

CA - Civil - Breach of Contract - written agreement - whether  
appellants contract amounted to breach of contract!  
Appeals allowed  
It is referred to  
✓ comp

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 24/92

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)  
THE HON. MR. JUSTICE GORDON, J.A.  
THE HON. MR. JUSTICE WOLFE, J.A.

Contract

Evidence

BETWEEN	TROPIGAS S.A. LTD	DEFENDANT/APPELLANT
	v.	
	DEXTON ABBOTT	PLAINTIFF/RESPONDENT
C.A. 25/92	TROPIGAS S.A. LTD	DEFENDANT/APPELLANT
	v.	
	WESLEY DIXON	PLAINTIFF/RESPONDENT
C.A. 26/92	TROPIGAS S.A. LTD	DEFENDANT/APPELLANT
	v.	
	ALVIN ROBINSON	PLAINTIFF/RESPONDENT
C.A. 27/92	TROPIGAS S.A. LTD	DEFENDANT/APPELLANT
	v.	
	VINTON SIMPSON	PLAINTIFF/RESPONDENT
C.A. 28/92	TROPIGAS S.A. LTD	DEFENDANT/APPELLANT
	v.	
	MANZIE THOMPSON	PLAINTIFF/RESPONDENT

Miss Hilary Phillips & Miss Sharon Service for Appellants

Crafton Miller & Mrs. Kim St. Rose for Respondents

April 19, 20, 21, 22, 23 & May 10, 1993

CAREY, P. (AG.)

These appeals arise from consolidated actions in which the plaintiffs (the present respondents) all succeeded in the respective claims for damages for breach of contract "contained in written agreements and other documents", against the present appellants (Tropigas). We reversed those judgments after we were addressed by counsel and promised that we would put our reasons in writing, which now follow.

The respondents, save for Alvin Robinson, all entered into written agreements with Tropigas whereby they agreed to deliver cylinders of gas to customers of the company, lists of whom would be provided by the company. Tropigas undertook to refill empty cylinders which the respondents undertook to return from customers. The respondents were paid in accordance with rates which were changed over time. With respect to Mr. Robinson, he on the other hand contracted to supply dealers. The contracts were made at different times, but nothing turns on that fact for the purposes of this appeal. The breaches which the respondents averred in their statements of claim, were all to the same effect - viz, that in breach of the said agreement, the company refused to supply filled cylinders to the respondents and to supply a list of customers or a list of dealers in the case of Mr. Robinson. The company in its defence admitted that it refused to supply filled cylinders from time to time, but denied that it was by virtue of such refusal, in breach of contract as alleged. Further breaches were pleaded but there was no evidence adduced in support and I need say nothing more in that regard. It is helpful to set out "in extenso" two of the clauses which call for construction:

"Clause 1 - The Contractor shall

- (a) by means of the Company's motor truck transport and deliver on every day to such of the Company's customers within the parishes of Kingston and Saint Andrew (including Port Royal) and lower Saint Catherine as the Company shall from time to time designate such number of cylinders filled with the said gas as may be required by each such customer;"

In the case of Alvin Robinson, substitute "dealers" for "customers"

"Clause 5 -

The Company will have ready at Brighton Beach Plant each weekday morning at 8:00 a.m. a list of customers to whom delivery of cylinders shall be made that day.

"If during the course of normal delivery conditions the Contractor is unable to deliver the full complement of cylinders taken by him the previous day then the Contractor shall deliver the said cylinders the following day before undertaking the delivery of additional cylinders given on the same day in question."

In the case of Mr. Robinson the contract provided as follows:

"The Company will have ready at Brighton Beach Plant or at such other location within the Corporate Area of Kingston and Saint Andrew each weekday morning at 8.00 a.m. a list of Dealers to whom delivery of cylinders shall be made that day, and shall provide an adequate number of cylinders. If during the course of normal delivery conditions the Contractor is unable to deliver the full complement of cylinders taken by him the previous day, then the Contractor shall deliver the said cylinders the following day before undertaking the delivery of additional cylinders given on the same day in question or later."

For completion, clause 9 in Mr. Robinson's agreement must be included. It was in the following form:

"In the event of the unavailability of cylinders for delivery for three days and over due to the breakdown of the Plant, or for other reasons, the Company may make advances available to the Contractor in the sum not exceeding two weeks' earnings to be based on his average weekly earnings over the preceding twelve weeks. The repayment of this sum shall be on terms to be agreed on by the Company and the Contractor and in the absence of such agreement may be deducted by the Company by such one or more deductions as the Company may decide."

I pause to interject that unfortunately, we were not provided with the learned judge's reasoned judgment because, as we were advised, counsel who appeared below made no note. This omission is a matter of regret as his views would be more than helpful to counsel as to ourselves. Be that as it may, and despite the respondents' pleadings to that effect, there was no evidence that any breach of contract occurred by reason of any failure on the part of Tropigas to supply either lists of customers or dealers

as the case may be to the respondents. On the contrary, they gave evidence that they did, in fact, receive lists of customers. On the pleadings, there was an onus on the respondents at the trial to prove that under the agreements there was an obligation on the part of Tropigas to supply filled cylinders, to the respondents which obligation had been breached.

Mr. Miller argued that the effect of clause 1 (a) and clause 5 as respects the respondents save Alvin Robinson, obliged Tropigas to supply at one and the same time, not only lists of customers or dealers but also the number of cylinders as were sufficient to match customers' or dealers' orders. The breach lay, he urged, in the fact that the respondents were not given an adequate supply of cylinders to meet the demands of the customers, or dealers in the case of Robinson.

These submissions, I fear, are fanciful. Clause 1 (a) by its plain and ordinary meaning obliged the respondents to deliver cylinders of gas to customers as required by the company. The respondents plainly were not obliged to deliver cylinders of gas if they did not receive them. It follows that Tropigas could hardly be in breach of this clause if they "refused to supply cylinders." The evidence of the respondents was that at one time there was a general shortage of cylinders which obliged the respondents to collect empty cylinders from customers which they then returned to Tropigas for refilling. This activity they complained, caused delays and increased their expenses. In my view, this clause created no obligations on the part of Tropigas.

So far as Clause 5 went, it obliged the company to have lists of customers ready at a prescribed place and at a prescribed time. It clearly did not oblige the company to have cylinders of gas ready at that time. At all events, it did not oblige the company to fill cylinders at that time so that a refusal on their part to fill cylinders, could amount to a breach of the term of this clause.

With respect to Mr. Miller's argument that, the breach which it was sought to establish, was, that the respondents were not given an adequate supply of cylinders to meet the list of customers or dealers, the obvious riposte to that eleventh hour plea was that there were no pleadings to that effect. What the evidence did show was that the shortage of cylinders necessitated the respondents making several trips per day in order to obtain empty cylinders which could be refilled and thereafter making deliveries. It also showed that there was a reduction in the number of customers being assigned to the several respondents over time. All this resulted in a sharp fall-off in their profits. These doubtless were legitimate grouses which possibly called for a re-negotiation of the agreements but as I have adumbrated above, those grouses did not constitute any breach of the contracts in which the parties had entered.

The respondents had pleaded a breach, viz "refusal to fill cylinders" but were quite unable to indicate any term in the respective agreements, which imposed an obligation on Tropigas which was demonstrated to have been breached.

It was for these reasons that the judgments in the court below were set aside and judgment entered for the defendant with costs both here and below to be taxed if not agreed.

GORDON, J.A.

I agree.

WOLFE, J.A.

I agree.