1922.

[FULL BENCH.]

Present : Bertram C.J. and Porter and Schneider JJ.

KEARLEY & TONGE, LTD., *v.* PETER.

50—D. C. Colombo, 2,103

Agreement to import goods for another—Clause in contract that all complaints regarding goods should be made within seven days of arrival of goods—Latent defect in goods—No complaint made within seven days—Claim for damages.

Defendant ordered a consignment of Australian jams through the plaintiffs, and it was agreed between them that all complaints regarding the goods should be made within seven days from arrival of the goods. The goods arrived in November, 1920, and seventeen specimen cases were delivered to defendant at once, and the rest were, by agreement, kept at plaintiffs' stores and delivered on February 4, 1921. The defendant found the seventeen cases in good condition, but found that some of the tins delivered in February were leaking owing to bad soldering. The defendant claimed damages in respect of the bad tins.

Held [*per* BERTRAM C.J. and SCHNEIDER J. (PORTER J. *dissentiente*)], that as the defect was a latent defect the defendant was entitled to claim damages, even though he had made no claim within seven days.

BERTRAM C.J.—The fact that the buyer has examined the goods before accepting them does not prejudice any claim he may have as regards any defects which a reasonable examination would not have revealed. It is possible for a seller by special contract to contract himself out of the liability which the law imposes upon him, and the question in this case is, has he effectively done so? In other words, is it the true meaning of the clause that the buyer undertook to make within seven days any complaint which he might have to make, even with regard to a defect, which with those seven days could not possibly be known to him, and renounced the right to make any such complaint afterwards . . . . . The law regards with jealousy any attempt by persons who are liable under the law unreasonably to relieve themselves of their responsibilities by the insertion of general words in a printed contract. It requires them in such cases to make their meaning clear by express words.

THE factst are set out in the judgment of the Chief Justice.

H. J. C. Pereira, K.C. (with him *Navaratnam*), for defendant, appellant.—Clause 8 of the indent cannot include latent defects which were not discoverable within seven days of delivery. It could only be construed to cover defects that could be discovered on inspection. It was the duty of the plaintiffs to supply goods of a

merchantable quality. This is an implied condition required by the Sale of Goods Ordinance, No. 11 of 1896, section 14 (2) and 15 (2) (*c*). The rule that risk passes with the property does not apply to damages resulting from a latent defect. There is evidence of the surveyor, which has not been rebutted by the plaintiffs, that the soldering was inefficiently carried out. This is a defect which could not have been discovered by the plaintiffs on inspection at the time of delivery. The fact that the seventeen cases delivered in November were to all outward appearances good and merchantable is evidence that the defect was latent and could be found out only when the jam began to exude. Counsel cited *Drummond v. Van Ingen*,[1] *Jones v. Just*,[2] *and Heilbutt v. Hickson*.[3]

H. V. Perera (with him *Spencer Rajaratnam*), for plaintiffs, respondent.—Clause 8 was understood by the parties to include all defects both patent and latent, and so it was acted on by them for years. There is definite evidence, that this clause was inserted so that the plaintiffs may pass on their liability to the manufacturers. It is always open to the parties to contract out of the Sale of Goods Ordinance, and so they have done in this case. Therefore, conditions as to merchantable quality provided in sections 14 (2) and 15 (2) (*c*) will not apply (*Sharp v. The Great Western Railway Co.*)[4]

The surveyor's evidence is of no value either as regards the condition of the jam or as regards the soldering of the tins. He dooes not pretend to be an expert. The question whether the defect was a latent defect or not is a question of fact, and should have been put in issue. Then plaintiffs could have called evidence to show that it was not latent. Now it is not open to the defendant to raise, for the first time in appeal, a point of law which depends on facts not before the Court.

H. J. C. Pereira, K.C., in reply.

cur. adv. vult.

September 26, 1922. BERTRAM C.J.—

This is a commercial action relating to a claim by the defendant with respect to certain jams said to have proved unmerchantable, which he ordered from the plaintiffs as Commission Agents.

The learned District Judge has delivered a very carefully reasoned judgment and has made a number of findings of fact, with practically all of which I find myself in agreement. These findings of fact, however, do not affect the real issues of the case, which are, in the first place, a question of the legal interpretation of a clause in the contract; and, secondly, a question of fact arising out of that interpretation.

[1] *(1887) 12 A. C. 282.*
[2] *(1868) L. R. 3 Q. B. 197.*
[3] *(1872) L. R. 7 C. P. 438.*
[4] *(1841) 9 M & W. 7.*

1922.

BERTRAM C.J.

Kearley & Tonge, Ltd., v. Peter

It is not necessary to go very fully into the facts. Briefly stated they are as follows:—The defendant ordered a consignment of Australian jams through the plaintiffs, and the plaintiffs undertook to order and import them on plaintiffs' account. It is recognized that it was the plaintiffs and the defendant who are the parties to the contract. The jams duly arrived early in November, 1920, and a partial delivery of the consignment was made at once. One case of each kind of jam, seventeen in all, selected haphazard were duly delivered to the defendant and found to be in perfect condition. The delay in delivering the rest of the consignment, according to the findings of the learned District Judge, was due to a request of the defendant that plaintiffs should keep the jams for him as he had no spare storage space. A dispute as to the price at which the jams were to be invoiced arose. This was settled and the price adjusted on November 18, 1920. The remainder of the jams was not removed to defendant's premises until February 4, and on February 5 he gave his promissory note for the amount due.

The defendant states that within a few days of the arrival of these jams he had occasion to open two cases, and found that some of the tins in the cases were leaking, and that the jam which had exuded from these leaking tins had spoiled the labels of the others so as to make them most unattractive to customers. The defendant stated, at first in qualified terms, but afterwards with some assurance, that he mentioned the circumstance to the plaintiffs' broker the same day. The broker denies this, and says that nothing was said to him till the beginning of March or early in April, and I agree with the learned Judge that the broker's memory of the circumstance is more to be relied on. At any rate the defendant did not take the matter seriously, and, perhaps, thought the defects found in these two cases were accidental. He did not have occasion to open any more cases until about April 20. He then discovered on opening several cases that they were all in the same condition, that is to say. jam had exuded from some of the tins in each case and had spoilt the labels of the whole. He thereupon took measures to have a survey made and complained to the plaintiffs. He did not give plaintiffs notice of the survey, and the surveyor states that in the majority of cases this is not done. The plaintiffs on April 25, two days before the survey, wrote to their principals in Australia saying "we regret to have to report that the tins that contained the jam which you sent us have been badly made, and the contents are oozing out and damaging the labels." They asked for a further supply of labels, a 100 of each kind, and concluded "the tins being unsaleable, our customer will probably claim on you for the damaged artices, unless we are able to replace the labels, therefore please be good enough to expedite the despatch as soon as possible." Two days later a survey was made by Mr. G. F. Edge, who is Lloyds' surveyor. His survey report stated that he found 707 tins out of

1,800 to be leaking. From an examination of the cases he concluded that the damage could not have taken place since they were taken delivery of by the consignee. The tins which had leaked most were those containing red current jelly and apple jelly, which compromise 504 tins out of the 707. The surveyor declared "after close examination of the tins, I am of opinion that the soldering is inefficiently carried out, and presumably chemical action sets up quicker in the case of the red current and apple jellies than in the other jams, but that leakage eventually takes place, more or less, in all." He pronounced the damaged tins unmerchantable and recommended a sale.

The plaintiffs, on the report of the survey being communicated to them, declined to take back the damaged tins, and they were sold. They were by no means worthless, and realized some 60 cents a tin. The nett sum realized was Rs. 263.69, and defendant gives plaintiffs credit for this amount.

The first question we have to consider is the question of law, that is to say, the legal interpretation of clause 8 in the contract, which is in the following terms :—"All complaints regarding the goods to be made in writing within seven days from arrival of the goods." In my opinion "arrival" here means "arrival at the port of *Colombo.*" *I consider that effective* delivery of the whole consignment was given by delivery of the seventeen specimen cases, and that the defendant had thus an opportunity of examining the consignment on its arrival. The clause is not very definitely expressed. It says that all complaints are to be made within seven days, but it does not definitely say that in any case in which no such complaints are made they will not be entertained afterwards. I will take it, however, that this is the meaning of the clause.

The question which now arises is this: Is this clause to be taken as absolute, and as including not only defects which could have been reasonablv ascertained by examination of the goods within the seven days referred to, but also latent defects which could not reasonably be so ascertained? The general law on the subject does draw a distinction between these two classes of defects. It is specially enacted in the Sale of Goods Act, and the enactments in both cases embody the result of a line of decided cases, that whether goods are bought by description or by sample, the fact that the buyer has examined the goods before accepting them does not prejudice any claim he may have as regards any defects which a reasonable examination would not have revealed. See sections 14 (2) and 15 (2) (*c*) of the Sale of Goods Ordinance, No. 11 of 1896. It is, of course, possible for a seller by a special contract to contract himself out of the liability which the law thus imposes upon him, and the question in this case is : Has he effectively done so ? In other words, is it the true meaning of the clause that the buyer undertook to make within seven days any complaint, which he might

1922.

BERTRAM C.J.

Kearley & Tonge, Ltd., v. Peter

have to make, even with regard to a defect, which within those seven days could not possibly be known to him, and renounced the right to make any such complaint afterwards.

I attach little importance to the admission which the defendant made under very skilful cross-examination, that he "understood under the indent that if he did not complain in seven days in writing he could not complain." What we have to determine is, not what the defendant thought the words meant, but what they must be taken in law to mean. Parties to cases in cross-examination are often induced to express peculiar views of their legal rights. Sometimes these indiscretions may be put right by re-examination. I have no doubt that if the defendant had been asked in re-examination whether, in so speaking, he intended to include complaints as to defects of which he could not become aware till after the seven days were over, he would at once have qualified this admission.

The law regards with jealousy any attempt by persons who are liable under the law unreasonably to relieve themselves of their responsibilities by the insertion of general words in a printed contract. It requires them in such cases to make their meaning clear by express words. Perhaps the most conspicuous example of this principle is to be found in the Law of Carriage by Sea (see *Carver on Carriage by Sea, paragraphs 77, 94, and 101*, where the cases are collected). Thus, it is presumed, unless stated to the contrary, that the shipowner, even where he has excluded liability for negligence, is to continue liable for negligent acts and defaults committed by himself or by his servants or agents engaged in performing the contract. "General words excepting losses from a particular cause do not protect him if that cause came into operation through his own neglect or default." See the *Xantho*.[1] In another case the shipowner had disclaimed liability for loss by thefts, but this was held not to include thefts by persons on board the ship. "It is not, I think, reasonable to suppose, where the language used is ambiguous, that it was intended that the shipowner should not be liable for thefts by one of the crew or persons on board. The shipowner must protect himself if he intends this by the use of unambiguous language."

On the same principle, I am of opinion, in view of the general principles of the law as laid down in the Sale of Goods Ordinance and in view of the extreme generality of the clause under consideration, that it must not be taken to include complaints with regard to latent defects which could not be discovered by a resonable examination within the seven days referred to.

Mr. H. V. Perera, who appeared for the respondents, cited to us on the other side an authority which was both interesting and apt (*Sharp v. The Great Western Railway Co.* (*supra*)). In that case an agreement for the supply of railway engines provided the test of

[1] *(1887) 12 A. C. 503.*

a 1,000 miles run up for the purpose of testing the materials and workmanship of the engines supplied, and it was provided that if the engine was perfect at the end of the run, the supplier should have no further liability in respect of these matters. The run disclosed no defects, but afterwards an engine burst, and it was contended that this was due to a defect in the copper lining of the fire box, which, owing to inferiority in quality, had worn thin with undue rapidity, and it was argued that the test could not be deemed to relieve the suppliers of liability for defects which could not have reasonably been discovered in the course of the trial run. This argument was disallowed, and the Court refused to permit evidence to be led for the purpose. It must be borne in mind, however, that each case must depend upon its own circumstance, and that in the case cited the words relieving the supplier from liability were full and explicit.

This being the legal position, let us proceed to consider the question of fact. Was there in the case of these jams a latent defect rendering them to a certain extent unmerchantable? It may be taken that jams packed in tins, for sale by a retail trader in that condition, are not merchantable, unless they are so securely soldered that the jam will remain good for a reasonable period. The defendant states, and there is nothing to contradict him, that jams might be reasonably expected to remain in good condition for two years if necessary. In this case the period within which the alleged defect manifested itself was about six months. and it seems to me that a retail trader would be entitled to expect his imported jams to remain in good condition for at least this period. What then is the latent defect alleged? The surveyor says in his report, "after close examination of the tins, I am of opinion that the soldering is inefficiently carried out," and proceeds to refer to chemical action in such a way as to show that the exuding of the jams from the tins was, in his opinion, due to chemical action (by which I take him to mean fermentation), and that this chemical action was caused by inefficient soldering. What is more, this was just the view the plaintiffs themselves took as to the probable cause of the trouble when it was reported to them by the defendant. In writing to their Australian suppliers they said: "We regret to have to report that the tins that contained the jam which you sent us have been badly made, and the contents are oozing out." Why then should this natural explanation, supported as it is by the considered opinion of the surveyor made after close examination, not be accepted? Personally, I am prepared to accept it. It is true that the surveyor disclaims the qualifications of "an expert as to how long jams keep," and is not sure that he has ever examined jams before, but I take it that as Lloyds' surveyor he has been selected as a man of practical good sense, who could be trusted to make general surveys of goods with intelligence. He has given his opinion

1922.

BERTRAM C.J.

Kearley & Tonge, Ltd., v. Peter

I do not see why in giving his opinion he should be expected to exclude every conceivable alternative possibility.

In my opinion, therefore, the defendant has suffered damage owing to a latent defect in the jams supplied to him, and the existence of this latent defect was a breach of the implied condition which the law imports into all such contracts that the goods shall be of merchantable quality. In respect of that breach he is entitled to damages, and I think that in the circumstances of the case, and in view of the way in which the matter was treated in the Court below, he must be considered as entitled to debit the plaintiff with the amount of his loss, and to treat these damages as due to him on a partial failure of consideration in respect of the promissory note upon which he is sued. I would, therefore, allow the appeal with costs, and concur in the order made by my brother Schneider.

PORTER J.—

In this appeal I regret to find myself of a different opinion from my Lord the Chief Justice and my brother Schneider J. I have had the opportunity and advantage of reading the judgments of both the learned Chief Justice and my brother Schneider J., and the facts of the case are sufficiently stated therein. The points on which I differ are three :—

(1) There is no evidence on the record that the jam was bad. Such evidence as there is appears to me to be to the effect that the jam was good, and it was eventually sold by auction at sixty cents a tin with damaged labels. The evidence of Lloyds' surveyor himself goes no further than to show that some of the tins were leaking, and he recommended a sale. One cannot believe that he considered the jams other than fit for human food when he recommended their sale. The evidence of the defendant only goes to show that with fresh labels the jams would have been saleable in the ordinary course of defendant's business, and they requested plaintiffs to obtain the labels.

(2) There is no evidence on the record of a latent defect in the soldering, or any other defect, which might not have been discovered by the defendant on examination. The only evidence is the opinion of the Lloyds' surveyor, who does not pretend to be an expert. It is worthy of note that the plea of a latent defect was not raised in the Court below, and never suggested by either parties, or counsel, in the Court below, and it seems to me to be a clever plea raised by clever counsel, for the first time in this Court, when the case came here on appeal.

(3) The clause 8 in the indent is, I think, intended by the parties to cover such a case as this, and does in law cover the case. The words are "all complaints regarding the goods to be made in writing within seven days from arrival of the goods." It would be well to consider the position of the parties. The plaintiffs are

brokers, and as such, necessarily, wish to limit the time of their liability, so as to be able to prefer any claim which they may have against the people from whom they buy. The defendant is a dealer in provisions with a monthly turnover of Rs. 40,000, and has been so for some eight years. He admits that "he understood that under the indent if he did not complain in seven days in writing he could not complain." I attach the greatest importance to this statement of the defendant. It is a statement made on oath, not by a child, but by an astute business man. He was not re-examined on this point, and I do not think it fair to assume that it was an indiscretion which could be put right by re-examination, or to assume that the statement would have been qualified by re-examination. I consider that *Sharp v. The Great Western Railway Co.* (*supra*) applies most aptly to the present case. In that case the latent defect was proved, but as the parties had contracted themselves out of the Sale of Goods Act, the parties were held to their contract. In my opinion, the parties in the present case have by clause 8 of their indent contracted themselves out of the Sale of Goods Ordinance, No. 11 of 1896, even if the defect in the soldering of the tins was of such a nature as could not have been discerned by a reasonable examination. But as I have said above, there is no evidence that the defect was of such a nature, except an expression of opinion by Lloyds' surveyor (who had had no previous experience of examining jam tins) that he thought the leakage was due to inefficient soldering. The letter of the plaintiffs to the sellers of the jam in Australia is nothing more than a request to them to expedite the forwarding of the labels and setting out the complaint made by the defendant to them.

For these reasons I think that the Judge in the Court below was right, and that this appeal should be dismissed with costs.

SCHNEIDER J.—

This appeal was partly argued in the first instance before a Bench consisting of my Lord the Chief Justice and my brother Porter. After I was associated with them two questions only were argued. The one of fact and the other of the construction of indent P 1. Of fact, whether there was a latent defect in the goods which rendered them unmerchantable; the other, whether clause 8 in the indent P 1, that all complaints regarding the goods should be made in writing within seven days from the arrival of the goods is absolute, and shuts out any complaint of whatever nature from being made after the time limit fixed by that clause. The contention on behalf of the plaintiffs-respondents was that if there was any defect in the goods it was not latent, and if defect there was, whether latent or otherwise, any objection on account of it was precluded, unless it were made within the terms of clause 8.

I will address myself first to the question of fact.

1922.

SCHNEIDER J.

Kearley & Tonge, Ltd., v. Peter

The goods in question were jams and jellies of several kinds of fruit manufactured in Australia and imported to this Colony for sale by the defendant, who is a retail dealer in a large way of business.

I would accept as proved that the goods arrived in Colombo in November, 1920, and that the defendant took immediate delivery of seventeen out of forty-eight cases, and that the balance was stored for him by the plaintiffs and was delivered to him in February, 1921. Shortly after the delivery of these cases, the defendant discovered that the contents in a certain percentage of the tins were exuding, and that the labels had been damaged. He thought that it would be all right if these damaged labels were replaced. He accordingly asked the plaintiff company for fresh labels.

Subsequently he suspected that the contents of the tins were not in order, and had a survey made by Mr. Edge, a local Lloyds' surveyor, who reported that upon inspection by him on April 27, 1921, he found the cases in fair order, but that on having them opened and examining the contents he found 707 tins out of a total of 1,800 leaking; that he examined the tins closely and came to the conclusion that the soldering had been insufficiently carried out, with the result that chemical action had set in. He gave it as his opinion that these tins were in an unmerchantable condition, and recommended that they be sold by public auction. This was done.

The defendant claims in this action to restrict the plaintiff company's demand for the price of the damaged goods to the sum actually realized by their sale.

The surveyor's report and evidence are not challenged. except upon the ground that he is not an expert in jams nor their packing in tins. His own evidence shows that he has not had much experience as a surveyor, but it seems to me that the reason urged against the value of his evidence is not sound. It does not want any expert knowledge in jams or chemical action or the soldering of tins to examine tins which had been soldered, and to point out that the soldering had not been done properly when the contents are apparently exuding. It is matter of common knowledge that fermentation sets in in jams unless they are kept in airtight vessels. But in this case, whether there had been fermentation or not, the fact is undeniable that the jam was exuding, and exuding through apertures left by defective soldering.

I would, therefore, accept the surveyor's evidence on the point. I do so the more readily as there is nothing in the rest of the evidence against accepting his evidence. His evidence is that the damage to the contents of the tins was caused by defective soldering. The question then arises, was that a latent defect? Again, the evidence, to my mind, proves that it was latent in the sense that it was not discoverable in the contents of the seventeen cases which were taken delivery of at first. The defective soldering was concealed by the paper label in which each tin was wrapped.

A purchaser does not and would not be expected to tear the label to inspect the soldering. He would assume that it had been done properly so long as the label discloses no indication to the contrary.

It is proved by the evidence called by the plaintiff company that the seventeen cases first delivered had been picked out haphazard, and the defendant's evidence, which stands unshaken proves that the contents of the tins in those cases were in order and roused no suspicion. He disposed of them in the ordinary course of his business. They were merchantable. The soldering was done by the manufacturers in Australia. The defect, therefore, was in existence when the tins left the manufacturers' possession. It was latent till the discolouration of the labels led to its detection. There is nothing in the contract under which the goods were sold to preclude the application of the provisions of section 14 of the Sale of Goods Ordinance, No. 11 of 1896, except the contention regarding the effect of clause 8 of the contract, which I shall deal with presently. Under the provisions of that section there is an implied condition that these goods shall be of merchantable quality. The evidence proves that they were not merchantable. Hence there was a breach of this implied warranty.

It was argued that the goods were of merchantable quality when they were delivered in November, 1920, because the course of the exudation of the contents was not discovered till April, 1921. This argument is not sound.

It was held in *Beer v. Walker* [1] that where a wholesale provision dealer contracted to send at stated intervals, from London by rail, to a retail tradesman at Brighton a quantity of rabbits, that there was an implied warranty by the wholesale dealer that the rabbits would be fit for human food, not only when delivered at the Railway Station in London, but when in the ordinary course of transit they should reach the retail tradesman at Brighton, and until he should have had then a reasonable opportunity of dealing with them in the usual course of business.

The facts of that case are analogous to those in this case. It was proved that the rabbits were in good order and condition and merchantable when delivered to the railway at London. Upon or shortly after their arrival at Brighton one of the casks was opened and the rabbits were found to be good, but upon opening the other cask shortly afterwards, the rabbits therein were found not to be in good order or condition or merchantable or fit for human food.

It is not proved in this case that the tins of jam, which were found damaged and unmerchantable in April, were not in that state in November, 1920, when delivery was first made. But, assuming that they were then to all appearance merchantable, yet the fact that they had turned unmerchantable by April would entitle the defendant to raise the defence of a breach of warranty, because his

[1] *(1877) 46 L. J. (N.S.) C. P. D. 677.*

1922.

SCHNEIDER J.

Kearley & Tonge, Ltd. v. Peter

evidence is, and that evidence stands uncontradicted, that " it is a common thing to keep jam for one or two years." A retail dealer, it seems to me, might legitimately claim that the implied warranty as to merchantableness in this species of goods must be deemed to extend for at least a period of six months.

It was next contended that as defendant had accepted the goods, and had examined the seventeen cases and found them merchantable, he was debarred from impeaching the quality of all the goods. That there was no implied condition as regards the rest. This contention again is not sound. The proviso to section 14 (2) is that " If the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed." Here the fact is that there was no examination of the cases not included in the seventeen cases, nor was the defect such as was discoverable by the examination of the seventeen cases.

But the main contention on behalf of the plaintiff company was that by virtue of clause 8 of this contract or indent the claim founded upon the implied warranty could not be asserted by the defendant, because he had made no complaint in writing within seven days of the arrival of the goods. The words of that clause are " all complaints regarding the goods to be made in writing within seven days from arrival of the goods."

The contention was that this clause shuts out every complaint on any ground whatsoever, unless it were made within seven days. I am unable to uphold that construction of these words. They must be strictly constructed against the plaintiff company. Such a construction is not the natural meaning of the words.

I cannot imagine how a complaint can be made of a defect unseen and unknown. The words are " all complaints." They refer, and can only refer, to complaints regarding such matters as would be revealed by an examination of the goods in the ordinary course of business. They cannot refer to latent defects. If the words were intended to protect the plaintiff company altogether from any claim whatsoever, the language employed is clearly inapt and insufficient. It is not possible to give to those words the effect which would be conveyed by words such as these, " Unless complaint is made within seven days of the arrival of the goods, the plaintiff company are absolved from any claim whatsoever against them upon this contract."

I would therefore hold against this contention.

In the result I would set aside the decree appealed against, and direct that judgment be given for the plaintiff company for the sum of Rs. 263.79 lying in Court to the credit of the action. The plaintiff company must pay the defendant his costs of the action and of this appeal.

Set aside.