TOKN Grass

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THE HIGH COURT

No. 7024P of 1980

BETWEEN:-

TOKN GRASS PRODUCTS LIMITED

Plaintiffs

-and-

SEXTON AND COMPANY LIMITED

Defendants

Judgment of Mr. Justice Doyle delivered the 3rd day of October 198

This is an action alleging breach of contract in the sale of a grain dryer. In the course of this judgment the parties will for brevity be known as "Tokn" to signify the Plaintiffs and "Sexton" to signify the Defendants. It is claimed that the contract was made between the parties on the 27th of February 1978. Drying with the grain dryer commenced on the 15th day of August 1978 and continued during the following eight weeks harvest season. It is claimed that the machine was defective from the start, that the electric motor frequently burnt out and that various parts had to be replaced.

The contract was in writing and although this should not normally present much difficulty in interpretation the particular

circumstances of this case and the nature of the writing require elucidation which it is convenient to do before one embarks on an investigation of the further activities of the parties.

The business of the Plaintiffs Tokn is, amongst other things to dry harvested crops where that is necessary. In the circumstances to be considered here, the crops of that character may be narrowed down to grass, grain for milling and grain for animal feed. Some mention also was made of activities in drying barley; but this is not material to the matters now to be decided. The Defendants Sexton are a firm of milling and grain handling engineers. They also are consultants and advisers in activities of this sort. It was part of the contract which is the subject of the dispute that they would sell and install a grain drying plant for Tokn. The main plant was manufactured in the United Kingdom by an agricultural machinery firm known as Alvin Blanche although certain ancillary items were made or assembled or modified by Sextons. Such ancillary equipment included a control panel which had been manufactured by a firm called Newcourt Electronics Limited but was assembled for the Plaintiffs and installed upon their premises as part of the grain

dryer by Sextons. The control panel last mentioned embodied ar overload device designed as a safeguard or protection for the electrically driven machinery and intended to trip the motors and cause them to stop should they become unduly overloaded. The overload gear in question was manufactured by a British firm known as Allen-West and had been substituted for a similar devic made by another manufacturer, which had originally been incorporated in the grain drying plant.

The contract between the parties was contained in four typewritten sheets each of which was dated on the 27th of February 1978. The face of each sheet consisted partly of printed matter naming the Defendant Company, Sexton & Company Limited and also the printed words "Specification and Tender." At the bottom of each sheet appeared the words "Terms and Conditions of Sale overleaf" and below that in smaller print the names of the Directors of the Defendants, Sextons. The reverse of each of the four sheets, upon which no typewritten legend appeared, exhibited printed terms and conditions of sale numbering 13 in all. These printed terms and conditions of sale differed in certain respects from the typewritten script

of the contract and in certain respects are incompatible. Mr. Martin Furlong, the Sales Director of Sextons, had signed his name at the end of the typescript on the last of the four sheets of the contract.

To deal briefly with the nature of the discrepancies which I have mentioned between the written terms and conditions and th typed provisions in the body of the contract, I may perhaps exemplify, in the first place, the printed term and condition number 4 which reads as follows:-

"Payment: Cash on or before Delivery"

However the typewritten portion of the contract on page 4 contain a heading:-

"TERMS OF PAYMENT"

"20% Deposit with Order

70% On delivery of the equipment to site

5% When erected or 30 days from date of delivery

5% When started."

As stated the reverse of the sheet upon which these typewritten provisions occur and upon which same sheet Mr. Furlong's

signature also appears contains the conflicting printed arrangement for payment. Having regard to the view which I take as to which of these conflicting arrangements is to predominate in my construction of this contract, it may not be necessary for me to consider other examples of discrepancies between the printed words and the typewritten ones.

There was oral evidence in the course of the trial, not contested, which indicated that the parties were following the typewritten terms of their arrangement as being the binding ones, rather than the printed terms and conditions on the back of the sheets containing the provisions of the contract. This is not to say that the printed terms and conditions of sale are out of the case. In fact the parties purported to rely on certain of them which, as will appear, were not in conflict with the typed arrangements, and arguments were addressed to me as to the effect of and implications to be drawn from certain of these terms and conditions by both parties to this case. In particular, a good deal of argument was directed to the effect of Clause 5 of the printed terms and conditions, which provided:-

"No condition as to quality is implied and no guarantee or warranty expressed or implied is given under the Sale of

Goods Act, 1893 or otherwise in respect of any goods, vehicles or equipment sold. All goods, vehicles and equipment are sold with the benefit only of the manufactuer guarantee if any."

Reliance was also placed inter alia upon the provisions of Clause 12 of the printed terms and conditions which provides:-

"The Company will not be liable for any consequential loss arising from the operation of any equipment or plant supplied."

Another variation between the final written or typed contrac and an earlier arrangement which had been made between the parties in respect of the erection and specification of the grain dryer was that the Plaintiffs required that the electric control panel of the machine should be fitted with Allen-West Contactors. Originally these, as it turned out, important components were intended to be of a type manufactured by a German electrical firm and the original price was agreed with this component in mind; but it was subsequently altered and the Allen-West equipment was agreed upon, as exhibited at page 3 of the "Contract" as it is called, on the 27th of February 1978. This particular component

and its efficiency involved a good deal of examination and had considerable evidence devoted to it in the course of the trial.

I propose to adopt the following method of construction of the arrangement between the parties in so far as it is evidenced in writing. I look first to the typed four page contract of the 27th of February 1978 as setting out what was agreed. However I do not disregard the printed terms and conditions of sale on the back of each typewritten sheet, in so far as such terms and conditions of sale are not in clear or obvious conflic with the typewritten arrangement; and where no such conflict appears I must give them their ordinary legal meaning and constr their effect in binding the parties to the contract. In particular I must have regard to the principles stated by Willes J., in Mody -v- Gregson L.R. 4 Ex. Ch. 49 at page 53, when he stated:-

> "The doctrine that an express provision excludes implicatior does not affect cases in which the express provision appears upon the true construction of the contract to have been super-added for the benefit of the buyer."

The Sale of Goods Act itself provides confirmation of this

opinion when it provides at Section 14(4) that:-

"An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

To summarise, it may be said that the Statutory provisions and the dicta of Judges in the recognised authorities are really to afford assistance in the construction of the agreement and its true terms as arrived at between the parties. They do not in any way restrict the parties in the type of contract or bargain into which they may wish to enter. They merely afford help in deciding precisely what that contract or bargain may be.

I now turn to consider the evidence and its effect.

Mr. Michael Doherty, the first witness for the Plaintiffs. Mr. Kearney stated that the milling of wheat had commenced in September. The machine burnt out its motors on the in-take side and on the elevators and conveyor. He described how it was necessary to remove the motors from the machine and to rewind them, a complex process, and then reinstal them. They broke down again because the overload mechanism was defective and this was not repairable. These parts were manufactured,

he said, by Messrs Allen-West. He described complaints made to Sextons and the fact that they sent replacement overloads. These replacements were also Allen-West manufactured. The drying process according to this witness was very substantially disrupted. The replacement process took a minimum of 24 hours. Tokn were working three hour shifts. It required two hours to re-start after the repairs and the replacements had been done. That meant a 26 hour loss altogether. These unhappy experiences were repeated on numerous occasions. Some of the drying process was required to be done on feeding wheat which the Plaintiffs had contracted to do. This commenced in the last week in September and the machine broke down very shortly after the start, the cold fan being found to be out of action. Sextons did some replacement and provided a dryer at the conclusion of the season, but Tokn had had to finish that season's work without the cold fan. The hot fan, which formed an earlier part of the drying operation, also broke down late in that season and this caused a shutdown of the drying plant. This particular breakdown happened in the middle of the night. From this it can be seen that time was of the essence in the operation which the Plaintiffs

were carrying out for their customers. Mr. Kearney detailed other defects in the plant which I think it unnecessary for me no to examine in detail. This witness under cross-examination by Counsel for the Defendants claimed to have been told by a member of the Defendant firm, or of the manufacturers Allen-West, that a faulty batch of overload units had been installed in some of the machines. If they had not been faulty he did not believe that most of the break-downs would have taken place at all. In answer to me he agreed that a wet season would put more strain on the machines but, he stated, that a wet season and its effects should be capable of being dealt with by the overload controls.

The next witness, Mr. Tong, is a Director of Tokn, the Plaintiffs. He indicated that in the year under consideration the harvesting of spring barley commenced about the 15th of August. It was succeeded by the harvesting of wheat and when that came to their premises they would stop buying barley. It seemed that the machine was capable of drying the barley but incapable of dealing with the wheat, that is milling wheat. He described the extent of their contracts to supply a firm called Messrs Coakley, who are brokers of grain in a large way of

business and described the losses suffered by their inability to complete these contracts because of the defects in the machinery. Mr. Tong's evidence established beyond reasonable doubt that the electrical problems were what caused the stoppages. When they were able to be dealt with the motors would continue to run and to process large quantities of grain as has been the case in subsequent seasons to that of 1978.

Another witness, Mr. Alick Tong, Senior, in the course of his evidence stated that the electrical equipment which they had in other parts of their plant had been manufactured by Allen-West and that it was on Tokn's request that an Allen-West electric control panel should be incorporated in the machine purchased fror Sextons, and this panel was to be fitted to Allen-West Contactors. This was in substitution of a German manufactured part which the machine originally incorporated. A great deal of the subsequent trouble experienced by Tokn in the working of the machine may be traced to the defective nature of this control panel.

Another witness, Mr. Richard Talbot, who is a Loss Assessor examined the contracts and was furnished with the necessary figures and explanations to enable him to make a calculation to

which he subsequently deposed. He estimated Tokn's loss at a figure slightly in excess of £12,000-00. In respect of this estimate he was not seriously shaken on cross-examination and I believe the loss suffered, which includes consequential loss, to be of the order stated by this witness.

Mr. Martin Furlong, Sales Director of Sextons, was their first witness. He was the person who had conducted the negotiations with Tokn about the sale of the grain dryer, which commenced in October of 1977. The "contract document" as it was called of the 27th of February 1978, to which so much attention has had to be given, was accompanied by a letter of eve date from Sextons to Tokn and signed by Mr. Furlong. This letter deals with certain special requirements of Tokn to be incorporated in the drying equipment layout, and draws attentior to certain extra costs associated with the installation of the Allen-West type of contactors. It is noteworthy, also, that in the course of this letter Mr. Furlong specifically drew attention to certain requirements which he describes as the "thermistor protection relay" for the hotran motor, which must be wired out to the thermistors in the motor; otherwise the

letter states:-

"We will be unable to avail of the manufacturers' warranty on the motor."

The letter continued by urging Tokn to study the drawing and "Contract Quotation" carefully,

"to see if we have interpreted your instructions correctly and if you find any discrepancies in your requirements please let us know without delay to enable us to correct the same without interfering with the proposed delivery schedule."

Another reference to manufacturers' guarantees is to be found on each of the invoices for materials supplied and worked on. At the bottom of each such invoice appears the following printed words:-

"The Company holds itself free of any liability in respect of manufacturers' guarantees. Any claim arising out of faulty work will be confined to the making good of such work and no claim for consequential loss will be entertained.

This was I conclude a sale of the grain drying equipment by

description since Tokn relied to some extent on the description given by Sextons: see the observations of Judge Davitt, afterwards Davitt P., in O'Connor -v- Donnelly (1944) Ir. Jur. Rep. It would however, be vain to regard Tokn as innocents in the operation of grain dryers. They had been in the business in a substantial way and were sufficiently familiar with grain drying machines to specify a particular make of control panel - the Allen-West - in place of that normally incorporated in it. I can find nothing in the typewritten pages in the "Contract Quotation" which runs counter to the printed term and condition number 5 endorsed on each page. It would be unreal to suggest that Tokn were taken by surprise or that they became aware of it only at a late stage. The letter of even date with the "Contract Quotation" and the wording at the foot of the invoices negatives such a conclusion.

Tokn in the Statement of Claim allege a contract for the sa of the grain dryer made in circumstances sufficient to bring int operation the provisions of Section 14 of the Sale of Goods Act, 1898, especially sub-section 1, and they allege an implied condition and a warranty by Sextons that the grain dryer should

be reasonably fit for Tokn's purpose, known to Sextons. I am satisfied that it was not so fit when delivered once erected and that it continued to be unfit during the 1978 harvest season whereby Tokn suffered loss.

Sextons deny that the circumstances of the sale gave rise to the condition or warranty alleged. They rely upon the expre negative contained in Clause 5 of the printed terms and conditio: Sextons further rely upon Clause 12, exempting them from consequential loss, which if effective and not modified by Clause 13 would exclude most of the damage claimed by Tokn.

Tokn have claimed in paragraph 4 of the Statement of Claim both a condition and a warranty that the dryer should be reasonably fit for their purpose. It would appear that the circumstances relied upon give rise only to a condition: Bankes J J., in Baldrey -v- Marshall (1925) 1 K.B. 260 at 266; Aitken L.J ibid. at 269; Wallis -v- Pratt (1911) A.C. 394 (H.L.)

The Sale of Goods Act, 1893 was a codifying statute and its construction requires consideration of the previous state of the law as stated by Palles C.B. in Wallis -v- Russell (1902) 2 I.R. 585 at 590; Lord Ashbourne ibid. at 603. In this connection

112

Judges before and after the Sale of Goods Act have construed exemption clauses strictly, contra proferentem. The maxim "expressum facit cessare tacitum" (a comperdious statement of Section 14(4) although antedating it by many years) was depart from according to particular circumstances in Mody -v- Gregson (1868) L.R. 4 Ex. Ch. 49, Willes J., at page 53 as earlier cit and in Bigge -v- Parkinson (1862) 7 H & N 955; Ex. Ch. Applyi the strictest scrutiny to the wording of Clause 5 I consider it to be sufficiently wide and explicit to exclude the provisions of Section 14. I am also satisfied that Tokn knew of the term of the Clause, in fact, Sextons as earlier stated in their accompanying letter, requested Tokn "to study the "Contract Quotation" carefully". Thus I am constrained with regret to dismiss this claim.

The counterclaim relates to charges for work done and materials supplied in the maintenance, repair and making serviceable of the grain drying plant and equipment. Since I have found that the plant was defective when supplied and installed I consider it inequitable to charge Tokn with the necessary repairs.