BRITISH COLUMBIA ADMIRALTY DISTRICT

1962
Feb. 27, 28,
May 15,
June 1
1965
Nov. 5

BETWEEN:

NORTHERN SALES LIMITED .....PLAINTIFF;

AND

THE SHIP *GIANCARLO ZETA* .....DEFENDANT.

Shipping—Freight contract—Loading limit "at owner's option"—Meaning of—Variation of written contract—Admissibility of parol evidence.

A lump sum freight contract arranged by a ship's broker between plaintiff and the owners of defendant ship for the carriage of barley stated:

> "10,000 tons..., 10% more or less quantity at owners' option... Vessel has 611,000 cft. bale..."

The ship stopped loading at 10,430 tons and plaintiff sued for breach of contract, alleging that the ship's broker as agent for the ship's owners had verbally assured plaintiff that the reference in the contract to 611,000 cubic feet bale capacity meant that plaintiff could load to 11,000 tons, i.e. 10% more than 10,000 tons.

The Court found that the ship's broker was agent for both parties in arranging the contract and that the defendant did not authorize him to amend the written contract.

Held, dismissing the action, the words in the contract "at owners' option" authorized the ship's owners to limit loading as they had done, and parol evidence of the alleged variation of the written contract was inadmissible. *Louis Dreyfus & cie v. Parnaso Cia Naviera* [1960] 1 All E.R. 750, p. 763 applied; *Behn v. Burness* (1863) 3 B. & S. 751, per Williams J. at p. 757 (22 E.R. at 283); *Oppenheim v. Fraser* (1876) 3 Asp. M L C. 146, per Mellor J. at 147; *Jacobs v. Batavia & General Plantations Trust* [1924] 1 Ch. 287, per Lawrence J. at p. 295; *Henderson v. Arthur* [1907] 1 K B. 10, per Collins M.R. at p. 12 referred to. There was no basis for rectification of the contract since it did not misstate the agreement. *Frederick E. Rose (London), Ltd. v. William H. Pim & Co. Ltd.* [1953] 2 Q.B. 450, per Denning L J. at 461 referred to, and there was no evidence of a collateral contract or warranty. *Heilbut, Symons & Co. v. Buckleton* [1913] A.C. 30, per Haldane L.C. at pp. 36-37 and Lord Moulton at p. 47 referred to.

ACTION for damages for breach of contract.

D. E. Jabour for plaintiff.

J. R. Cunningham and *B. A. Kelly* for defendant.

NORRIS D.J.A.:—This is an action by the plaintiff, a Manitoba corporation carrying on business in British Columbia as a grain exporter, against the defendant ship in respect of a contract between the plaintiff and the disponent owners of the defendant vessel contained in a freight contract bearing date of April 24, 1960. Although the

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freight contract was dated April 24, 1960, it was not executed by the owners until some time shortly before May 19, 1960.

The booking was confirmed by a letter dated April 25, 1960. The plaintiff, because of the absence of the president, Maxwell M. Nusgart, from his office in Winnipeg, did not execute the freight contract but had acted upon it and proceeded to load grain on defendant's ship upon receipt of written notice of readiness to load, dated May 24, 1960.

The relevant history of the transaction is that on March 26, 1960, the plaintiff confirmed the sale to the Government of Kuwait of 10,000 long tons "10% more or less at sellers' option" of Canadian No. 1 barley packed in bags, each 150 lbs. gross, to be shipped from a Canadian port not later than May 31, 1960. The price basis was C.I.F. Kuwait, the ton basis "ship weight final".

Apparently this was the first time there had been any large quantity of bagged barley shipped from Canada.

The negotiations between the parties in connection with this cargo were handled by Ocean Freighting and Brokerage Corporation, a firm of New York brokers whose chief business generally was to find ships for shippers of various commodities and also to act for ship-owners in obtaining freight for them. The plaintiff had, since 1946, employed this firm as chartering brokers and the charterers of the defendant vessel, Scimiter Shipping Corporation and Sabre Shipping Corporation, agents for Scimiter, had previously to 1960 had dealings with these brokers in obtaining cargoes for their vessels. One of the grounds of dispute between the parties in this action is as to whether in respect of the negotiations in obtaining the vessel and in settling the terms of the sale as set out in the letter of April 25th, 1960, and the consequent freight contract, the brokers were agents for the plaintiff or for the defendant vessel.

The letter dated April 25th, which was on the letterhead of the brokers, was addressed to the plaintiff for the attention of Nusgart and contained the following terms, (*inter alia*):

re: m s. "GIANCARLO ZETA"
Bkng. dated April 24th, 1960 No. 7231

In accordance with your authority we are pleased to confirm having booked the above vessel on the following terms and conditions:

Quantity: 10,000 tons of 2240 lbs., 10% more or less quantity at owners' option

Cargo:	BARLEY in bags Vessel has 611,000 cft bale including deeptanks available under deck
Loading:	One (1) safe berth Vancouver, always afloat
Discharging:	One (1) safe berth Kuwait, always afloat
Laydays:	May 10th, 1960/cancelling May 31st, 1960
Freight Rate:	A lumpsum $130,000 U.S. Currency fully prepaid upon surrender of signed bills of lading, discountless and non-returnable vessel and/or cargo lost or not lost, freight deemed earned as cargo loaded on board Cargo to be loaded, stowed and discharged free of risk and expense to the vessel
Commission:	1¼% to Northern Sales, Ltd. and 1¼% to Ocean Freighting and Brokerage Corporation. Otherwise booking note to apply

It was signed, "Ocean Freighting and Brokerage Corporation as Brokers, J. Bingham, Chartering Department".

The freight contract dated April 24, was executed on behalf of the disponent owners some considerable time after the April 25th letter, on letterheads of Ocean Freighting and Brokerage Corporation, as follows:

No. 7231

April 24th, 1960

FREIGHT CONTRACT

By and between SCIMITER SHIPPING CORPORATION
As Owners or Disponent Owners of the M.S. "GIANCARLO ZETA" hereinafter referred to as Owners and NORTHERN SALES LTD., Winnipeg, Canada, hereinafter referred to as Shippers.

Quantity:	10,000 tons of 2240 lbs., 10% more or less quantity at owners' option BARLEY in bags Vessel has 611,000 cft. bale including deeptanks available under deck
Loading:	One (1) safe berth Vancouver, always afloat
Discharging:	One (1) safe berth Kuwait always afloat
Laydays:	May 10th, 1960/cancelling May 31st, 1960
Freight Rate:	A lumpsum $130,000 U.S. Currency fully prepaid upon surrender of signed bills of lading, discountless and non-returnable vessel and/or cargo lost or not lost, freight deemed earned as cargo loaded on board. Cargo to be loaded, stowed and discharged free of risk and expense to the vessel

It was signed "For and on Behalf of Disponent Owners By Telephonic Authority SABRE SHIPPING CORPORATION As Agents Only: Keith David".

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On May 5, 1960, the brokers forwarded to the plaintiff a plan of the vessel for the use of the stevedores in the loading of the barley in bags.

The freight contract was forwarded by the brokers to the plaintiff with a letter dated May 19, 1960, reading as follows:

May 19th, 1960

AIRMAIL
Northern Sales, Limited
Northern House
Lombard Avenue
Winnipeg 2, Canada

Attn: Mr. M. M. Nusgart

Gentlemen:

Re: FREIGHT CONTRACT
M/S "GIANCARLO ZETA"
Dated April 24th, 1960
no. 7231

Enclosed herewith please find original and two copies of the above captioned contract which has been duly signed by Owners.
If same meets with your approval, kindly sign and return to us advising at the same time the number of copies you will require.

Yours very truly,

OCEAN FREIGHTING & BROKERAGE CORPORATION
As Brokers

"J. Bingham"
Chartering Department

Jb:bc
Enc. 3

The notice of readiness of the ship was contained in a letter signed by the Master as follows:

MS. "Giancarlo Zeta"
Vancouver, B.C.
May 24, 1960
Time: 0800 Hours

Northern Sales (B.C.) Ltd.,
(As Charterers' Agents)
355 Burrard Street,
Vancouver 1, B.C.

Dear Sirs:

This is to advise that the above vessel under my command is entered at Customs, passed by the Port Warden and Department of Agriculture and is in all respects ready to load cargo in accordance with all terms, conditions and exceptions of the existing Booking Note dated April 24th, 1960, No. 7231.

My vessel is being tendered to you to load approximately 10,000 long tons Barley in bags.

Yours very truly,

"Colombo Renzo"
MASTER
MS. "GIANCARLO ZETA"

Accepted:
Date: May 24 1960
Time: 0800 hours
NORTHERN SALES (B.C.) LTD.
(As Charterers' Agents)
By T.W.B. London

It is of importance to note that it was on May 24, 1960, that this notice was accepted by Northern Sales (B.C.) Ltd., a wholly owned subsidiary of the plaintiff.

The matters at issue in this action involve, in the main, questions of fact and of interpretation of the words "10,000 tons of 2240 lbs., 10% more or less quantity at owners' option BARLEY in bags" and the effect of the provision that the contract was a lump sum contract and of the statement "Vessel has 611,000 cft. bale including deeptanks available under deck". It will be noted that the words as to which controversy has arisen appear both in the April 25th letter and in the freight contract or booking note. The plaintiff was notified on June 9th by the Master and by the solicitors for the owners that the owners elected to exercise their option under the contract option provision to cease loading after 10,430 long tons had been loaded. The plaintiff claims damages for breach of contract because of the fact that the vessel ceased loading the barley after 10,430.036 long tons of barley had been loaded, the plaintiff's position being that it was entitled to load the full 611,000 cubic feet bale space in the vessel, and that it was entitled to load another 570 long tons bagged barley over the quantity loaded, and as a result lost profit accordingly.

The vessel was arrested but after providing bail was released and sailed from Vancouver on June 13, 1960.

The defendant claims that no Admiralty jurisdiction *in rem* exists in respect to the circumstances of the claim because the owners of the defendant vessel were not a party to the freight contract and the shipping corporation was not a charterer by demise of the defendant ship and the action should be dismissed for lack of jurisdiction. However, on the 13th day of June, 1960, a motion was

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made by the defendant that the vessel be released from arrest and the action against the defendant be dismissed on substantially this ground. On the hearing of the motion my predecessor, the late Mr. Justice Sidney Smith, dismissed the motion, which dismissal was not appealed.

It is my opinion, therefore, that this matter is *res judicata* and in any event I am of the opinion that this Court has jurisdiction to hear this case.

The plaintiff in its Statement of Claim and particulars thereof delivered pursuant to demand, sets up certain telephone conversations between Nusgart, representing the plaintiff, and Jules Bingham, of the Ocean Freighting and Brokerage Corporation, alleged to represent the defendant, prior to April 24, 1960, and subsequently on or about April 27, and that it was stated by Bingham that as the term to the contract with the government of Kuwait was for 10,000 long tons "10% more or less" the plaintiff was assured that it could load the capacity of the vessel up to the maximum of the tolerance permitted by the term "10% more or less".

In his evidence Nusgart testified that on April 27 Bingham said in effect, with reference to the owners' option provision:

> Your sale to Kuwait is 10,000 long tons—10,000 more or less at your option—therefore, the inclusion of this clause means that you are certain that the owner will load a minimum of 9,000 tons and the owner is certain that you will load a maximum of 11,000 tons but you have the complete use of 611,000 cubic feet bale. . .10,000, 10 per cent more or less at Northern Sales option, . . .

Nusgart testified that he, as representing the plaintiff, definitely queried the words "10% more or less at Northern Sales option" and that the plaintiff relied on the statement of Bingham, as representing the owners of the defendant ship, in the clarification of this statement. All this evidence was admitted subject to objection.

The following questions arise with reference to this evidence:

1. Whether the Ocean Freighting and Brokerage Corporation was at material times the agent for the plaintiff or for the defendant;
2. Whether the plaintiff's story is credible and whether the plaintiff in the light of the circumstances and its actions may be heard to say that the words in the

written contract, "Quantity: 10,000 tons of 2240 lbs., 10% more or less quantity at owner's option BARLEY in bags" are not to be interpreted as they read;

3. Whether there being a written contract, the evidence is admissible.

What I will say about the first two questions is subject to my conclusions on the third.

1. As to whether the Ocean Freighting and Brokerage Corporation was at material times the agent for the plaintiff or for the defendant:—

I am satisfied on all the evidence that the broker was engaged by both the plaintiff and the defendant—by the plaintiff to find it a ship, by the defendant to find a cargo for his ship. It is to be noted that on their letterhead the brokers are designated Freight and Steamship Brokers and Agents. I am equally satisfied that there is no evidence that the broker was engaged or authorized on behalf of the defendant to amend the written contract. Similarly, I am satisfied that the broker prepared the contract, including the words in controversy, on the instructions of the plaintiff. See *Fowler v. Hollins*[1], Brett J. at p. 623.

The letter of April 25th on its face reads: "*In accordance with your authority* we are pleased to confirm having booked the above vessel on the following terms and conditions:" Here follow the words in question with the other conditions. The words italicized indicate that in making the booking and settling the terms, the broker considered that he was acting for the plaintiff and the plaintiff on receipt of the letter of April 25th did not disavow the authority of the broker. Nusgart for the plaintiff in March or April 1960, asked Bingham to quote a freight rate based on his opinion of the market, and after the Kuwait contract was entered into, instructed Bingham to obtain a vessel for the plaintiff. There is no specific allegation in the Statement of Claim or the particulars, nor was there specific evidence from the plaintiff's witness, that as a fact Bingham was the agent for the defendants. Bingham testified as to instructions from Nusgart:

Q. What did he tell you to do about the quantity in your, in the contract he wanted you to prepare?

A. In this particular contract?

[1] (1872) L.R. 7 Q.B. 616.

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Q. Yes.

A. I was instructed to put in the contract—

THE COURT: Who instructed you?

A. Mr. Nusgart of Northern Sales.

THE COURT: All right. Told you to put?

A. In the contract—

THE COURT: In the contract, yes.

A. —ten thousand tons, ten percent more or less quantity at owners' option.

* * *

Q. Now you have already identified Exhibit 3, which is the April 25th letter, which was sent to Mr., to Northern Sales attention Mr. Nusgart by yourself, confirming the terms. After that letter was mailed to Mr. Nusgart what was the next occasion you spoke to him in connection with this contract as to the terms of the contract.

A. As to the terms?

Q. Yes.

THE COURT: Well, did you ever speak to him again about the terms, first of all?

A. The terms were only brought up after the vessel loaded, your Lordship.

THE COURT: Just a minute. The next occasion you spoke to him about the terms of the contract was after the vessel had loaded?

A. The vessel had started loading, I should have said.

MR. CUNNINGHAM:

Q. And that would be after the Notice of Readiness in this case?

A. Oh yes, indeed, after.

Q. Would you have had occasion to speak to Mr. Nusgart about matters in connection with this vessel during the period—

THE COURT: Did you speak to him about the vessel in that period at all?

A. Yes. We sent a plan of the vessel, and also we tried to ascertain the readiness, the expected arrival of the vessel at Vancouver.

* * *

Q. Now it is claimed in this action, Mr. Bingham, that, by Northern Sales, that there were certain oral parts to the contract, certain oral agreements were entered into which provided that Northern Sales had the right to use the full 611 cubic feet bale of the "Giancarlo Zeta". What have you to say about that?

A. There was no oral agreement except the agreement as confirmed by my letter of April 25th.

THE COURT: There was no oral agreement, that's what you said?

A. No, my Lord.

Q. You say it was all in writing?

A. No, excuse me, your Lordship. On April 25th I confirmed an agreement which had been made, your Lordship, on April 24th between Mr. Nusgart, myself as broker, and Scimiter Shipping Corporation.

MR. CUNNINGHAM:

Q. Which was reduced into writing by yourself?

THE COURT: On what date did you confirm it?

A. On April 25th, your Lordship.

THE COURT: You confirmed an oral agreement?

A. Which was made on April 24th.

THE COURT: Yes.

A. I confirmed that on April 25th.

THE COURT: Yes.

MR. CUNNINGHAM: And it was reduced into writing by this witness on April 24th, and, which is Exhibit 6.

* * *

THE COURT: All right, April 24th. This contract, which is dated April 24th, might have been really drawn by you at some other time and dated forward from that time, is that right?

A. The contract was drawn later. I confirmed the contract on April 24th.

THE COURT: Yes, but the document which—show him the document, and ask the question.

MR. CUNNINGHAM:

Q. When was the document, dated April 24th, which is Exhibit 6, prepared by you?

THE COURT: Look at that particular document. Now that is dated what, April 24th?

A. Yes, your Lordship.

THE COURT: All right. Was that actually drawn on April 24th?

A. No. It was drawn a few days later.

THE COURT: It was drawn a few days later and dated back, is that right?

A. Indeed, that is customary in the shipping—

* * *

THE COURT: Put it to him—"was anything said as to a reservation to the Northern Sales to use the full 611 cubic feet bale?"

A. No reservation was made, as such, your Lordship. It was only said that the vessel had 611,000 cubic feet bale under deck.

MR. JABOUR:

Q. And when was that?

A. And that the railroad ties were going to be loaded on deck; the 611,000 cubic feet bale space was mentioned for information purposes.

Q. But this was mentioned at the time you were discussing lump sum freight, is that correct?

A. Yes, I would imagine so.

* * *

THE COURT: It was impossible to obtain a ship because the owners were not sure that they would get 9300 tons in their ships.

A. I can explain that more and say it was impossible to obtain a ship at a rate acceptable for Northern Sales.

* * *

A. At a certain point Scimiter Shipping would have been willing to guarantee ten thousand tons available for cargo, ten thousand tons available for cargo.

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Q. I see.

A. That was rejected by Northern Sales, the reason being that again they had no protection against the minimum of nine thousand tons. They wanted to be sure that nine thousand tons would be lifted. I might add that on a lump sum basis it's up to the charterers—if you guarantee ten thousand tons and the charterer ships only five thousand tons, he still has to pay the same amount

Q. Yes, and in this contract, whether or not the owner cut Northern Sales off at nine-thousand, or ten, or ten five, Northern Sales would be liable to pay full lump sum?

A. Northern Sales had the safety of knowing that their calculations were so based that the worst that could happen was nine thousand tons at the lump sum of, I think it was $130,000.00

* * *

Q. April 25th letter?

A. It is Exhibit 3.

THE COURT: Exhibit 3

MR. JABOUR: Yes, thank you.

Q. Now didn't you receive a telephone conversation from Mr. Nusgart with regard to that letter?

A. No, I did not.

Q. Do you deny there was ever any telephone conversation about that letter?

A. About this letter?

Q. Yes.

A. At no time.

Q. Have you checked your notes, if you have any notes, concerning this?

A. There was no telephone conversation on this matter until, as I told you, it was brought up in June when the ship started loading.

* * *

Q. Now you mentioned, Mr. Bingham, that the freight contract, the contract, the document headed "Freight Contract" of April 24th, the date, was drawn up shortly after that date, is that right?

A. Somewhat after; I don't know how many days after.

Q. Do you have an explanation of why it wasn't sent to Mr. Nusgart until May 19th, mailed from your office on May 19th?

A. It's customary in the shipping business first to have the owners sign the booking note, charter party, or contract, or booking note; first it is signed on behalf of the owners, then by the charterers. As such it was signed by Scimiter or Sabre, agents for Scimiter, and signed by them.

Q. Isn't that an unusually long time?

A. No.

Q. Between the 24th and May 19th?

A. It may be I was lax because of many things and couldn't do it for some time later, because it had all the same terms as the form; so it may have been sent early May to Mr. David for signature.

Having seen and heard Nusgart and Bingham giving their evidence, and considering the nature of that evidence, where there is any conflict in testimony between the two I

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accept the evidence of Bingham as that of an honest witness in preference to the evidence of Nusgart. I do not believe that the telephone conversations testified to by Nusgart and which Bingham denies did take place. It is my opinion that Nusgart's story in this connection is quite untrue. Some attempt was made on cross-examination of Bingham to show that as he was friendly with a senior official of the agent for the charterers and had done work for them, he was not a credible witness, but in my opinion he answered the questions frankly and stood the test well.

2. On the second issue, as to whether the plaintiff's story is credible and whether the plaintiff in the light of the circumstances and the actions of its representative, Nusgart may be heard to say that the words in the written contract, "Quantity: 10,000 tons of 2240 lbs., 10% more or less quantity at owners' option BARLEY in Bags" are not to be interpreted as they read:—

The matter of credibility as between Nusgart and Bingham has been dealt with.

The words referred to are to be read in context with the other terms of the freight contract: *Behn v. Burness*[1] Williams, J. at p. 757 (E.R. p. 283):

> It is plain that the Court must be influenced in the construction, not only by the language of the instrument, but also by the circumstances under which and the purposes for which, the charter party was entered into.

Also *Oppenheim v. Fraser*[2] Mellor J. at p. 147:

> In this case *Behn v. Burness* is in point. Evidence is not admissible to show that the parties meant something not expressed, but the circumstances under which the contract was made must be known. We do not admit the evidence to show what the parties intended, but to show what the words mean in reference to the circumstances.

The plaintiff submits that as the freight contract was a lump sum contract and as the freight contract sets out the fact that "Vessel has 611,000 cft. bale including deeptanks available under deck" the plaintiff was entitled to load the total 611,000 cft. subject to the maximum limit of 11,000 tons. To accept this construction is to ignore the effect of the words "at owners' option". It is a well-known rule of

[1] (1863) 3 B. & S. 751 (22 E.R. 281).
[2] (1876) 3 Asp. M.C.L. 146.

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interpretation that words introduced into a deed are not to be rejected or rendered inoperative if it can be avoided: *Nind v. Marshall*[1] Park J. at p. 335 (E.R. 752).

It has been argued that the words as to the total capacity of the vessel were inserted by way of assurance to the plaintiff that other cargo would not be loaded on top of the barley. The agreement as to deck cargo was reached at about the time the agreement of April 24th was settled. Bingham was cross-examined as follows:

Q. Didn't you tell Mr. Nusgart you had to bring the contract for barley together with the contract for ties and present that to the chartering owners, or parties rather, to see if they would take the ship?

A. In fact they were not meeting at the same time together; they were discussed—

Q. They were discussed?

A. They were discussed.

THE COURT: You will have to get dates if this is to be of any value.

MR. JABOUR:

Q. This is in your early contacts with Mr. Nusgart, when he asked you to obtain a ship.

A. Yes.

Q. It was discussed at that time orally that the people who would be chartering the ship were requesting permission to take a deck cargo?

A. Are you referring specifically to the "Giancarlo Zeta", or a ship?

Q. The "Giancarlo Zeta".

A. It may have come up later. I don't know whether in the beginning, or not. It came up prior to the conclusion of the contract, yes.

Q. Yes. And in what regard did this come up?

A. In what regard?

Q. Yes.

A. Because otherwise the Scimiter Shipping would not have been able probably to do the whole contract of the barley if they did not have the option to take more cargo.

THE COURT: This is the matter of the deck load?

A. Yes, my Lord.

MR. JABOUR:

Q. So Scimiter Shipping would not have taken barley if they would not have been allowed to take the deck load?

A. If they would not have the privilege, it was discussed that they may not have, that they possibly could, would not take the barley. As it is at the time they took the barley they were not sure they could take the railroad ties. It wasn't confirmed on the same day.

The plaintiff was concerned as to the amount of the freight charge which was conditioned by the fact that the owners were able to obtain remuneration for the deck load.

[1] (1819) 1 B. & B. 319 (129 E.R. 746).

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The stowage factor in relation to space was uncertain at the time the contract was completed as was also the question as to whether or not the cargo was going to stow more heavily than was contemplated. Under these circumstances the inclusion of the reference by way of information to the capacity was an assurance to the plaintiff, and the provision as to owners' option provided protection to the owners in the event of the barley being exceptionally heavy.

The situation here was similar to that under review in *Louis Dreyfus et cie v. Parnaso Cia Naviera*[1]. In that case it was provided that the vessel should go to La Pallice:—

> ... and there load a full and complete cargo of not more than 10,450 tons and not less than 8,550 tons wheat in bulk, quantity in owners' option, to be declared by the master in writing on commencement of loading...which the charterers bind themselves to ship, and being so loaded the vessel shall proceed to Karachi...

The reference in that case was stronger against the owner than in the case at Bar because of the provision that the vessel should load a "full and complete cargo" and yet the provision as to owners' option was construed as a governing phrase in favour of the owner. At p. 763, Harman, L. J. said:

> The meaning of the words preceding the reference to the option is not in doubt, having regard to the authorities, *Carleton S. S. Co. v. Castle Mail Packets Co.* ((1896) 2 Com. Cas. 173) and *Jardine, Matheson & Co. v. Clyde Shipping Co.* ([1910] 1 K. B. 627), cited by my Lord. They are a warranty by the shipowners that not less than 8,550 tons shall be carried. They give the charterers the right to load up to the higher figure, if the vessel will take so much, but no more, even though she could carry more. Thus an inroad is made on the primary meaning of "full and complete cargo". The option that follows is an option to the shipowners by their agent, the master, to put a further limit on this same right by declaring the quantity. This declaration need not, in my judgment, be made. It is truly an option. If, however, the option be exercised within the limits set by the document, then the figure declared by the master must be read into the contract, and, as between the parties, will constitute, a full and complete cargo.

Similarly here the figure of 10,430.036 tons fixed by the owners on June 9th as the quantity is to be read into the contract.

It is not credible that the plaintiff would not be alive to the force and meaning of the phrase "quantity at owners' option", particularly in view of the fact that in its contract with the government at Kuwait (Ex. 1) under the heading

[1] [1960] 1 All E.R. 759.

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"Quantity" there appear the words "10,000 long tons 10% more or less at sellers option", and yet Nusgart said as to this:

> Yes; when I received this letter (the letter of April 25th confirming the verbal contract) and read through the terms I immediately pounced upon the fact that there was a clause in there, "10 per cent more or less at owner's option" and put a bracket around it and wrote in one word "clarification". I then contacted Mr. Bingham either on the 27th or the 28th April—I cannot recall which date.

I have already referred to the fact that Bingham denies that he had any conversation with Nusgart such as the latter alleges, and that I accept Bingham's denial as the truth. Nusgart testified that he made no note of his alleged conversations with Bingham and when he received the formal contract under cover of Bingham's letter of May 19th, he did nothing to have the contract altered to set out the provision which he said Bingham, about a month earlier, indicated to him was the correct provision. As to this he testified:

> MR. JABOUR:
>
> Q. Now, the letter of May 19th, is that before you?
>
> A. Yes.
>
> Q. It states there:
>
> "If same meets with your approval, kindly sign and return to us advising at the same time the number of copies you will require."
>
> Did you sign and return that contract?
>
> A. No, I did not.
>
> Q. Will you explain to his lordship why you did not?
>
> MR. CUNNINGHAM: Well—
>
> THE COURT: Do you object to it?
>
> Mr. CUNNINGHAM: Yes, my lord. No, I will not object to that question.
>
> MR. JABOUR:
>
> Q. Will you explain to his lordship why?
>
> A. I received this, I believe, on May 24th and the terms in this letter of contract still contained the clause "10 per cent more or less quantity, at owner's option, barley in bags." There was no explanation in the letter pertaining to this along the lines of my conversation with Mr. Bingham and I just felt that maybe I had better hold on to this. I don't know, there was not any real reason after I had received Mr. Bingham's explanation. I just did not feel quite right about it, my lord, and I was leaving for Vancouver on May 25th, and the result is I just left it on my desk, went out to Vancouver and never did sign the contract because that clause in there was still nagging and bothering me. It was not part of our contract for the charter of this ship.

Nusgart went to Vancouver on May 25th, the loading having commenced on May 23rd, and spent four or five

days there during which time the vessel continued to load. He did nothing further about having the contract changed. On his own version of events he did nothing at all about the contract until June 6th when he heard from his Vancouver office that the owners were threatening to stop loading at 10,200 tons and that he then telephoned Bingham who said that the owners could not do so and were just bluffing. Bingham's evidence, which I accept, is that Nusgart had said at this time that the owners intended to stop loading at 10,000 tons and that he, Bingham, had said that he didn't believe it and that the owners would probably load more although they did not have to.

As a result of a communication with his Vancouver office Nusgart went to Vancouver on June 9th. The vessel stopped loading on June 10th at 11.15 P.M. after it had taken on a little over 10,430 long tons of bagged barley. At the end of 1960, Nusgart called on Bingham in New York but Bingham refused to discuss the matter with him.

Nusgart testified that he kept no notes of the alleged telephone calls with Bingham, he did not take up the matter of rectification or clarification of the contract with the owners, and he wrote no letters to Bingham confirming the telephone calls. He did not write to the owners on the subject. His testimony on cross-examination as to this matter is as follows:

Q. Now you had a contract in your office all this weekend, or about the 24th, yet you didn't write or telephone at that time?
A. No, I didn't call at that time.
THE COURT: On what date?
MR. CUNNINGHAM: Week of May 23rd, or—
A. The explanation had already been given to me by Mr. Bingham.
Q. Well, if this explanation had been given to you, did you not expect that the contract would show that in its final form, or in some change in the contract?
A. Quite true. I didn't give it a further thought.
Q. No. In fact you didn't give it any thought until it turned out, during the course of loading, that the barley was going to stow heavy.
THE COURT: All right, go ahead, you've got only one answer to that.
A. Mr. Cunningham, I must answer emphatically no.

Even accepting Nusgart's evidence as to the conversations with Bingham, the effect of it does not support a submission that they constituted oral parts of a contract, part written and part oral, as alleged in the particulars. At the very best for the plaintiff, on Nusgart's own version, they

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amount only to assurances by Bingham as to the meaning of the written contract. As to this Nusgart testified:

MR. CUNNINGHAM:

Q. I put it to you, Mr. Nusgart, that prior to the ten thousand, ten per cent more or less, being fixed, as the contract states, the contract that we are dealing with in this action, there was, it was submitted to you through Mr. Bingham that a contract was available from a ship owner at 9500 tons, ten percent more or less, for your consideration.

A. It's possible, I don't recall. If it was given to me by Mr. Bingham it would have been mentioned on a per ton basis, Mr. Cunningham, and it would have been turned down by us because if the ship had then loaded ten percent under 9500 tons it would not come within the minimum requirements of our contract.

Q. Now when you were cut off, as your counsel stated in opening, at ten thousand, ten percent more or less that would be the quantity set in the booking—ten thousand four hundred and thirty would be within the terms of the booking note.

THE COURT: As it reads—

A. Depends on how you interpret the booking note.

THE COURT: As it reads—ten thousand tons of 2,240 pounds, ten percent more or less quantity at owner's option barley in bags —would the cut-off that was actually made comply with that, interpreting that literally as it reads?

A. Yes, my Lord.

Rectification is not asked for and indeed it could not very well be asked for because there is no certain evidence to show that the contract was other than as contained in the writing—the freight contract. The evidence does not meet the four requirements for rectification referred to in Cheshire and Fifoot on Contracts (6th Ed.) at pp. 201-202, and particularly the requirement referred to in *Frederick E. Rose (London), Ltd. v. William H. Pim & Co., Ltd.*[1] by Denning L.J. at p. 461 as follows:

> In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties—into their intentions—any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice.

There is no case here, on the evidence, of warranty or collateral contract within the terms of the judgments in

[1] [1953] 2 Q.B. 451.

Heilbut, Symons & Co. v. Buckleton[1] where Viscount Haldane, L.C. said at pp. 36-37:

The words of Mr. Johnston in the conversation proved by the respondent were words which appear to me to have been words not of contract but of representation of fact. No doubt this representation formed part of the inducement to enter into the contract to take the shares which was made immediately afterwards, and was embodied in two letters dated the next day, April 15 But neither in these letters nor in the conversation itself are there words either expressing or, in my opinion, implying a special contract of warranty collateral to the main contract, which was one to procure allotment.

It is contrary to the general policy of the law of England to presume the making of such a collateral contract in the absence of language expressing or implying it, and I think that the learned judge who tried the case ought to have informed the jury that on the issue of warranty there was no case to go to it, and that on this issue he and the Court of Appeal ought to have given judgment for the appellants.

and Lord Moulton at p. 47 of the same report:

He must show a warranty, i e, a contract collateral to the main contract to take the shares, whereby the defendants in consideration of the plaintiff taking the shares promised that the company itself was a rubber company. The question in issue is whether there was any evidence that such a contract was made between the parties.

It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds." is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by £100, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are, therefore, viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.

The owners' option provision is inconsistent with any conclusion that there was a warranty or collateral contract for the use by the plaintiff, if desired, of the total capacity of the vessel. Such would entail provision for a *shipper's* option condition. See *Louis Dreyfus et cie v. Parnaso Cia Naviera, supra.*

[1] [1913] A.C. 30.

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3. On the third issue, as to whether there being a written contract, the evidence is admissible:—

The evidence by Nusgart as to the telephone conversations was not evidence of the meaning of ambiguous terms. It was merely evidence in an attempt to vary a written contract the admissibility of which will be dealt with now.

To the extent that Nusgart's evidence, objected to, deals with circumstances surrounding the making of the contract, it is admissible. See *Oppenheim v. Fraser, supra,* Mellor J. at p. 147. I rule as inadmissible the evidence objected to as attempting to add to, vary or contradict the freight contract. The authorities are clear on the matter and are well known. See Cheshire and Fifoot on Contracts (6th Ed.) p. 101:

> If the contract is wholly in writing, the discovery of what was written normally presents no difficulty, and its interpretation is a matter exclusively within the jurisdiction of the judge. But on this hypothesis the courts have long insisted that the parties are to be confined within the four corners of the document in which they have chosen to enshrine their agreement. Neither of them may adduce evidence to show that his intention has been mis-stated in the document or that some essential feature of the transaction has been omitted.
>
> "It is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. Accordingly it has been held that ... parol evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties."
>
> (*Jacobs v. Batavia & General Plantations Trust* [1924] 1 Ch. 287, per Lawrence, J. at p. 295.)

See also *Henderson v. Arthur*[1], Collins M.R. at p. 12:

> It seems to me that to admit evidence of such an agreement as being so available would be to violate one of the first principles of the law of evidence; because, in my opinion, it would be to substitute the terms of an antecedent parol agreement for the terms of a subsequent formal contract under seal dealing with the same subject-matter. I do not see how, in this case, the covenant in the lease and the antecedent parol agreement can co-exist, and the subsequent deed has the effect of wiping out any previous agreement dealing with the same subject-matter. It was somewhat faintly suggested that the agreement relied upon was a collateral agreement in the nature of a condition upon which the lease was entered into by the defendant. But it appears to me, when the terms of the agreement are looked at, that it is not a merely collateral agreement, but provides in another and contradictory manner for doing what was subsequently provided for by the lease.

And also *Galt v. Frank Waterhouse & Company of Canada Limited*[2], Robertson, J.A. at p. 109 *et seq.*

[1] [1907] 1 K.B. 10.

[2] (1943) 60 B.C.R. 81.

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In my opinion the freight contract of April 25th between the parties contains the whole contract covering the shipment of the barley, and, for the reasons given, the action must be dismissed with costs.

It is regrettable that judgment on this case as on two others has been delayed for so long due to the fact that I was engaged for over a year on the Inquiry into labour troubles on the Great Lakes, my subsequent illness as a result thereof, and the fact that the number of Judges available to sit on the Court of Appeal has been restricted due to illness and other causes. Fortunately, however, my notes on all these cases were complete and I have now had the opportunity to give them the consideration which is warranted.