[HIGH COURT OF AUSTRALIA.]

LUBRANO . . . . . APPELLANT;
PLAINTIFF,

AND

GOLLIN AND COMPANY PROPRIETARY LIMITED . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 17.

KNOX C.J., ISAACS, GAVAN DUFFY and RICH JJ.

Contract—Construction—Sale of goods—Shipment in specified months—Seller not to be responsible for delay caused by war, &c.—Obligation of buyer to accept goods shipped out of time—Waiver—Acceptance of portion—Demurrer.

The plaintiff by his declaration alleged that the defendant had agreed to buy from the plaintiff certain goods—"shipment in April May and/or June 1918 . . . from Italy to Australia . . . the plaintiff not to be held responsible for delay caused by war strike wreckage or other unavoidable causes."

Held, that the effect of the clause which provided that the plaintiff should not be held responsible for delay caused by war, &c., was merely to relieve the plaintiff from liability to the defendant for breach of the contract if the plaintiff was prevented by war, &c., from shipping the goods within the period specified, and did not require the defendant under any circumstances to accept goods which were not shipped within that period.

By the declaration it was also alleged that the defendant accepted portion of the goods notwithstanding that that portion had not been shipped during the prescribed period, as the defendant before accepting that portion well knew.

Held, that the facts alleged did not amount to a waiver by the defendant of the condition of shipment during the prescribed period in respect of the rest of the goods.

Observations as to what facts can be regarded on a demurrer.

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Decision of the Supreme Court of New South Wales: *Lubrano* v. *Gollin & Co.*, 19 S.R. (N.S.W.), 214, affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court by Frank Lubrano, trading as Lubrano & Ferrari, against Gollin & Co. Proprietary Ltd., the plaintiff by the first count of his declaration alleged that " it was agreed by and between the plaintiff and the defendant that subject to cable confirmation the plaintiff should sell to the defendant and the defendant should buy from the plaintiff ten tons of tartaric acid powder at 3s. 3½d. per pound c.i.f. and e. including war risk freight based on 190s. per ton measurement and insurance based on war risk £5 5s. per £100 and marine insurance w.p.a.— shipment in April May and/or June 1918 by direct steamer from Italy to Australia and in the event of there being no direct steamer from Italy to Australia the said goods to be transhipped either at Port Said or Singapore for Sydney provided shipment is made from Italy *viâ* the Suez Canal the plaintiff not to be held responsible for delay caused by war strike wreckage or other unavoidable causes payment cash against documents or shipping delivery order and the plaintiff did receive cable confirmation respecting the said agreement And the plaintiff entered upon the performance of the said agreement and there being no direct steamer from Italy to Australia duly shipped the said goods from Italy *viâ* the Suez Canal and duly transhipped the said goods at Singapore for Sydney and insured the said goods in accordance with the terms of the said agreement though delay in shipment of the said goods until after the month of June 1918 was caused by war and by other unavoidable causes within the meaning of the said agreement And the defendant accepted the said documents and shipping delivery order in respect of portion of the said goods and took delivery of the said portion of the said goods notwithstanding shipment of the said portion was delayed until after the month of June 1918 as aforesaid as the defendant before taking delivery of the said portion of the said goods well knew and the defendant exonerated and discharged the plaintiff from tendering to the defendant the said documents and shipping delivery order relating to the balance of the said goods And except

as aforesaid all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to the performance by the defendant of their said agreement and to sue for the breach hereinafter mentioned Yet the defendant did not nor would accept from the plaintiff the said documents or shipping delivery order relating to the said balance of the said goods or the said balance of the said goods and did not nor would pay the plaintiff the price for the said balance of the said goods or any part thereof and the defendant wholly repudiated the said agreement and refused to be bound thereby Whereby the plaintiff lost the price of the said goods and the value thereof and the said goods became depreciated in value and the plaintiff was put to expense in keeping and storing the said goods."

The second count was the same as the first, except that the subject matter of the agreement was stated to be of ten tons of tartaric acid (five tons powdered and five tons crystals) and the price 3s. 4½d. per pound. The third count was also the same as the first—except that the subject matter of the agreement was stated to be ten tons of tartaric acid powder and the price 3s. 4½d. per pound, that it was not alleged the defendant had accepted the documents and shipping delivery order in respect of portion of the goods and took delivery of that portion, and that it was alleged the defendant had exonerated and discharged the plaintiff from tendering to the defendant the documents and shipping delivery order in respect of the whole of the goods.

The defendant demurred to the three counts on the grounds: (1) that they disclosed no cause of action; (2) that they respectively disclosed breaches of the respective agreements on the part of the plaintiff which entitled the defendant to refuse to accept the goods, and (3) that the proviso in the alleged agreements that the plaintiff was not to be held responsible for delay caused by war, &c., merely protected the plaintiff from liability to damages for delay, and did not entitle him to have the particular agreement performed by the defendant notwithstanding delay amounting to a breach thereof. The defendant also demurred to the first and second counts on the grounds: (4) that the facts alleged therein did not amount to a

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waiver by the defendant of the breaches, and (5) that the agreements as alleged were for delivery by instalments, and the acceptance of one instalment did not preclude the defendant from refusing to accept other instalments tendered otherwise than in accordance with the terms of the respective agreements.

The demurrers were heard by the Full Court, which ordered that judgment on the demurrer be entered for the defendant, and that the plaintiff should have seven days within which to amend the first and second counts: *Lubrano* v. *Gollin & Co.* (1).

Ferguson J., in his judgment, stated that in his opinion the clause in the agreement which provided that the plaintiff should not be held responsible for delay caused by war, &c., was only intended to relieve the plaintiff from responsibility in such a case, and did not require the defendant in any circumstances to accept goods which had not been shipped until after the expiration of the last of the specified months. He also stated that there was no sufficient allegation of waiver in the declaration, and that it was impossible to say that the facts alleged conclusively established an irrebuttable case of waiver.

From the decision of the Full Court the plaintiff now appealed to the High Court.

Leverrier K.C. and *Delohery*, for the appellant. The provision that the appellant was not to be held responsible for delay caused by war, &c., contemplated a delay in shipment after the end of June 1918, and it excused the appellant from shipping before that time if the delay was caused by war, &c., but it did not excuse him from shipping after that time if the cause of the delay ceased to operate. He would be bound to ship as soon as he could. The result would be that, if the delay occurred and the appellant shipped the goods as soon as the cause of the delay ceased to operate, then he complied with the contract and the respondent was bound to accept the goods. By refusing to accept the goods the respondent held the appellant responsible for the delay. If the delay was so long as to alter the commercial nature of the contract, the contract would be at an end. [Counsel referred to *De Oleaga* v. *West Cumberland Iron and Steel Co.* (2).]

(1) 19 S.R. (N.S.W.), 214.

(2) 4 Q.B.D., 472.

[ISAACS J. referred to *Bentsen* v. *Taylor, Sons & Co.* [*No.* 2] (1).

[RICH J. referred to *Roberts* v. *Brett* (2).]

The question of waiver is sufficiently raised by stating facts which are consistent with waiver only. Under the contract the goods were deliverable by instalments, and the acceptance of one instalment with knowledge of late shipment amounts to a waiver.

[KNOX C.J. The allegation of knowledge of late shipment is limited to the portion of the goods accepted, and does not extend to the whole quantity sold.]

Maughan K.C. and *Rogers*, for the respondent, were not called upon.

KNOX C.J. For the reasons stated by *Ferguson* J. in his judgment, I think the Supreme Court was right in allowing the demurrer. I desire only to add that the allegations in the declaration of the knowledge of the defendant Company refer only to the parcels of goods of which it is alleged to have accepted delivery, and not to the whole quantity agreed to be supplied.

ISAACS J. read the following judgment:—Two points have been taken by the appellant. The first is as to the construction of the contract. That depends on its effect when read as a whole, giving the natural meaning to words that are not technical. When so read, it is a contract for the sale of goods to be shipped from Italy not later than June, with a protective provision in favour of the seller that if by reason of delay through any unavoidable cause he cannot perform his contract, he is not to be bound to compensate the purchasers for his failure. It means that if unavoidable circumstances prevent the performance of the contract as intended, then each is content to stand his own loss and let the matter go. But there is nothing which, fairly construed, ties the purchasers and frees the seller.

The second point is as to waiver. Mr. *Leverrier* objected to some words in Mr. Justice *Ferguson's* judgment as to throwing on the defendant the duty of pleading further facts. I do not think his Honor meant to rest his judgment on that proposition. The rest of his judgment is clear.

(1) (1893) 2 Q.B., 274, at p. 280.

(2) 11 H.L.C., 337, at p. 354.

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Isaacs J.

On a demurrer, or on proceedings equivalent to a demurrer, the law is laid down by Lord *Atkinson* in *Vacher & Sons Ltd.* v. *London Society of Compositors* (1). He says :—" In a proceeding such as that adopted in this case, which is in truth somewhat of the nature of a demurrer to the statement of claim, the only facts which can be taken as admitted are those which are, expressly or impliedly, averred in the statement of claim itself. Inferences of fact must be drawn by the jury. And no Court can, for the purposes of such a proceeding as this, take as admitted a fact not averred, but which is, in truth, an inference from facts which are averred in the pleading." The difference between an inference and an implication must be borne in mind. An implication is included in and part of that which is expressed : an inference is something additional to what is stated. It may reasonably or even irresistibly follow from what I may call the evidentiary facts, but it is a further conclusion in the nature of an ultimate fact. Now, here there was no allegation of " waiver " as a fact, and, unless it is contained in what is said, as an implication, it is not there at all. It is not contained as an implication because, putting it at the best for the plaintiff, it is not stated that the purchasers when they accepted the shipping documents for portion of the goods knew that the whole of the goods were in the same position. It is not necessary to decide whether that would be sufficient, but, at all events in the absence of the statement referred to, the implication cannot arise. I should, in justice to Mr. *Leverrier*, say that ultimately he did not contend this point.

GAVAN DUFFY J. I agree in what has been said by the Chief Justice.

RICH J. I agree with the judgment of *Ferguson* J., subject to the understanding expressed in the judgment of my brother *Isaacs* with regard to the question of waiver.

Appeal dismissed with costs.

Solicitors for the appellant, *Minter Simpson & Co.*

Solicitors for the respondent, *Sly & Russell.*

B. L.

(1) (1913) A C., 107, at p. 125.