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1934 *Present :* **Dalton A.C.J. and Koch A.J.**

DODWELL & CO. *v.* UNITED STATES SHIPPING BOARD MERCHANT AND FLEET CORPORATION.

111—D. C. Colombo, 30,616.

Shipping contract—Offer by defendants to take cargo at certain rates— Agreement to ship definite amount of cargo each month—Acceptance of offer —Binding contract—Measure of damages.

Where the agents of the defendants made an offer through a broker to carry cargo between certain ports during a stated period at certain rates and the plaintiffs agreed to ship two hundred tons of cargo each month during the said period at the rates offered,—

***Held,* that there was a binding contract entered into between the parties.**

***Held further,* that (on a breach of the contract by the defendants) the measure of damages was the difference between the contract rates and the rates paid by the plaintiffs to other shippers for the amount of cargo actually shipped by them to the said ports during the period.**

THE plaintiff company sued the defendants to recover damages for breach of a contract to carry tea and general cargo from Colombo to New York and other American ports between April and December, 1928. The defendants denied that any contract as alleged was made by them and stated that what was made was only an offer. The learned District Judge gave judgment in favour of the plaintiff and awarded them damages in the sum of Rs. 19,843 and costs.

H. V. Perera (with him *N. K. Choksy* and *D. W. Fernando*), for defendants, appellants.—Lionel Edwards, Ltd., sent the plaintiff two shipping orders on June 19. On April 21, 1928, Lionel Edwards, Ltd., intimated to Dodwells that forward bookings were cancelled on instructions (P 1) from America. P. 2 is a similar intimation to the brokers, Messrs. Keell & Waldock. The plaintiff declined to accept the cancellation (P 3), and sued for the breach of contract.

The sailings were usually fortnightly. The first shipment on the basis of the cut rate was on April 11, 1928, by the ss. "Algic": Eighty-one tons were shipped through the defendants. Was there a legal obligation on the defendants to carry at fixed rates throughout the whole period, or was it an offer or unilateral promise not valid for failure of consideration by the other side? Each acceptance of cargo would constitute a separate and new contract.

No corresponding obligation on the other side to ship 200 tons a month. Lionel Edwards, Ltd., acted as the second defendant's agent in Colombo. There was, in fact, no legal contract between the parties. In April,

May, and June there were shipments of less than 200 tons by the Rooseveldt Line. On June 14, by P 5 the plaintiff wrote to Lionel Edwards, Ltd., offering 150 tons. The latter answered by P 6 that a guarantee of rebate could not be given.

On the plaint itself there is no contract. With the delivery of cargo in each month a binding contract arises (*Burton v. The Great Northern Railway*[1]). Under the English law valuable consideration must be given (*The Queen v. Demers*[2]; Anson on *Contracts (13th ed.), p. 39*; *Clifford v. Davies & Lloyd*[3]). The alleged contract in paragraph 4 of the plaint is no contract at all. The plaintiffs did not actually ship 200 tons a month. The forward contracts were satisfied by shipments in earlier months. The loss of profits is due to plaintiff's inaction and is too remote.

Judgment cannot be obtained against both defendants as the second defendant is an agent of the first. The plaintiff's evidence does not prove any liability on defendant's part. The freight notice (P 19) has no meaning. No consideration given by the plaintiff. The contract pleaded in paragraph 4 of the plaint is not an enforceable one. On the question of damages, see Carver on *Carriage of Goods by Sea (7th ed.), p. 996, s. 717.*

You cannot obtain judgment against both principal and agent (*Bulner v. Krelzheim*[4], *Firm of R. M. K. R. M. v. Firm of M. R. M. V. L.*[5]). In any case the damages awarded to the plaintiff are excessive. The measure of damages is the difference between the contract rates and the rates that the plaintiff actually paid for on the amount of cargo they actually shipped during the six months.

F. A. Hayley, K.C. (with him *H. E. Garvin*), for plaintiffs, respondent.—Admittedly Lionel Edwards, Ltd., were acting for undisclosed principals. In all their letters they said they were the agents of the Rooseveldt Steamship Co. (P 19, P 20). In P 6 they refer to the United States Shipping Board, and not the Corporation. The defendants filed separate answers. Both made the same claim in reconvention: Each claimed £332. 10s. The defendants admitted that Lionel Edwards, Ltd., were agents of the second defendant and that the second defendant managed vessels for and on behalf of the first defendant. Lionel Edwards, Ltd., had authority to bind the first defendant—admitted by counsel at the trial. These matters were wholly in the knowledge of the defendants themselves. There is no evidence as to the position between the two defendants. The admission of defendants' counsel excludes the question of sub-agency.

Lionel Edwards, Ltd., had nothing to do with the case. The proxies came direct from the two defendants—Scrutton on *Charter Parties (12th ed.), Appendix III., s. 59.* Lionel Edwards, Ltd., bound both defendants by their contract. There is a contract to ship 200 tons of cargo at 20 or 25 shillings according to the nature of the cargo. The contract was for the using of a certain amount of space on each ship. This was a contract entered into by a ships' broker—*Scrutton, p. 34.* A broker's note is practically complete evidence of a contract—it constitutes a

[1] *(1854) 9 Ex. 507.*
[2] *(1900) A. C. 103.*
[3] *(1862) 6 L. T. R. 579.*
[4] *23 N. L. R. 408.*
[5] *(1926) A. C. 761.*

memorandum under the Sale of Goods Act, No. 11 of 1896. Boustead on *Agency* (*7th ed.*) describes Brokers' Notes, Article 94. P. 18 and D 1 constitute a memorandum of contract signed by a mutual broker. See Benjamin on *Sale* (*6th ed.*)—*Chicago and G. E. R. R. v. Dane at p. 91.* This is more a case of carriers.

On the question of damages, the contract is in the form of a hiring of the vessel. The general principle is that the person losing by the breach should be put in the same position as if the contract has been carried out (*Halsbury, pp. 341, 343*).

The measure of damages is discussed in *Rodocanachi Sons & Co. v. Milburn Bros.*[1]. The defendants were responsible for making the contract not a lucrative business (*Stroms Bruks Aktie Bolag v. John & Peter Hutchison*[2]).

H. V. Perera, in reply.—The admission by defendants' counsel does not touch the right to get judgment against both defendants. A sub-agent cannot bind the principal—Boustead on *Agency* (*7th ed.*), *p. 113, Article 41.* The contract pleaded in the plaint is that the defendants agreed to carry 200 tons in consideration of payment. The evidence does not bear out this. If there was no obligation on plaintiffs to ship 200 tons, then there was no consideration for contract. On the facts Mr. Bostock is the most competent person to speak of the arrangement. On the measure of damages a person is entitled to get only the actual loss sustained.

Cur. adv. vult.

August 4, 1933. DALTON A.C.J.—

The plaintiff company (respondent to the appeal) brought this action to recover from the defendants (appellants) damages for an alleged breach of a contract to carry tea and general cargo from Colombo to New York and North American East Coast ports for the period April to December, 1928.

The first question arising on the appeal for decision is whether there was any binding contract between the parties; the second question relates to damages.

The defendants in their answers denied, *inter alia,* that any contract was made as alleged by plaintiffs, it being urged that they had merely made an offer. In the alternative they pleaded that, if there was a valid contract, the plaintiff company had committed a breach thereof for which they each claimed the sum of £332. 10*s.* On both questions the learned trial Judge answered the issues framed in favour of the plaintiff company, and has awarded them damages in the sum of £1,488. 5*s.*, equivalent to Rs. 19,843.33 and costs.

On the first question it is urged that the arrangement between the parties was merely an offer on the part of Lionel Edwards & Co., Ltd., the agents of the defendants, to carry cargo up to 200 tons for the period mentioned at the rate specified by the witnesses, which offer was accepted, but with no obligation at all on the part of the plaintiff company to ship anything at all by the defendants' ships.

[1] (1886) *56 L. J. Q. B. 202.*

[2] (1905) *A. C. 515.*

The evidence shows that the Rooseveldt Line were, prior to about April, 1928, getting no cargo from Colombo, their ships passing through the port practically empty. About that time the manager of Lionel Edwards & Co., Ltd., approached the witness, Mr. Bostock, a partner in a firm of freight brokers, asking him if he could get them business on the basis of 30 shillings a ton for tea and 25 shillings for general cargo, stating that his firm was prepared to book cargo at these rates until the end of the year, or a lower rate if competition reduced their rates lower. At that time the standard rate between Ceylon and the United States of America was 60 shillings for tea and 50 shillings for general cargo, all the lines of steamers plying on this route working on the standard rates. Mr. Bostock approached the plaintiff company amongst others with this offer which, according to the evidence, seems to have caused a good deal of discussion in local shipping commercial circles. Having regard to the prevailing standard rates, the cut in rates now offered would mean a very considerable advantage to anyone shipping at the lower rate. Mr. Dulling, one of the managers of the plaintiff firm, states that the offer was the talk of the office, and at first seems to have doubted whether it was genuine. Even Mr. Harger, Lionel Edwards' manager in Colombo, speaks of it as a revolutionary thing for Colombo. On inquiry, however, and after discussion with Mr. Bostock, Mr. Dulling states he was satisfied it was a *bona fide* offer and he undertook to ship 200 tons of cargo each month, from April to December at the rates offered. Notes thereafter of the agreement passed from the brokers to the plaintiff company and to Lionel Edwards & Co., Ltd. (exhibits P 18 and D 2). They set out that they have booked cargo on behalf of the plaintiff company with Lionel Edwards & Co., Ltd., from Ceylon to Boston and/or New York. The cargo is stated to be 200 tons of tea or general cargo a month from April to December at the rates of 30 shillings and 25 shillings for tea and general cargo respectively, or lower rates if available.

The forms used by the brokers were the ordinary forms used for booking individual shipments contracted for, Mr. Bostock saying that being the ordinary contract entered into, this being the first instance he had known of forward booking beyond a month or six weeks, even the latter periods being unusual. It is clear, however, to my mind from his evidence and from the brokers notes what was the nature of the agreement made. There was considerable discussion as to the quantity of cargo, and as to what amounts of tea and general cargo should be shipped before any agreement was arrived at, and the final arrangement made was that the figure should be fixed at 200 tons of cargo, without specifying how it was to be divided between tea and general cargo. This agreement was concluded on March 19, 1928.

Subsequent events showed that all went well until April 21st. What had happened was that other shipping lines had heard of the cut in rates by Lionel Edwards & Co., Ltd., and the standard rate was thereupon similarly reduced. On April 21st, Lionel Edwards & Co., Ltd., wrote to the plaintiff company and to the brokers (letters P 1 and P 2) stating they had received cabled instructions to cancel all forward bookings with immediate effect, and that they were unable to take the cargo

tendered for shipment except at the former standard rates. The plaintiff company protested against what they called " this unreasonable and arbitrary cancelment of your forward fixtures with us ", and stated that they had, under the recommendation of the brokers of Lionel Edwards Co., Ltd., covered elsewhere the balance of their April commitment without loss, since the standard rate had been reduced during April. They forwarded, however, a debit note for £2,100 covering the freight differences over the period May to December and asked for an early settlement. There can, I think, be no doubt that Lionel Edwards & Co., Ltd., consented to the plaintiff company shipping a portion of the 200 tons of cargo in April by a ship not of the defendants' line. Mr. Harger says he has no recollection of this, but he admitted at one point in the course of his evidence that he had spoken to the brokers and had instructed them to advise the plaintiffs to ship their goods elsewhere without loss. Mr. Dulling is clear on the point and this letter corroborates him.

As a result of this protest, for May and June, shipments continued by the defendants on behalf of the plaintiff company ostensibly at the old rates but in fact at the rates contracted for, Lionel Edwards & Co., Ltd., on behalf of the defendants, making a refund to the plaintiff company from time to time of the difference between the contract rate and the old standard rate. There seems, however, to have been some delay in making these refunds, for on June 14 (letter P 5) in tendering cargo for ss. Jalapa, the plaintiff company asked for a prompt refund of the difference between the standard rate and the contract rate. It is to be noted that this letter, as does other correspondence between the parties, speaks of the forward contract and contract rates. The reply of Lionel Edwards & Co., Ltd., is the letter P 6, which also refers to the contract rate. They say they are unable to guarantee a prompt refund but state the claim should be sent to them as agents for the Rooseveldt Steamship Co. Inc., Managing operators for the United States Shipping Board, and that it would be put before the Board for their immediate attention. On a further communication, by letter P 8 of June 26, they assured the plaintiff company that a prompt refund of the difference would be made. This was followed up by a letter P 9 of July 2 saying " we wish to assure you that refund of freight between contract and current rates will be immediately made on all steamers up to the end of the year on your contract, dated 19th March, 1928 ".

Coming to July, a steamer of the defendants, the West Honaker, was due towards the end of that month. Defendants' agents by letter (P 10, July 18) notified the plaintiff company of this and they tendered 150 tons of cargo for shipment (P 11, July 23). On the same day, however, the agents by letter (P 12, July 23) notified the plaintiff company that they had been instructed by their New York principals not to promise further refund of the difference between the contract and current rates pending further instructions, and that they could only accept the cargo now tendered at current standard rates. It is admitted that the standard rates from July to December remained at the figure 60 shillings for tea and 50 shillings for other cargo. The plaintiff company informed them (P 13 of July 24 and P 14 of July 25) that they had in consequence

shipped the cargo by another steamer, and forwarded a debit note for the difference between current and contract rates. Thereafter 200 tons of cargo was tendered each month by the plaintiff company to defendants' agents, the latter replying that on instructions of their principals they could only accept the cargo at the current rates. Mr. Harger admits he never at any time repudiated his liability to pay to the plaintiff the difference in the rates claimed by them, whilst the correspondence of the defendants' agents clearly admits the existence of the contract. Their local manager was obviously in a very difficult position, having been asked as he says to enter into the contract and then told to cancel it.

With reference to the part to be performed by the plaintiff company, there is no doubt in my mind on the evidence that there was an obligation on the part of the company to ship 200 tons of cargo during the period agreed upon, by the defendants' ships. The defendants were badly in want of cargo to ship, and it is inconceivable to me that in the circumstances they would have offered the very favourable terms to the plaintiff company without any obligation at all upon the part of the plaintiff company to ship by their line. At one point in his evidence Mr. Harger states he would have objected to their shipping by a boat of another line. Mr. Bostock, it is true, says he never gave his mind as to what the position would be if the plaintiff company in any month shipped less than the amount stipulated. He conceded that in the ordinary way, under the usual contracts of which he was speaking, if a shipper did not ship the full quantity, he was not sued by the ship owner, and if his cargo was partly shut out he would make no claim on the ship owner. This, however, did not include possible claims by consignees for late shipments. As Mr. Hayley points out, however, where rates are standardized and shipping is plentiful as in Colombo, no loss would as a rule be incurred where cargo is shut out from any one ship. The learned trial Judge has, I think, although he is satisfied there was no want of mutuality in the contract, misapplied Mr. Bostock's evidence on what he calls the course of business in the event of a failure by the shipper to ship all he had undertaken to ship. The witness in speaking of claims was not referring to the contract in question in this case, but to the bookings to which he had referred earlier, when he said it was the custom to book for one steamer only. Mr. Dulling for the plaintiff company never at any time seems to have had any doubt as to the liability of his company to ship 200 tons a month. The inquiries he made to ascertain before the contract was made whether his firm would have this amount of cargo available and the care with which he formally tendered this amount each month up to the end of December, and on one occasion, in May, obtained the consent of the defendants' agents to ship by another line, amply support his view of his position. I entirely agree with the learned trial Judge that there was no want of mutuality.

On the first question then, I am satisfied that a binding contract was entered into between the parties as claimed by the plaintiff company. If there is a binding contract it is not urged on appeal that there was no breach of it on the part of the defendants, as found by the learned trial Judge.

On the question of damages, the learned trial Judge has held that the plaintiff company is entitled to recover the difference between the contract rate and the current rate on the quantity of cargo, the subject of the contract, namely, 200 tons. On the footing that the tenders indicate that the plaintiff company proposed to ship 150 tons of general cargo and 50 tons of tea per month, after deducting the cost of shipping 69 tons of cargo carried in July by defendants' ships, he has accordingly awarded them the sum of £1,488. 5*s*. It was urged in the lower Court, however, and has been urged before us, that the damages should be measured by the difference between the contract rates and the rates that the plaintiff company have actually paid to other shippers for the goods actually shipped to the United States during the six months. Although the plaintiff company tendered to the defendants against each of those months the full 200 tons, when the cargo was refused they did not in fact ship this full amount every month, except in July. An error seems to have been made in the figures for November given in the return P 53. The actual shipments, we were informed during the argument on the appeal, were as follows:—

Month.	Total. Tons.	Tea. Tons.	D/C Nuts. Tons.	Other Cargo. Tons.
July	224	45.8	170.2	8.3
August	183	45.9	136.8	—
September	121	43.9	72.8	4.1
October	192	38.6	136.0	16.9
November	135	69.5	60.5	5.7
December	135	57.5	77.5	—
	990	301.2	653.8	35.

There is no reason to doubt that the plaintiff company were in a position to ship the 200 tons each month but in fact they have not done so. The reason given is that they could not take advantage of the cut rates, but that is no reason, since they did ship considerable quantities at the standard rate and claimed the difference from the defendants. It is urged, however, that even if they had shipped nothing at all during the six months they could still recover the difference between the rate contracted for and the standard rates.

The broad principle governing the question of measurement of damages actually sustained is set out by Lord Haldane in *British Westinghouse Electric Co. v. Underground Electric Co.*[1] One who has proved a breach of a bargain to supply what he contracted to get, is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. If one party, who is legally bound to carry out a contract, fails to do so, the other party may do so for him, and charge him for the reasonable expense incurred in so doing. (Chitty on *Contracts (18th ed.)*, *p. 951.*) This broad principle, I take it, applies equally to a contract for the carriage of goods whether it be on land or sea. All that Mr. Hayley has cited from Scrutton on *Charter Parties* seems to me to conform to this principle. If a charterer, for instance, is not furnished with a ship under a charter, and charters a vessel to replace her, the

[1] *(1912) A. C. 673, at p. 689.*

excess freight he has to pay will be, *primâ facie*, the measure of damages. If the rate of freight demanded is unreasonable, he need not make a substituted charter.

This appears to be supported by the view of Lord Macnaghton in a case cited during the argument (*Stroms Bruks Aktie Bolag v. Hutchison*[1]), an action for a breach of a contract of carriage. Owing to the failure of the ship owners to fulfil their contract in respect of one shipment, the plaintiffs were unable to fulfil a contract to supply wood pulp which they had entered into with T. O. & Co. T. O. & Co. therefore had to buy as best they could in the market, and made a claim against plaintiffs which was duly paid, the plaintiffs then making a claim over against the ship owners. Included in their claim was the amount they had had to pay to T. O. & Co., and also a small sum for extra freight on the balance of 33 tons which T. O. & Co. accepted at a later date, making up the full 400 tons to which they were entitled. Lord Macnaghton states that if the ship owners had given timely notice of their inability or unwillingness to perform their contract, the plaintiff might possibly have secured other means of transport. In that case he says the measure of damages would probably have been just what was claimed in the case of the 33 tons, namely, the difference in freight. There is no suggestion in the case before us that the plaintiff company were unable to obtain space in other ships for the whole of their 200 tons of cargo each month after the defendants refused to carry it under the contract. They appear, however, to have preferred to ship only a portion of it. In the circumstances, the measure of damages appears to be the difference between the contract rates and the rates that the plaintiff actually paid for on the amount of cargo they actually shipped during the six months. There is no suggestion of any damages flowing from any other cause, *e.g.*, such as failure by the plaintiff company to fulfil any contract for the sale and delivery of goods in America. The figures on this basis work out as follows :—

	£	s.	d.
Excess freight paid by plaintiff company for tea, 301.2 tons at 30 shillings a ton	451	16	0
Excess freight on D/C nuts, 653.8 tons at 25 shillings a ton, less 69.4 tons shipped through defendants in July, *i.e.*, 584.4 tons ..	730	10	0
Excess freight for other cargo, 35 tons at 25 shillings	43	15	0
	1,226	1	0
Less excess freight paid for 24 tons shipped in July, in excess of 200 tons at 25 shillings	30	0	0
	1,196	1	0

The plaintiff company is therefore entitled to this sum of £1,196. 1*s.* or in rupees at the exchange rate of 1*s.* 6*d.* to the rupee. The amount awarded in the decree must therefore be reduced to this sum, with costs of the action.

There is one other point raised by Mr. Perera for the respondents, which he concedes is of practical concern only in so far as it might affect the costs of the action. He urges that the plaintiff company is not

[1] (*1905*) *A. C. 515.*

entitled to judgment against both the defendants, suggesting that the second defendants are agents of the first defendants. At the opening of the trial in the lower Court counsel for defendants made certain admissions on page 44 of the record. I take those admissions to mean that Lionel Edwards & Co., Ltd., in their transactions with the plaintiff company were the agents of both the defendants. The two defendants, it is to be noted, have filed separate answers and they have both made a claim against the plaintiff company for breach of contract. Under the circumstances I cannot say that the learned Judge was wrong in entering judgment against both of them as he has done.

The appeal is for the above reasons dismissed, subject to an amendment in the amount of damages awarded as I have denoted. The principal point argued on the appeal was no doubt the first point, but appellants have been successful in obtaining an appreciable reduction in the damages awarded. I would therefore make no order as to the costs of the appeal.

KOCH A.J.—I agree.

Appeal dismissed.