St. John Tug Boat Co. Ltd. v. Irving Refining Ltd., [1964] S.C.R. 614

Supreme Court Reports

Supreme Court of Canada
Present: Cartwright, Abbott, Ritchie, Hall and Spence JJ.
1964: June 1 / 1964: June 29.

[1964] S.C.R. 614

Saint John Tug Boat Co. Ltd., (Plaintiff) Appellant; and Irving Refining Ltd. (Defendant), Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Case Summary

Contracts — Acceptance — Letter proposing terms for rental of tug — Verbal arrangements made for services and at rates set out in letter — Continuation of services beyond expressed period — Whether agreement implied from defendant's acquiescence.

The defendant operated an oil refinery at Saint John, New Brunswick, and required tugs to guide incoming tankers into the harbour. The plaintiff company claimed that a letter sent by it to Kent Lines Ltd., a shipping firm which was owned or controlled by the same interests as the defendant, contained the terms under which the plaintiff's tug Ocean Rockswift was made available for use by the defendant. There was no written acceptance of this offer, but it was not disputed that the defendant made verbal arrangements for the rental of the tug for a period of one month commencing June 13, 1961, for the services and at the rates set out in the letter, nor was it disputed that this arrangement was expressly extended twice, each time for a period of two weeks. Although no formal authorization was made for any further extension, the services of the tug continued to be employed by the defendant, and, apart from a complaint about handling charges, the defendant gave no indication to the plaintiff as to any change in the arrangements for the tug's employment or the per diem charges being made for its services until late in February 1962. The plaintiff's monthly invoices since July 1961 remained unpaid and the defendant denied liability for all charges after the middle of August in that year.

The plaintiff sued for services rendered and was successful at trial. The Court of Appeal allowed an appeal and varied the trial judge's assessment of the plaintiff's damages by reducing considerably the amount thereof on the ground that the liability of the defendant for the rental of the plaintiff's tug on a stand-by basis was limited to the period extending from June 12 to December 15, 1961 (the end of the port summer season) instead of continuing on the same basis until February 28, 1962, as found by the trial judge. The plaintiff appealed and the defendant cross-appealed to this Court.

Held: The appeal should be allowed and the judgment at trial restored; the cross-appeal should be dismissed.

The defendant must be taken to have known that the tug was being kept standing by for its use until the end of February 1962, and that the plaintiff expected to be paid for this special service at the per diem rate specified in the monthly invoices. The matter drifted from day to day without any move being made on the defendant's behalf to either dispense with the services or complain about the charge. It was not unreasonable to draw the conclusion from this course of conduct that the defendant was accepting the continuing special service on the proposed terms. The contract was concluded by the defendant's own acquiescence.

The test of whether conduct, unaccompanied by any verbal or written undertaking, can constitute an acceptance of an offer so as to bind the acceptor to the fulfilment of the contract is an objective and not a subjective one; the intention to be attributed to a man is always that which his conduct bears when reasonably construed, and not

that which was present in his own mind. However, mere failure to disown responsibility to pay compensation for services rendered is not of itself always enough to bind the person who has the benefit of those services. The circumstances must be such as to give rise to an inference that the alleged acceptor has consented to the work being done on the terms upon which it was offered before a binding contract will be implied. Smith v. Hughes (1871), L.R. 6 Q.B. 597, applied; Falcke v. Scottish Imperial Insurance Co. (1886), 34 Ch. D. 234, referred to.

APPEAL and cross-appeal from a judgment of the Supreme Court of New Brunswick, Appeal Division, allowing an appeal from a judgment of Anglin J. Appeal allowed and cross-appeal dismissed.

Paul Barry, Q.C., for the plaintiff, appellant. A.B. Gilbert, Q.C., for the defendant, respondent.

Solicitor for the plaintiff, appellant: J. Paul Barry, Saint John. Solicitors for the defendant, respondent: Gilbert, McGloan & Gillis, Saint John.

The judgment of the Court was delivered by

RITCHIE J.

This is an appeal from a judgment of the Appeal Division of the Supreme Court of New Brunswick whereby that Court allowed an appeal from the judgment of Anglin J., rendered at trial, and varied his assessment of the appellant's damages by reducing the amount thereof from $79,639 to $49,944, on the ground that the liability of the respondent for the rental of the appellant's tug on a "stand-by" basis was limited to a period extending from June 12 to December 15, 1961, instead of continuing on the same basis until February 28, 1962, as found by the learned trial judge.

Since early in 1960, the respondent has operated an oil refinery bordering on the harbour of Saint John, New Brunswick, at Courtenay Bay, and as a necessary incident of this operation it is supplied with crude oil brought by large tankers which are owned or chartered by the California Shipping Company, a corporation with its head office in the United States of America, which was, at all times material hereto, represented at Saint John by Kent Lines Limited, a shipping firm which was owned or controlled by the same interests as the respondent company.

It was important to the respondent that tugs should be available when required to guide the incoming tankers into the harbour as any delay whilst they waited in the harbour approaches involved demurrage charges and to meet this situation, Mr. K.C. Irving, the chairman of the board of directors of the respondent company and president of Kent Lines Limited, had one of the other companies in which he was interested purchase tugs to do this work. Unfortunately, however, from the time when the large tankers first started servicing the refinery in April 1960, up to and including the date of the trial, difficulty was encountered in having these tugs used by the Saint John Harbour pilots and it accordingly became necessary to employ the services of the appellant's tug boats which were the only other such boats available in the harbour.

On March 24, 1961, no firm arrangements having been made as to the employment of these tugs by the respondent during the forthcoming months, the Saint John Tug Boat Company Limited wrote to Kent Lines Limited in the following terms:

Dear Sirs:

> This is to advise you that unless some special arrangement is made, on and after early in April when the winter port season closes here, we will only have two tug boats available for assisting in docking and undocking ships in St. John Harbour.
>
> If we do not hear from you we will assume that you are making arrangements elsewhere for any additional tugs that you may require.

On the same day, C.N. Wilson, the president of the appellant company, wrote to Mr. Irving, in part, as follows:

> My dear Kenneth:
>
> I am enclosing herewith copy of letter which we are sending to Kent Line Ltd. concerning tug services in St. John Harbour this coming summer.
>
> * * *
>
> We do appreciate the work we have received from Kent Line Ltd. and thought it was only fair to advise both them and you of our plans for this coming summer. If more than two tugs are required from us during the coming season, we feel that we could arrange to provide them if we are advised to this effect now. However special rates will need to be agreed upon as it would be absolutely impossible for us to provide them at the present tariff rates.

This was followed by a letter of March 27 addressed to Kent Lines Limited which was also brought to the attention of K.C. Irving and which is now claimed as containing the terms under which the appellant's tug Ocean Rockswift was made available to the respondent during the period covered by the statement of claim. That letter reads:

> Gentlemen:
>
> With further reference to our letter of the 24th inst. and our telephone conversation of this morning, we would say that as it looks now, we will probably be keeping available for assisting in docking and undocking ships in St. John Harbour this coming summer, the tugs "OCEAN HAWK 11", 900 h.p. Diesel; and the "OCEAN WEKA", 400 h.p. Diesel.
>
> We could make either the tug "OCEAN ROCKSWIFT", Steam, 1,000 h.p. and/or the tug "OCEAN OSPREY", Steam, 1,000 h.p. available for your large tankers at a cost per day each of $450.00. This of course would take in Sundays and holidays as well as the ordinary working day and would be for all days during the month regardless of whether the tug was working or not.
>
> If at any time, more than two tugs were required and the "ROCKSWIFT" and/or the "OSPREY" were used on work other than large tankers, we would give you credit at the tariff rate on the earnings of this tug, less 10% for handling.
>
> As we have other enquiries concerning the "OCEAN OSPREY" and the "OCEAN ROCKSWIFT", we would appreciate your early decision as to whether or not the above is of interest to you.

There was no written acceptance of this offer, but it is not disputed that the respondent made verbal arrangements for the rental of the Ocean Rockswift for a period of one month commencing June 13, 1961, for the services and at the rates set out in the letter of March 27, nor is it disputed that this arrangement was expressly extended twice, each time for a period of two weeks, and it appears to be agreed also that these extensions were intended to cover the

time until the arrival of an Irving tug which was expected to be available sometime in the month of August. There is evidence also that Mr. L.L. Henning, the president of the respondent company, was succeeded in this position by a Mr. W.R. Forsythe in August 1961, and that before leaving Saint John he had told the president of the appellant company "that he should for any further extensions contact Mr. Forsythe". Neither Mr. Forsythe nor any other officer of the respondent formally authorized any further extension of the agreement, but the services of the Ocean Rockswift continued to be employed by the respondent until late in February 1962, and accounts for these services were rendered by the appellant to the respondent each month, up to and including February 28, 1962. Each of these accounts carried the heading: "To Rental 'Ocean Rockswift' As Per our letter of March 27th, 1961" and disclosed that the rental was $450 per day "Less Credit Note Attached".

The effect of this method of billing was that the respondent company was charged $450 per day for the privilege of having this tug "standing by" and that the normal tariff rate paid by other companies for the tug's services was deducted from the $450, but this deduction was reduced by 10 per cent to defray the appellant's "handling charges". The way this worked out in respect of the larger tankers which were escorted to the refinery was that the normal tariff rate for each such tanker was paid by Kent Lines Limited, and this amount was duly deducted from the $450 daily "stand-by" charge which was billed to the respondent. When the respondent found that the appellant was deducting the 10 per cent for handling charges in respect of these tankers, it protested and in giving judgment at the trial the learned trial judge, in my opinion quite rightly, excluded this charge in respect of such tankers from the total bill.

There does not appear to have been any difference in the use which the respondent made of the Ocean Rockswift after July 31, 1961, nor, apart from its complaint about the 10 per cent handling charge, did the respondent give any indication to the appellant as to any change in the arrangements for the tug's employment or the per diem charges being made for its services until late in February 1962, but all the appellant's invoices for the services of the tug since July 1961, remain unpaid, and the respondent now denies liability for all charges after the middle of August in that year.

In finding the respondent liable for payment of these invoices up to and including February 28 (less the 10 per cent adjustment above referred to) the learned trial judge stated:

> Although the plaintiff over the period in question was pressing Mr. Forsythe for payment, there was no written or verbal notification to it that the defendant refused to accept liability as invoiced for the rental of the Rockswift. Even in the latter part of February, 1962, when Mr. Forsythe was invited by Mr. Keith Wilson "to take her off charter", Mr. Forsythe said he would have to talk to Mr. Irving first.
>
> I find that the defendant knew that the Ocean Rockswift continued after August 1, 1961, in commission on call to assist and did assist the large tankers during the period in question, and that the plaintiff expected payment on a rental basis for its being kept in commission. The defendant had ample opportunity to notify the plaintiff that it did not accept any liability on that basis, but did not do so. The defendant acquiesced in the tug being so employed. It had and took the benefit of such stand-by service and the probable avoidance of demurrage charges.

In the course of his reasons for judgment rendered on behalf of the Appeal Division, Chief Justice McNair, after quoting at length from the letter of March 24, 1961, went on to say:

> It is abundantly clear, that, throughout their negotiations the parties contemplated the special arrangements for the services of the Ocean Rockswift on a stand-by footing was to meet conditions at the port during its summer season when tugs available in the harbour would be at a minimum. Such arrangements had no relation to the port's winter season when quite different conditions as to tug availability would prevail.
>
> It follows that the plaintiff is entitled to recover under the special contract for the period from June 12 to December 15, 1961, both dates inclusive.

It was contended by way of cross-appeal that the contract for hire of the tug came to an end on August 15, this being the expiry date of the second extension of the 30-day period for which it had originally been hired on June 12. In the alternative, respondent's counsel based the cross-appeal on the contention that the hiring was for the "summer" as a season of the year and therefore came to an end on September 21, 1961. In the further alternative, it was contended that as found by the Appeal Division, the arrangement contemplated by the parties could not be construed as extending the period of hire after the end of the "port summer season" (i.e. December 15, 1961).

These submissions are based in large degree on the wording of the third paragraph of the statement of claim and the particulars thereof which were furnished pursuant to demand. Paragraph 3 of the statement of claim reads as follows:

> The Plaintiff Company offered to provide tug services on certain terms and conditions which terms and conditions were accepted by the Defendant Company.

The particulars of this paragraph contain the following statements:

> The "terms and conditions" referred to in the Statement of Claim herein are set forth in a letter to Kent Lines Limited dated March 27, 1961, from the Plaintiff, which letter was the result of a telephone conversation with Kent Lines Limited following letters of March 24, 1961 to K.C. Irving and Kent Lines Limited. On April 1, 1961, K.C. Irving acknowledged receipt of these various letters.
>
> The acceptance of the offer of March 27, 1961, by the Defendant was made by Mr. Henning, an officer of the Defendant Company, on or about June 12, 1961, in a telephone conversation with Keith M. Wilson, a senior managing officer of the Plaintiff. "The terms of the said offer were told to Henning and were accepted by Henning".

The conclusion which is advanced on behalf of the respondent in reliance on these particulars, is summarized in the following paragraphs taken from the factum filed on its behalf:

> It is clear from the above that the Appellant's claim was upon an express contract based upon the letters which refer to "this coming summer" and not upon an implied contract as held by the trial judge.
>
> It is respectfully submitted that the judgment of the learned trial judge cannot be supported because he purports to imply a contract to February 28, 1962 notwithstanding the use of the word "summer" as a limitation (by the appellant) to the hiring. There was an express contract only and no contract existed beyond the summer.

The contract accepted by Mr. Henning on June 12, 1961, which is recited in the particulars was not a contract for "this coming summer" but one for a period of thirty days on the "terms and conditions" as to the nature and costs of services which are set forth in the letter of March 27, and in my view the reference in the particulars to the "terms and conditions" set forth in that

letter is to be similarly construed not as incorporating in the pleadings a contract for rental during "this coming summer", but rather as alleging that the appellant offered to provide the tug's services during the months specified in the statement of claim for the same purpose and at the same per diem rate as it had been theretofore employed.

If it were assumed, as respondent's counsel contends, that it was the intention and understanding of both parties that the offer of hire should come to an end on August 15, 1961, or that its life was in any event limited to September 21 of that year, then it would appear to follow that in making the "stand-by" services of the tug available after that date the appellant was making a new offer and the invoices make it clear that it was an offer for the same services at the same rate. The same considerations would apply with equal force to the services rendered after December 15 if it were assumed, as the Appeal Division found, that the original offer did not extend beyond that date.

The question to be determined on this appeal is whether or not the respondent's course of conduct during the months in question constituted a continuing acceptance of these offers so as to give rise to a binding contract to pay for the "stand-by" services of the tug at the rate specified in the invoices furnished by the appellant.

The test of whether conduct, unaccompanied by any verbal or written undertaking, can constitute an acceptance of an offer so as to bind the acceptor to the fulfilment of the contract, is made the subject of comment in Anson on Contracts, 21st ed., p. 28, where it is said:

> The test of such a contract is an objective and not a subjective one, that is to say, the intention which the law will attribute to a man is always that which his conduct bears when reasonably construed, and not that which was present in his own mind. So if A allows B to work for him under such circumstances that no reasonable man would suppose that B meant to do the work for nothing, A will be liable to pay for it. The doing of the work is the offer; the permission to do it, or the acquiescence in its being done, constitutes the acceptance.

In this connection reference is frequently made to the following statement contained in the judgment of Lord Blackburn in Smith v. Hughes [(1871), L.R. 6 Q.B. 597 at 607.], which I adopt as a proper test under the present circumstances:

> If, whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was consenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

The American authorities on the same subject are well summarized in Williston on Contracts, 3rd ed., vol. I, para. 91A where it is said:

> Silence may be so deceptive that it may become necessary for one who receives beneficial services to speak in order to escape the inference of a promise to pay for them. It is immaterial in this connection whether the services are requested and the silence relates merely to an undertaking to pay for them, or whether the services are rendered without a preliminary request but with knowledge on the part of the person receiving them that they are rendered with the expectation of payment. In either case, the ordinary implication is that the services are to be paid for at their fair value, or at the offered price, if that is known to the offeree before he accepts them.

It must be appreciated that mere failure to disown responsibility to pay compensation for services rendered is not of itself always enough to bind the person who has had the benefit of those services. The circumstances must be such as to give rise to an inference that the alleged acceptor has consented to the work being done on the terms upon which it was offered before a binding contract will be implied.

As was observed by Bowen L.J., in Falcke v. Scottish Imperial Insurance Company [(1886), 34 Ch. D. 234 at 248.]:

> Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.

Like the learned trial judge, however, I would adopt the following excerpt from Smith's Leading Cases, 13th ed. at p. 156 where it is said:

> But if a person knows that the consideration is being rendered for his benefit with an expectation that he will pay for it, then if he acquiesces in its being done, taking the benefit of it when done, he will be taken impliedly to have requested its being done: and that will import a promise to pay for it.

In the present case the ordinary tariff rates for the tug's normal services were being paid by Kent Lines Limited, a company closely associated with the respondent, and it is perhaps for this reason that, in the absence of any formal agreement fixing any additional rate, the respondent took no steps to either pay for or dispense with the "stand-by" services which continued to be rendered for its benefit until February 1962.

The matter was put clearly and frankly by Mr. K.C. Irving himself when he was asked:

> If there was a misunderstanding, it could have been cleared right up in September, couldn't it?

and he replied:

> Well, it seemed so obvious to me, yes, that there was no arrangement . . . Mr. Forsythe it came to his attention, and he just thought there was no agreement . . . He had no record of anything and he just -- I don't know how it drifted or what happened.

Neither the absence of an express agreement nor the fact that the respondent did not consider itself liable to pay for the "stand-by" services after July 31 can, however, be treated as determining the issue raised by this appeal. The question is not whether the appellant is entitled to recover from the respondent under the terms of an express or recorded agreement, but rather whether an agreement is to be implied from the respondent's acquiescence in the tug's services being supplied for its benefit during the period for which the claim is now made.

In my view the respondent must be taken to have known that the Ocean Rockswift was being kept "standing by" for its use until the end of February 1962, and to have known also that the appellant expected to be paid for this special service at the per diem rate specified in the monthly invoices which were furnished to it, but the matter drifted from day to day without any move being made on the respondent's behalf to either dispense with the service or complain about the charge. I do not think it was unreasonable to draw the conclusion from this course of conduct that the respondent was accepting the continuing special services on the terms proposed in the March letters and the appellant is accordingly entitled to recover the sums charged in the invoices up to and including the month of February 1962 (subject to the

adjustment as to handling charge) as being money due pursuant to a contract which was concluded by the respondent's own acquiescence.

For these reasons I would allow this appeal, set aside the judgment of the Appeal Division of the Supreme Court of New Brunswick and restore the judgment of the learned trial judge. The appellant will have its costs of the appeal in this Court and in the Appeal Division. The cross-appeal is dismissed without costs.

Appeal allowed and judgment at trial restored with costs; cross-appeal dismissed without costs.
