

**JUAN RODRIGUEZ, PLAINTIFF AND APPELLANT, VS. FINDLAY &
CO., DEFENDANT AND APPELLEE.***G.R. No. 4606. October 19, 1909*

Ponente: MORELAND, J.

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The complaint asks damages for breach of a written contract between plaintiff and defendant for the delivery of the machinery, complete, for a ship in process of construction belonging to the plaintiff.

The defendant, in its answer, denies the allegations of the complaint generally, and sets up as a counterclaim the balance due from plaintiff on the purchase price of the machinery aforesaid, and asks for an affirmative judgment against the plaintiff accordingly.

The defendant secured in the court below an affirmative judgment against the plaintiff for the sum of P9,216.60, with interest thereon, at the rate of 6 per cent per annum, from February 28, 1907. The plaintiff made a motion for a new trial upon the grounds that the evidence does not justify the decision of the court and that the decision is contrary to law. This motion was denied, and the plaintiff duly excepted and perfected his appeal.

On the 19th of September, 1907, the plaintiff was the owner of a freight ship called the *Constancia*, then in course of construction in plaintiff's shops in the city of Manila. The vessel was designed for the coastwise trade in the Philippine Islands. On that date, and for some time prior thereto, one William Swann was the consulting engineer of the defendant, in charge of its machinery department. Swann was at that time an engineer and naval architect and had been working as an engineer substantially all his life. On the date mentioned he was, and for some time theretofore had been, a naval architect, a member of the Institute of Engineers and Shipbuilders of Scotland, and a member of the Institute of Naval Architects of Great Britain. The plaintiff was acquainted with Swann and knew him to be an engineer and naval architect of long experience. On the date referred to Rogaciano Rodriguez, acting for and on behalf of the plaintiff and as his agent, made a written contract with Swann, acting for and on behalf of the defendant and as its agent, wherein and whereby the plaintiff agreed to purchase of the defendant, and the defendant agreed to sell and deliver to the plaintiff, certain machinery, complete, for the ship *Constancia* already referred to. Prior to the making of the contract on the date referred to, and during the negotiations leading up to the contract and in connection with them, Swann, the agent of the defendant, visited the shipyard of the plaintiff and inspected the steamship *Constancia*, then being constructed. This he did several different times. The inspections were made for the purpose of determining the kind and nature of the machinery which would be suitable to the ship referred to. Neither the plaintiff nor his agent, Rogaciano Rodriguez, was a marine or other engineer and they knew little or nothing about the kind, of machinery which should be placed in the ship they were building. They relied entirely upon the recommendations, knowledge, and experience of the engineer Swann. The plaintiff had in mind and stated to Swann, among other things, the speed which it was necessary that the *Constancia* should have in order to be available as a coastwise vessel, and left the kind, nature, and construction of the machinery to the greater knowledge and experience of Swann. This is particularly true of the propeller placed in that vessel, the questions relative to which are the main issues of this case. The contract, so far

as its interpretation is disputed, reads as follows:

"One brass propeller of 8' diameter and suitable pitch for an expected speed of ship about 9½ knots.

* * * * *

"The whole to be suitable for a wooden ship of 150 ft. long by 24 ft. beam and 14 ft. depth, as per plan supplied by Sr. Juan Rodriguez."

Before the contract was entered into, the plaintiff delivered to Swann, as the defendant's agent, a plan of the hull of said vessel. Thereafter Swann delivered to the plaintiff a plan of the entire vessel, showing the machinery placed therein. The plans in question showed length and breadth of the hull, its general outline and the number of feet of water which it drew. These plans also showed location and outline of the sternpost and rudderpost of said ship.

In the process of manufacturing the propeller the defendant thought it discovered that the propeller described in the contract would not give the speed required by the contract and notified the plaintiff to that effect, and at the same time asked permission to put in its place a propeller 10 feet in diameter. This the plaintiff declined to permit.

The machinery, so purchased, was delivered, except certain items which were required to be upon all vessels by the rules of the customs officials of the city of Manila and about which there is little or no dispute. Certain other articles of small value, necessary for the completion of the machinery, seem not to have been delivered, but concerning these there is very little dispute between the parties.

The machinery was duly installed in the vessel upon its delivery. Upon the trial of the ship, after the installation of its machinery, it was found that all of the machinery worked well except the propeller. This, instead of giving the ship a speed of about 9½ knots an hour, gave a speed of less than 7 knots an hour. The failure of the propeller to give the required speed to the vessel is substantially the only point in controversy in this case.

The contention of the plaintiff is that, under the terms of the contract, the defendant was obliged to furnish a propeller 8 feet in diameter which would give the *Constancia* a speed of 9½ knots an hour, and that, failing in that, the contract was broken and the defendant should be held liable for all damages resulting.

The defendant contends that the machinery was to be according to the specifications in the contract and that, if these specifications were complied with, it does not matter what may be the actual speed of the vessel. It claims that it had nothing to do with the construction of the steamship or the placing therein of the machinery. The defendant also claims that, under the terms of the contract, there was no guaranty of speed, and that, if the propeller was 8 feet in diameter and of brass, it would fulfill the terms of the contract even though the speed of the vessel should not exceed a knot per hour.

The contract, by its words, expressly requires that the defendant must furnish a propeller which shall give to the steamship *Constancia* a speed of about 9½ knots per hour.

The language of the contract is so plain, and the negotiations leading up to the execution of the contract point in one direction so clearly, that there ought to be little need of discussion. But the parties have insisted so strongly upon the justice of their several contentions that a detailed discussion is considered advisable.

The language is without ambiguity. The defendant agrees therein to furnish "One brass propeller of 8' diameter and suitable pitch for an expected speed of ship about 9½ knots;" and "The whole to be suitable for a wooden ship 150 ft. long by 24 ft. beam and 14 ft. depth, as per plan supplied by Sr. Juan Rodriguez."

The ship for which the machinery, including the propeller, was designed, is specifically described in the contract

and is identified without question. That ship is the *Constancia*, a coastwise vessel 150 feet long, 24 feet wide and 14 feet deep. These are the measurements contained in the contract. This was the only ship for which the plaintiff needed machinery. It was the only ship he was constructing. During the course of the negotiations the defendant's agent, Swann, its engineer and naval architect, in company with the plaintiff or the plaintiff's agent, several times visited the yard wherein the ship was being built and examined it for the purpose of making the contract for the machinery. During these different visits the kind of machinery, its purpose and value were discussed by the parties. This is conceded. Plans of the hull and the interior of the vessel were exchanged by the parties at various times, either before or after the making of the contract. The plaintiff, in particular, delivered to the defendant, prior to the execution of the contract, a plan of the hull of the vessel, with its measurements. Later the defendant delivered to the plaintiff a plan, in considerable detail, showing the vessel with the machinery figured as having been already placed in it.

Swann was a naval architect and marine engineer of long experience, which fact was known to the plaintiff and his agent, and the general details relative to the kind and character of the machinery were left to the defendant. The thing mainly insisted upon by the plaintiff was the result that should be produced. The plaintiff himself testifies, and this is undisputed by the defendant, that he relied upon Swann in these particulars, especially in reference to the propeller and the pitch which it should have; and, by reason of that reliance, the pitch in feet and inches which the propeller should have when placed in the ship was not stated in the contract. Instead, the plaintiff placed in the contract what the propeller should do, rather than what it should be. The diameter of the propeller was fixed by the structure of the vessel and could not exceed 8 feet or 8½ feet. The pitch which the propeller should have in order to give 9½ knots an hour to the steamship was left to the greater knowledge and experience of the defendant's agent, Swann. The plaintiff placed the condition only that it should produce a certain result when attached to the ship *Constancia*.

The words of the contract clearly demand, upon the part of the defendant, that it furnish a propeller with a pitch proper to give the steamship *Constancia* a speed of about 9½ knots per hour. Language for that purpose could scarcely be made plainer than the language used.

The defendant contends that "the machinery was to be according to the specifications in the contract and that, if these specifications were complied with, it does not matter what may be the actual speed of the vessel." The trouble with this contention is that one of the specifications of the contract is speed, namely, a speed of 9½ knots per hour, and the specifications of the contract can not be complied with unless a speed of 9½ knots an hour, or thereabouts, is given. Simply because the specific pitch in feet and inches is not stated in the contract does not mean that there is no specification upon that point. The contract provides that the defendants shall supply to the plaintiff, among other things, one brass propeller 8 feet in diameter with suitable pitch for an expected speed of ship about 9½ knots. The word "suitable" has reference to two objects, the antecedent subject, "pitch" of the propeller, and the subsequent object, "ship;" and the meaning of the word requires that the subject, "pitch" of the propeller, shall have qualities which will harmonize so perfectly with the qualities of the object, "ship," that a certain and specified result, viz, a speed of 9½ knots, shall be produced. The word "suitable," referring to the vessel in which the propeller is to be placed as well as to the propeller itself, the pitch of the propeller must, therefore, be suitable to that vessel, and it is not suitable to that vessel, under the terms of the contract, unless with the other machinery mentioned in the contract it gives to that vessel a speed of about 9½ knots an hour. Therefore, the specifications contained in the contract are not complied with until the vessel shall have received from the machinery installed a speed of about 9½ knots an hour. The word "suitable" is perfectly definite and clear in its meaning and its reference is undoubted.

The defendant, in the contract, not only agrees to furnish a propeller 8 feet in diameter and of brass, but also

agrees to furnish a propeller with certain other characteristics, among them being a pitch suitable to produce a certain speed in a certain vessel. If the pitch of the propeller was suitable to do that, it would do it. The failure of the propeller to give a speed anything like $9\frac{1}{2}$ knots an hour indicates clearly and beyond question that the pitch of the propeller was not suitable for the purposes specified in the contract.

The contention of the defendant is, further, that the pitch of the propeller as furnished, viz, $15\frac{1}{2}$ feet, was suitable to give a speed of more than $9\frac{1}{2}$ knots an hour; and in its argument it quotes the expert, Swann, who testifies, in relation to the pitch of the propeller, that with the pitch of $15\frac{1}{2}$ feet the propeller would have a speed of a little over 11 knots per hour. The defect in this contention is that a propeller has no such quality as speed; that the thing which Swann figures out as 11 knots an hour is not speed but pitch. A propeller has, aside from the material of its construction, three qualities-diameter, area, and pitch. A propeller has no such quality as speed. The pitch of the propeller is described by Swann and Gilchrist as the distance which it would travel if it were turned one revolution in a substance which, although yielding sufficiently to permit the passage of the propeller, would admit of no slip. In other words, if a propeller, were immersed in wax and then given a turn amounting to one revolution, the pitch of the propeller would be the distance which it would travel through the wax in that one revolution. The expert Swann says that the way to determine the speed of a propeller is to "take the pitch, multiply it by the revolutions, which would give me the distance the propeller would advance in any one minute; then multiply that by sixty, which would give me the amount in one hour; then divide by 6,080, which is the number of feet in a knot, and that would give me the number of knots per hour which the propeller would advance;" and then says that the speed of the propeller would be more than 11 knots. The mere fact that Swann multiplies the pitch of the propeller by a number of figures, and then divides that product by other figures, does not change pitch into speed. It remains pitch still. In other words, the 11 knots per hour which Swann refers to as the speed of the propeller is the distance which the propeller, unattached to any vessel, would travel, in wax in one hour if it was turned at the rate of 84 revolutions per minute. But this is the acknowledged definition of pitch, not speed. It is manifestly absurd to contend that the propeller can have a speed independent of the vessel to which it may be attached. Speed is a quality of the vessel itself and not a quality of the propeller. To be sure, the propeller, operated by the engine, is able to give speed to the vessel, but in and of itself it has no such quality.

It is apparent, therefore, that the contention of the defendant that the propeller was so constructed as to have a speed of 11 knots an hour is absurd. In other words, the contention of the defendant is, that a guaranty in a contract to give a ship a speed of 20 knots an hour is complied with if there is furnished to that ship a propeller with a pitch, which, multiplied by certain figures and divided by others, would produce twenty somethings at the conclusion of the calculation, and this absolutely regardless of whether the ship on which the propeller is to be placed is a war ship or a pleasure yacht, whether it is 100 or 1,000 feet long, 10 feet or 100 feet wide, whether it draws 5 feet or 60 feet of water and wholly regardless of the form of the vessel's hull. It is recognized by all authorities upon the construction of steamships that "the most important point to be considered in propulsive efficiency is the shape of the vessel's hull." In respect of speed this is one of the greatest problems and one of the most perplexing with which marine engineers have to deal. The defendant, by its contention, avoids all the trouble of figuring out this difficult problem by simply giving a speed to its propeller.

It was a condition, and not a theory, which confronted the plaintiff when he purchased the machinery in question, including the propeller. He had a vessel which was designed for the coastwise trade and, in order to be useful and efficient in that connection, it was necessary that it should have a speed of about $9\frac{1}{2}$ knots an hour. All of this the defendant knew. Speed being so important in a vessel carrying freight in competition with other vessels having a speed of $9\frac{1}{2}$ knots an hour, the parties placed in the contract a specification by which this vessel should receive machinery of such a character that it would be able to compete with other vessels in a similar occupation. These specifications required that the vessel should have a speed of about $9\frac{1}{2}$ knots per hour and that the machinery

furnished for the vessel should be arranged to that end, particularly the propeller.

The defendant not only asserts that it furnished a propeller with a speed of more than 9½ knots an hour, but also contends that the reason why the vessel did not have a speed of 9½ knots an hour after the installation of the machinery was because the propeller was, by the construction of the vessel, forced to work in a position where it could not display its properties adequately. To this end, it asserts, through its expert witness Swann, "that the propeller was, so to speak, too close to both the stern and the rudder posts, so that the propeller could not receive the water or throw it away from it in the manner wanted; that is, in a line with the boat's keel more or less. It could not do anything else because it was practically water-tight, so to speak, that is, to all intents and purposes, water-tight between these two large chocks of timber, the rudder and stern posts, and hence could not throw the water off or receive the water from forward in the manner it should, and hence would throw it sideways; that is the effect. The propeller could not get a chance to work."

The expert then goes on to assert that the pitch had nothing to do with it, that the diameter of the propeller had nothing to do with it, and that the sole and only reason why the vessel did not receive a speed of 9½ knots an hour from the propeller furnished was because of the sternpost and the rudderpost.

It should be noted, however, that, before the contract was signed, the defendant, and its agent, Swann, were furnished with a plan or plans of the hull of the vessel, showing the sternpost and the rudderpost fully and fairly; that Swann had himself inspected the vessel several times at the yard where it was being built and knew all about the said sternpost and rudderpost and their relative locations. Yet, with that plan in his hand and with that knowledge in his head, he, nevertheless, made a contract in which he agreed to furnish a propeller which would give a speed of 9½ knots an hour to that very ship. It must also be remembered that the events proved the contention of the expert Swann to be wholly unfounded when he claimed that the reason why the propeller would not work was because of its position between the sternpost and the rudderpost. The trial of the propeller furnished by the defendant having demonstrated that it was ineffective and that its pitch was too coarse and its area too great for the purposes specified in the contract, the plaintiff placed in the steamship another propeller in exactly the same position in the vessel as the other, i. e., between the sternpost and the rudderpost, with a diameter only 6 inches more than the diameter of the propeller furnished by the defendant, and the vessel immediately attained a speed of 9 knots, or thereabouts, per hour. It is thus apparent that the expert Swann again made a serious mistake in claiming that the failure of speed was due solely to the place in which the propeller worked.

The defendant also maintains that the plaintiff ought not to recover in this case because before the propeller was constructed the defendant notified him that a propeller 8 feet in diameter would not produce the results specified in the contract and that in order to attain those results it would be necessary to place in that ship a propeller 10 feet in diameter; that the plaintiff rejected this proposal and refused to accept a propeller of any dimensions different from that specified in the contract, and that, therefore, he brought his misfortune on his own head. In reply to this contention it is sufficient to state that, by reason of the construction of the vessel, which Swann knew perfectly before hand, the placing of a propeller 10 feet in diameter in the ship in question would necessitate cutting away a large portion of the rear part of the vessel's hull. The plaintiff was perfectly justified in refusing to change the whole structure of the rear of his vessel in order to accommodate the defendant. His refusal was justified by subsequent events; for, later, as before stated, a propeller 8½ feet in diameter, but of different pitch and area, was placed in the ship, without any change in the construction of the hull, and the vessel immediately attained a speed of 9 knots, or thereabouts, per hour.

There seems to be no question that the expert witness for the plaintiff was entirely correct when he stated that the fault of the propeller furnished by the defendant was in its pitch and area. He testified that the pitch of the propeller was too coarse and the area was too great for the kind of vessel in which it was placed.

It is thus apparent that the defendant failed to comply with the terms of the contract in respect to the propeller therein described, and the plaintiff, in consequence, is entitled to recover appropriate damages by reason thereof.

The damages recoverable of a manufacturer or dealer for the breach of warranty of machinery which he contracts to furnish or place in operation for a known purpose are not confined to the difference in value of the machinery as warranted and as it proves to be, but include such consequential damages as are the direct, immediate, and probable result of the breach. (30 Am. and Eng. Ency. of Law, p. 217, and cases there cited.)

The loss of the buyer's time and of that of his laborers resulting from the breach is recoverable where the circumstances of the sale were such as to have put the seller upon notice that such a loss would probably result from a breach.

Indemnity for losses and damages includes not only the amount of the loss which may have been suffered, but also that of the profit which the creditor may have failed to realize. (Art. 1106, Civil Code.)

The losses and damages for which a creditor in good faith is liable are those foreseen, or which may have been foreseen, at the time of constituting the obligation, and which may be a necessary consequence of its nonfulfillment. (Art. 1107, Civil Code.)

In an action against a manufacturer or dealer for a breach of warranty upon a sale of goods, which he knew at the time of the sale were intended to be used for a particular purpose, the measure of damages is not limited to the difference in value of the goods as warranted, and as they prove to be, as in cases where like articles are sold as merchandise for general purposes; but profits lost and expenses incurred, because of the breach, may be recovered. (Swain vs. Schieffelin, 134 N. Y., 471; New York and Colorado Mining Syndicate and Company vs. Fraser, 130 U. S., 611; Accumulator Company vs. Dubuque Street Railway Company, 64 Fed. Rep., 70.)

It is apparent from the authorities above cited that the plaintiff is entitled to recover P375, the value of 30 tons of coal consumed in the trials necessarily made to determine whether or not the propeller had the qualities specified in the contract; also the sum of P707, the wages of employees and other necessary expenses incurred during said trials.

The plaintiff not having presented competent proof as to the loss he sustained by reason of his ship being out of commission during the time intervening between the trial of the first propeller and the installation of the second, nothing can be awarded him as damages in relation thereto. He is, however, entitled to be allowed as damages the sum of P2,770.36, the amount paid by him for the first propeller, as its purchase price, the same being worthless to him for the purpose for which he bought it-said propeller to be and remain the property of the defendant, with the right to retake the same if it has not already done so.

The defendant failed to deliver to the plaintiff the following machinery and materials which it agreed to deliver under the contract, which said machinery and materials the plaintiff was obliged to purchase of other parties, paying therefor the following prices, which this court finds reasonable in amount, to wit:

One brass cock with flange for the donkey feed, weight 57
pounds

P114.00

One do. do. check valve for the engine, weight 62 pounds....

124.00

One do. do. ¾-inch blow-off for the boiler.....

7.50

One cast brass elbow for the steam valve, weight
97 pounds.....

145.50

One new 1¼-inch tube with flange for the blow-off cock of the donkey boiler.....

7.00

One brass cock with flanges, connections, and strainer for the surface blow-off.....

66.00

For turning the two covers of the high and low pressure cylinders, and placing new bushes with 5/8 x 9½-inch
studs and nuts

85.00

Three cast-iron pistons, turned, with rod and spiral steel
springs, brass covers and valves for the cylinders.....

185.00

Four cast-iron seatings for the boiler.....

217.00

Five ¼-inch pet cocks for the donkey pump and two for the
cylinder blow-off

15.00

One 1/8-inch air-cock for the donkey pump.....

1.80

Two ½-inch test cocks with stuffing boxes for the steam
gauges on boiler.....

9.00

Two straight ½-inch test cocks with stuffing box for the
boiler and donkey boiler.....

9.00

One lubricator with a 3/8x 1½-inch male thread for the donkey.....

3.40

One 1-inch check valve with test cock and hand wheel for the
donkey boiler.....

26.25

One 1¼-inch globe valve with flange and wheel for the steam
winch

18.00

Total

1,133.45

We find, therefore, that the defendant is entitled to recover in this action of the plaintiff the sum of P5,213.54, that being the difference between the balance remaining: due from plaintiff to the defendant on the purchase price of said machinery, viz, P10,199.35, and the aggregate amount of the damages herein allowed to the plaintiff by reason of the breach of said contract by the defendant, as aforesaid, viz, P-4,985.81, with interest on said P5,213.54 at the rate of 6 per cent per annum from February 28, 1907, and he is hereby given judgment for that amount.

The judgment of the lower court is, therefore, modified to the extent and in the particulars above enumerated, and, as modified, affirmed, with costs against the defendant.

Arellano, C. J., Torres, and Johnson, JJ., concur.

Carson, J., dissents.

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