House of Lords on appeal from CA (Sargant L.J. & Eve J – Scrutton LJ dissenting -) upholding on both occasions the KBD decision of Rowlatt J, before Lord Buckmaster, Viscount Dunedin & Lord Warrington of Clyffe. 22nd February 1929.

JUDGMENT : LORD BUCKMASTER.

1. My Lords, consequent upon the War there remained at the disposal of the Government a considerable quantity of goods which had formerly been required for the prosecution of the War. In order that these goods might be effectively disposed of, a Disposals Board was set up into whose charge the various Departments handed over such of the surplus stock as they from time to time possessed. The Disposals Board then proceeded to deal with those goods by sale to various people. The present appellants were among the purchasers of that class of goods that related to the construction and equipment of tents and which was called by a word, which has convenience if it has not euphony in its favour, tentage. The first arrangement made between the Disposals Board and the appellants was in April, 1920. The transactions between them all appear to have taken a similar form. There was an agreement for the sale of the goods; there was an agreement that the price for the goods should be subsequently fixed between the parties; and there were provisions with regard to arbitration in the event of dispute. A dispute then arose out of the bargain dated January 7, 1922. At or about that time the control of the Disposals Board was changed; Major Lethaby formerly had charge of it, and Sir Maurice Levy took charge from him. It has been suggested that this caused a difference of relationship between the parties which led to the dispute. Such a suggestion certainly is in no way material to the matter we have to decide, and I am quite unable to find anything throughout these proceedings to justify the suggestion that Sir Maurice Levy did otherwise than what was his duty to do - namely, take the steps he thought most effective to secure the largest price for the goods.

2. The earlier course of business appears to have been this: the Disposals Board received from the various Departments something in the nature of specifications of the goods that were to be handed over, and these specifications were in turn handed over to the would-be purchaser, who could check them if he liked for himself, or, if not, accept them as they were offered. Sir Maurice Levy discontinued this practice. He said that he did not think it was unreasonable on the part of the appellants to ask for the specifications, but he did not deliver them, and I think it is not difficult to understand why, because if he proceeded to sell by specification instead of selling after inspection, which was always open to the purchaser, he would be bound by the statements in the specification, many of which contained references to the quality and character of the goods which he ***19** himself had no opportunity of checking. As a business arrangement it was much better he should let the would-be purchaser have the fullest opportunity of inspecting the goods he was going to buy; he could then make his offer; and that was the course in fact pursued. The proposals made by the appellants for purchase were not acceptable to Sir Maurice Levy; the parties were unable to come to an agreement; and the Disposals Board said that they considered themselves no longer bound by the contract. Negotiations failed and the Board declined to deliver any more goods under the attempted bargain. It is that which has given rise to these proceedings.

3. The points that arise for determination are these: Whether or not the terms of the contract were sufficiently defined to constitute a legal binding contract between the parties. The Crown says that the price was never agreed. The suppliants say first, that if it was not agreed, it would be a reasonable price. Secondly, they say that even if the price was not agreed, the arbitration clause in the contract was intended to cover this very question of price, and that consequently the reasonableness of the price was referred to arbitration under the contract. Thirdly, they any that even if they are wrong on their first two contentions the fact that the whole of the bargain was ended in 1922 was doing them a wrong, because in any event they were entitled to have the opportunity of entering into a further agreement for future parcels of the goods which were referred to in the terms of the contract.

4. My Lords, those being the contentions, it is obvious that the whole matter depends upon the construction of the actual words of the bargain itself. The contract is contained in the form of a letter. It is written by Major Lethaby, the then Controller of the Disposals Board, to the appellants. It was a letter based upon the payment by the appellants of 1000l. as a consideration for the bargain, and it

opens in these words: "In consideration of your agreeing to allow the sum of 1000l. (one thousand pounds) now held by the Commission to remain on deposit as a security for the due performance of this extended contract, the Commission hereby confirm the sale to you of the whole of the tentage which may become available in the United Kingdom for disposal up to and including March 31, 1923," upon the terms of the earlier contracts. The provision as to price is in these words: *"The prices to be agreed upon between the Commission and the purchasers in accordance with the terms of clause 3 of the said earlier contract shall include delivery free"*; and it is provided that the actual price that has to be paid is to be the subject of further agreement between the parties. That is the result of the terms of one of the earlier bargains incorporated by the reference I have read. There is then a provision that the Commission may *"at any time in their uncontrolled discretion and before it has been despatched to or collected by or resold by the purchasers, certify that any portion of the said tentage is required by the British Government and the Commission shall be at liberty to withhold delivery of such portion"*; while finally there is an agreement as to arbitration, which again is contained in one of the earlier contracts. The arbitration clause may be important; it is in these words: "It is understood that all disputes with reference to or arising out of this agreement will be submitted to arbitration in accordance with the provisions of the Arbitration Act, 1889."

5. What resulted was this: it was impossible to agree the prices, and unless the appellants are in a position to establish either that this failure to agree resulted out of a definite agreement to buy at a reasonable price, or that the price had become subject to arbitration, it is plain on the first two points which have been mentioned that this appeal must fail.

6. In my opinion there never was a concluded contract between the parties. It has long been a well recognized principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all. It is of course perfectly possible for two people to contract that they will sign a document which contains all the relevant terms, but it is not open to them to agree that they will in the future agree upon a matter which is vital to the arrangement between them and has not yet been determined. It has been argued that as the fixing of the price has broken down, a reasonable price must be assumed. That depends in part upon the terms of the Sale of Goods Act, which no doubt reproduces, and is known to have reproduced, the old law upon the matter. That provides in s. 8 that "the price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price"; while, if the agreement is to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, s. 9 says that the agreement is avoided. I find myself quite unable to understand the distinction between an agreement to permit the price to be fixed by a third party and an agreement to permit the price to be fixed in the future by the two parties to the contract themselves In principle it appears to me that they are one and the same thing. This principle is not without one or two important authorities. I think that Parker J.'s decision in **Von Hatzfeldt-Wildenburg v. Alexander** [1912] 1 Ch. 284 really covers the whole of this dispute, although I agree that the comment upon it by Sargant L.J. in **Chillingworth v. Esche** 1924] 1 Ch. 97, 113 more fully and accurately expresses the whole position; but the principle that you cannot agree to agree remains entirely unchanged. **Loftus v. Roberts** (1902) 18 Times L. R. 532 is to the same effect. The only way the appellants seek to escape from those authorities is by saying that all related to another subject-matter. If it could be shown that the different subject-matter was the cause of different principles of contract being applied, that would be an effective and relevant argument, but apart from the fact that a contract, one, for example, for the sale of land, requires the consideration of a large number of special details that are wholly unnecessary in relation to a contract for the sale of goods, and apart also from the way in which either of these contracts may be regulated by the Statute of Frauds on the one hand, or by the Sale of Goods Act on the other hand, the general underlying principles of contract are the same in each, and there is no reason why those principles should be in any way varied because of the subject-matter with which they deal. I therefore find myself quite unable to accede to the argument that the authorities to which I

have referred are weakened in their application to the present case because it happens that their subject-matter is not the same.

7. The next question is about the arbitration clause, and there I entirely agree with the majority of the Court of Appeal and also with Rowlatt J. The clause refers "*disputes with reference to or arising out of this agreement*" to arbitration, but until the price has been fixed, the agreement is not there. The arbitration clause relates to the settlement of whatever may happen when the agreement has been completed and the parties are regularly bound. There is nothing in the arbitration clause to enable a contract to be made which in fact the original bargain has left quite open.

8. Finally, I cannot take the view that the parties are entitled to an offer for the further parcels, because in my opinion this agreement is not a binding agreement at all, and the suggestion that the payment of the deposit entitled the appellants as of right to these offers, and constituted a valid and binding option, is not to my mind the true construction of what that deposit was for. The deposit was really for the purpose of securing the carrying out of the terms of the bargain when it had been made complete, and for the reasons I have already stated such completion never took place; there never was a complete bargain between the parties, and in my opinion the appellants fail.

VISCOUNT DUNEDIN.

9. I am of the same opinion. This case arises upon a question of sale, but in my view the principles which we are applying are not confined to sale, but are the general principles of the law of contract. To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties. In the system of law in which I was brought up, that was expressed by one of those brocards of which perhaps we have been too fond, but which often express very neatly what is wanted: "***Certum est quod certum reddi potest.***" Therefore, you may very well agree that a certain part of the contract of sale, such as price, may be settled by some one else. As a matter of the general law of contract all the essentials have to be settled. What are the essentials may vary according to the particular contract under consideration. We are here dealing with sale, and undoubtedly price is one of the essentials of sale, and if it is left still to be agreed between the parties, then there is no contract. It may be left to the determination of a certain person, and if it was so left and that person either would not or could not act, there would be no contract because the price was to be settled in a certain way and it has become impossible to settle it in that way, and therefore there is no settlement. No doubt as to goods, the Sale of Goods Act, 1893, says that if the price is not mentioned and settled in the contract it is to be a reasonable price. The simple answer in this case is that the Sale of Goods Act provides for silence on the point and here there is no silence, because there is a provision that the two parties are to agree. As long as you have something certain it does not matter. For instance, with regard to price it is a perfectly good contract to say that the price is to be settled by the buyer. I have not had time, or perhaps I have not been industrious enough, to look through all the books in England to see if there is such a case; but there was such a case in Scotland in 1760, where it was decided that a sale of a landed estate was perfectly good, the price being left to be settled by the buyer himself. I have only expressed in other words what has already been said by my noble friend on the Woolsack. Here there was clearly no contract. There would have been a perfectly good settlement of price if the contract had said that it was to be settled by arbitration by a certain man, or it might have been quite good if it was said that it was to be settled by arbitration under the Arbitration Act so as to bring in a material plan by which a certain person could be put in action. The question then arises, has anything of that sort been done? I think clearly not. The general arbitration clause is one in very common form as to disputes arising out of the arrangements. In no proper meaning of the word can this be described as a dispute arising between the parties; it is a failure to agree, which is a very different thing from a dispute.

10. As regards the option point, I do not think it can be more neatly put than it was by Rowlatt J. when he said: *"It is an option to offer terms on terms that are not agreed. An option to offer a contract which is not a*

contract seems to me not to carry the case any further than the first way of putting it." For these reasons I agree in the motion.

LORD WARRINGTON OF CLYFFE.

11. I agree. The decision of this case depends upon the application of a well known and elementary principle of the law of contract, which is that, unless the essential terms of the contract are agreed upon, there is no binding and enforceable obligation. In the present case we have a document which purports to be an agreement for the sale by one party to the other party of certain specified goods at a price to be hereafter agreed between them. If that price is thereafter agreed there is a binding contract within the principle to which I have alluded; each of the essential terms of the contract has been agreed. If the parties fail to arrive at an agreement, then the price has not been ascertained in the way in which the parties stipulated that it should be ascertained, and there is therefore no binding agreement.

12. It is said that this case is to be treated on the same footing as if there had been no fixing of the price; as if the contract had been silent as to the price, and the law may then imply a reasonable price; but in the present case the facts preclude the application of any such principle. To do that would not be to imply something about which the parties have been silent; it would be to insert in the contract a stipulation contrary to that for which they have bargained to give them, not the result of their own agreement, but possibly the verdict of a jury, or some other means of ascertaining the stipulated price. To do that would be to contradict the express terms of the document which they have signed.

13. With regard to the application of the arbitration clause, the same considerations apply. In the first place, if I am right in the view I take in the events which have happened there is no binding contract, the arbitration clause is not binding, and there is no contract out of which or in reference to which any dispute can arise. But more than that, to apply the arbitration clause would be, as in the attempted application of the doctrine as to reasonable price, to substitute the award of the arbitrator for that agreement between the parties which was the term by which they had originally agreed to be bound.

14. With regard to the option, I have nothing to add to what has been said by my noble and learned friends. All I can say is that I think the judgments of Sargant L.J. and Eve J. are perfectly unanswerable, and that the appeal ought to be dismissed.

Appeal dismissed.

Solicitor for appellants: E. V. Huxtable. *Stuart Bevan K.C., James Wylie,* and *Leon Freedman*for the appellants.
Solicitor for respondent: Treasury Solicitor. *Sir Thomas Inskip A.-G., Sir Boyd Merriman S.-G.,* and *Bowstead* for the Crown.