Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Bank of China, Japan, and the Straits, Limited v. *The American Trading Company, from Her Britannic Majesty's Supreme Court for China and Japan; delivered 28th April* 1894.

Present:
LORD WATSON.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The Appellants carry on the business of bankers in London and Shanghai. The Respondent Company trade as merchants and commission agents in New York, Shanghai, and London; and part of their business consists in purchasing goods in Great Britain and America, which they export to and sell in China, receiving payment of the price in silver currency.

It appears to be a common practice for merchants in Shanghai, upon their entering into contracts for future delivery, to guard against any speculative risk arising from the possible fluctuation of the rates of silver exchange, between the date of sale and the time when the goods arrive and are delivered, by purchasing what are termed exchange contracts. These are simply contracts by which a bank, or other financier, undertakes to pay to the merchant, within certain limits of future time, sterling

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money, or its equivalent, in exchange for his silver, at a specified rate. It also appears to be an arrangement not uncommon, that the same bank which makes the exchange contract shall finance the goods, or, in other words, shall, in some shape or other, make advances to the merchants, upon the security of the goods.

In August, 1891, Mr. Talbot, the appellants' representative at Shanghai, and Mr. Forbes, the respondents' manager there, were introduced to each other, with a view to business, by Mr. Morriss, an exchange broker. They discussed, apparently on three occasions, the subject of exchange contracts, and also of financing the goods, Mr. Talbot intimating that the first of these matters was one within his control, whilst the second must be settled by the London office of the bank. On the 11th of August, the last of these occasions, Mr. Talbot agreed, pending negotiations, to give the respondents an exchange contract for £5000 without any condition as to financing goods, which on the following day was embodied in a contract note by Mr. Morriss as broker for the parties. As to that contract no question is raised in this case.

Between the 13th and the 31st days of August, 1891, both inclusive, the bank at Shanghai entered into nine separate exchange contracts with the company. The result of these contracts was, that the bank became bound to give the company the sum of £57,500 sterling in exchange for taels 255,938. 93c., the rates of exchange ranging from 4s. 5¾d. to 4s. 611d. per tael, the dates of settlement being various periods, from December, 1891, to May, 1892. Upon the face of each of the contract notes there were written by the broker who made it "goods financed through Bank of China," or similar words.

In point of fact, none of the goods to which these contracts applied were financed by the Bank, nor did the Bank give sterling money against taels, in terms of the exchange notes. As the goods arrived at Shanghai and were paid for, the Company purchased, with silver, the sums sterling specified in these notes, at the current rate of exchange, which had continued to decline from and after the month of August 1891. The result was that the Company had to pay upwards of taels 38,000 beyond the amount which they would have had to pay to the Bank under these nine contracts.

The Company brought two actions against the Bank, before the Supreme Court of Her Britannic Majesty for China and Japan, one in March and another in June 1892. These actions have been treated as a single suit, both in the Court below, and before this Board. They cover the nine exchange contracts in question, which are alleged to have been broken by the Bank, and the sums in silver actually paid by the Company in excess of the rates of silver exchange fixed by the contracts are claimed as damages. The Company admit that the conditions as to financing their goods through the Bank were obligatory, but plead that they were duly complied with, so far as they were concerned, and also that the fulfilment of such conditions was not essential, inasmuch as they were collateral with, and not precedent to the agreements for exchange. In defence, the Bank, whilst denying that the Company had given them an opportunity of financing the goods, mainly relied upon the plea that the exchange contracts were inoperative, because it was matter of mutual stipulation that their existence was to depend upon the London office of the Bank agreeing to finance the goods, which it never consented to do.

The learned Chief Justice appointed the trial

of these causes to take place before himself, for the purpose of hearing and determining all questions raised in the pleadings "except the questions whether the conditions precedent (if any) which the Court may find, were to be performed by the plaintiffs in London, or elsewhere than Shanghai, were performed by the plaintiffs, and whether the performance thereof by the plaintiffs was excused by the defendants." At the trial, both parties led evidence, subject to that reservation, and thereafter it was adjudged that the company should recover from the bank the sum claimed in both actions, with costs of suit.

It was held by the learned judge who tried the cause, that the broker's contracts, upon which the actions were founded, were complete in themselves, and were not, as the bank maintained, determinable in the event, which occurred, of the company failing to make an arrangement with their London agency, as to the terms upon which the goods were to be financed. In that finding their Lordships concur. There is no evidence, either internal or external, that these contracts were subject to any suspensive or resolutive condition. It does appear that Mr. Talbot and Mr. Forbes did not entertain the same views of the import of the communications which passed between them at their meetings on the 11th of August and previous days. Mr. Forbes seems to have understood that arrangements for financing goods were to be independent of exchange, and were to be made with the London office of the bank, after contracts were completed in Shanghai. Mr. Talbot, on the other hand, was under the impression that no exchange contracts were to be made by him until the company had arranged terms of finance with his London office. But his own testimony shews that he gave an unqualified assent to the contracts in question, as made by

the brokers on behalf of the Bank, he being at the time in the belief that such preliminary arrangements had already been made in London. His belief was no doubt erroneous; but their Lordships are satisfied that it was not induced by any misrepresentation of the Company or their agents.

The learned Judge was also of opinion that, although the arrangement for financing goods through them formed part of the consideration in respect of which the Bank agreed to give exchanges, it did not constitute a condition precedent of their so doing; and that the Company's claim for loss of exchange was therefore maintainable, notwithstanding their having violated the arrangement. Upon that point their Lordships are unable to concur in his decision. The circumstance that one of the conditions of a contract only affects part of the consideration is not *per se* sufficient to make it collateral to the main contract. It is capable of being so construed, but cannot be so regarded, unless it also appear that the condition was not intended by the parties to go to the root of the whole contract. In this case, it appears to their Lordships that the condition as to financing of the goods, written upon the face of the contract notes was meant to qualify the undertaking of the Bank to purchase silver at a specified rate from the Company. It was purposely omitted from the contract note of the 11th August, because, in that instance, the contract of exchange was to be independent of any arrangement to finance goods through the Bank; and, in the opinion of their Lordships, the fair inference derivable from the manner in which the condition was introduced into all the subsequent notes is, that the parties meant, not to add an independent and collateral arrangement,

but to add a condition to the contracts of exchange embodied in these notes.

Having come to the conclusion that due compliance with their agreement to finance goods with the bank was a condition precedent of the company's rights to demand fulfilment of the exchange contracts, their Lordships were not, owing to the state of the record, in a position to dispose of the case by a final judgment. The company had not been allowed to lead proof of their allegations that they had done all that was incumbent upon them, in order to comply with the condition precedent, and their averments on that point were disputed by the bank. Seeing that the evidence which the parties were prepared to offer was to be found in London, their Lordships thought it right, instead of remitting the case to Shanghai, to allow a proof to be taken by commission. That was accordingly done, and parties were heard upon the question whether the company had or had not done everything that they were bound to do in order to fulfil their obligation to finance their goods through the bank.

In the view which their Lordships took, to the effect that the stipulation as to finance was a condition precedent, neither of the parties raised any controversy as to its true import. It may be convenient to indicate here the construction on which they were substantially in agreement, and from which their Lordships see no reason to dissent. The stipulation was meant to be one in favour of the bank, and for their interest; and the bank was under no absolute obligation to accept the duty of financing if they found the performance of that duty proved to be incompatible with their business engagements. If the bank did not desire to undertake the duty, they were bound to give reasonable notice, so as

to enable the Company to make financial arrangements elsewhere. If the Bank wished to finance the goods, it was as much incumbent upon them, as upon the Company, to suggest and to endeavour to settle reasonable terms. On the other hand, the Company were bound to give the Bank the option of either accepting or declining the duty of financing the goods; and also to do their best towards the adjustment of reasonable terms, in the event of the Bank's acceptance. It is unnecessary, for the purposes of this case, to enter more minutely into the consideration of the obligations which were incumbent upon either party.

The proof adduced under the Commission granted by their Lordships adds very little, in their opinion, to the material facts previously disclosed in the history of the transaction, and in the correspondence of the parties. It is sufficiently obvious that throughout the negotiations with regard to finance, which began shortly after the date of the last of the contracts, and were conducted by their representatives in London, the parties were at cross purposes, owing to the different views which they entertained of their legal position. The Bank acted upon the footing that the existence of the exchange contracts was wholly dependent upon their choosing to agree to terms for financing the goods, and that they were entitled to decline any terms which might be offered by the Company, and by so doing to avoid liability for exchanges. Seeing that the rate of exchange gradually declined during the period of the negotiations, it was hardly to be expected that the Bank, in the view which they took, should have accepted any terms of finance which were insufficient to recoup them for the loss which they would probably incur upon exchange, in the event of their acceptance. The Company,

on the other hand, appear to have acted on the true construction of the contract, and to have recognised the fact that they as well as the bank were placed by its terms under a mutual obligation to settle reasonable terms for the financing of their goods.

The bank were by no means precipitate in breaking off the negotiations; and, had exchange rates risen, it does not appear to their Lordships to be improbable that they would have ultimately arranged terms of finance. But the bank never receded from the position which they originally took up, and to which they adhered in their defence to this action, that they had the option to determine whether the exchange contracts should come into existence or not, by their agreement or refusal to finance goods. Towards the end of November, 1891, the bank at length resolved to adopt the latter of these alternatives. On the 26th of that month Mr. Talbot, their agent in Shanghai, made this communication to Mr. Forbes, the representative of the company in that city: "A telegram from the head office of this bank states that, inasmuch as no arrangement had been made there up to the 20th instant in connection with goods to be shipped to Shanghai on your account, the conditional settlements of exchange for forward delivery are void." To that intimation Mr. Forbes replied by letter of the 27th of November, in which he notified the fact that, owing to the refusal of the bank in London, his company had been compelled to pass their drafts for goods ready for shipment through other banks, and added: "I understand that your London office intend their refusal to apply to all contracts made with you; but I wish to say that, as a large part of the goods has still to come, we are prepared to send such goods through your bank in accordance with our contracts." The

Bank took no notice whatever of that communication.

Their Lordships do not think it admits of doubt, that the intimation thus made by the Bank, coupled with their failure to give any answer to the inquiry made by the Company, amounted to a complete repudiation of all the contracts, whether for finance of goods or for exchange; and that the Company were absolved from the necessity of making further offers to settle terms of finance, in order to preserve their claims of damage for breach of the contracts of exchange.

In this appeal, the Bank renewed the objection which was taken by them, and over-ruled in the Court below, to the measure of damages as claimed. They maintained that, when the rate of exchange was steadily falling, it became the duty of the Company to mitigate the loss which would fall upon the Bank, in the event of their being held to have broken the contracts in question, by making forward contracts of exchange at current rates. In the opinion of their Lordships, it is sufficient for the purposes of the present case to say, that there is neither allegation nor proof, to the effect that the Company failed to take any reasonable means for protecting the pecuniary interests of the Bank.

Their Lordships, for these reasons, have come to the conclusion, although upon different grounds from those assigned by the learned Judge, that the Respondent Company are entitled to retain the judgment which they obtained in the Court below. They will accordingly humbly advise Her Majesty to affirm that judgment. The Appellant Bank must bear the costs of this appeal.