent with them that they did not leak was tested*".

On May 18 the Plaintiffs wrote the Defendants: "*We should advise your revising size (as galvanized is better than painted), but in the event of your not being able to alter the size, we have quoted you for the size given painted, which we only guarantee watertight*".

On May 19 the Defendants wrote to the Plaintiffs: *"Please quote for 11 tanks…galvanized after made; specification as previous*".

On May 21 the Plaintiffs wrote quoting a price; the letter concluded, "*The tanks to be thoroughly tested with water before leaving the works and to be guaranteed watertight*". That was accepted by Defendants by letter of May 25. He relied upon that as a Contract.

On September 19 Defendants wrote saying that the tanks were not watertight and asking to send down a man to make the tanks sound. A man was sent down by the Plaintiffs, who did what was necessary to make the tanks watertight. When turpentine was put in, it was found that the tanks leaked. The Plaintiffs then pointed out to the Defendants that they had not put on sufficient shellac and glue to make the tanks turpentine-tight, and that they, the Plaintiffs had only undertaken to make them watertight.

In October the Plaintiffs wrote requesting a settlement of their account to which the Defendants replied enclosing a cheque for £100 on account, withholding the balance on the ground that their architect had certified that the tanks were unfit for the storage of turpentine.

Evidence was called on behalf of the Plaintiffs to prove that the tanks were tested before leaving the works, and that the leakage was owing to insufficiency of shellac and glue. Evidence was called on behalf of the Defendants to prove that the tanks were buckled

when delivered; that the tanks were not sufficiently stayed inside, and were of improper construction for the storage of turpentine, and some were entirely useless.

Mr Jelf QC for the Defendants, contended that the was an implied condition that the goods should be reasonably fit for the purpose for which they were required. The words of the Contract contained in the letter of May 21 were not inconsistent with the ordinary implication that the tanks should be reasonably fit for the storage of turpentine. He cited "*The Sales of Goods Act 1894, Section 14*" and "*Bigge v Parkinson*" (10 W.R.,349). The specification said that they were to be turpentine-tight. The Plaintiffs recommended them to be galvanized, otherwise they could only be guaranteed watertight. That meant that galvanized tanks wold be turpentine-tight.

Mr Robson, for the Plaintiffs said that the Defendants took the tanks without the double lap and extra stays. The warranty that they were water-tight did not apply to turpentine at all. It was the Defendants' duty to put on the shellac and glue. The was no complaint of buckling at the time the tanks were delivered. The Plaintiffs had fulfilled their contract, having made the tanks water-tight.

Mr Justice Mathew, in giving judgment said; - The case for the Plaintiffs was that there was a warranty that the tanks should be water-tight; the case for the Defendants, that they should be turpentine-tight. The Contract depended upon the letters that passed between the parties. His Lordship referred to the letters of May 11,18,21 and 25 and continuing, said that the Defendants said that the Plaintiffs must have known that the tanks were to be used for the storage of turpentine and that there was an implied Contact that they should be fit for that purpose; and that the implied condition was embodied in the Contract. There was an express stipulation in the interest of the seller that the tanks should be water-tight, and to add an onerous implied stipulation in favour of the buyer was contrary to the authorities. The Defendants Contract showed that they understood the Contract in the sense that the tanks were to be watertight. The Defendants now complained that the tanks were buckled. The Defendants did not make that complaint at the time they arrived. When it was found that the tanks leaked, the Defendants applied to the Plaintiffs to send down a workman, who repaired them, and they were found to be watertight. He thought that the tanks had been properly tested before they left the works and that the water test was satisfactory to the Defendants. The Defendants had had what they bargained for, and there must be a judgment for Plaintiffs for the balance of account on the claim and on the counterclaim. Stay for a week granted, as the Defendants wished to consider whether they would take the opinion of the Court of Appeal.

Mr Robson QC and Mr Willes Chitty appeared for the Plaintiffs; Mr Jelf QC and Mr Herbert Smith for the Defendants.