

Case No. 10

14, 1960

No. 18 of 1958

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL OF THE COLONY OF
SINGAPORE ISLAND OF SINGAPORE

UNIVERSITY OF LONDON
W.C.I.
- 7 FEB 1961
INSTITUTE OF ADVANCED
LEGAL STUDIES

B E T W E E N

HONG GUAN & COMPANY LIMITED
(Plaintiff)

Appellant

- and -

53364

10 R. JUMABHOY & SONS LIMITED
(Defendant)

Respondent

CASE FOR THE APPELLANT

RECORD

1. This is an Appeal from an Order dated the 15th November, 1957, of the Court of Appeal of the High Court of the Colony of Singapore Island of Singapore pursuant to Leave granted by the said Court dated 24th January, 1958, dismissing with costs the Appellant's Appeal from an Order dated 22nd October, 1956, of the High Court.

p.65

p.70

p.46

20 2. By the said Order dated 22nd October, 1956, the High Court dismissed with costs the claim of the Appellant as Plaintiff against the Respondent as Defendant for damages for breach of contract for failure to deliver goods sold.

p.46

3. On the issue of liability the sole question in dispute is the meaning to be given to the words "Subject to shipment" which appeared in the Contract of Sale.

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4. On the issue of damage there are two questions.

a) The first is whether or not the Appellant can recover as special damages two sums paid by way of compensation to sub-purchasers for failure to deliver the goods, the subject matter of the contract which had been sold to such sub-purchasers; and further damages for loss of profit on such sub-sales.

b) If the answer to the first question be no the second question is whether or not the Appellant can rely on the evidence relating to the settlement of the claims on the sub-sales and on certain other evidence to establish that the market price at the date of the breach was at least \$46,780 or some other less sum greater than the total contract price.

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p. 3

5. In his Statement of Claim dated 7th April, 1951, the Appellant relied on a contract dated 7th November, 1950, whereunder the Respondent agreed to sell 50 tons of Zanzibar cloves, second grade, December shipment at \$94½ per picul ex godown.

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p. 4

6. The only defence raised on liability was that the contract was subject to force majeure and shipment and that the goods had not been shipped.

7. In his said Statement of Claim the Appellant claimed the following damage :-

PARTICULARS OF DAMAGE

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Market price of 50 tons (= 840 piculs) 2nd Grade Zanzibar Cloves in December 1950 and January 1951 at \$230 per picul	\$ 193,200.00	30
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Purchase price of the said 50 tons (= 840 piculs) 2nd Grade Zanzibar Cloves at \$94½ per picul	<u>79,380.00</u>	
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Difference in price	<u>\$ 113,820.00</u>	
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pp.8 - 10

8. In an amended Statement of Claim dated 8th November, 1955, the Appellant made an alternative claim to damages made up as follows :-

a) The Appellant alleged that he resold 25 tons of the said cloves on the 24th November to a

firm known as Mahhanlall at the price of \$99 per picul and on terms otherwise similar to the contract dated 7th November, 1950. He further alleged that the said firm sued him for damages for failure to deliver the said cloves and claimed the sum of \$42,420. The Appellant further alleged that on the 28th August, 1951, this claim was settled for \$28,000.

10 b) The Appellant alleged also that on the 24th November, 1950, he resold to a firm known as Panachand & Co. the remaining 25 tons of cloves at the price of \$99 per picul and on terms otherwise similar to the contract dated 7th November, 1950. The Appellant further alleged that this said firm also sued him claiming general damages, and on the 20th August, 1951, this claim was settled for \$15,000.

20 c) The Appellant further claimed a loss of profit of \$4½ per picul totalling \$3,780. A further \$1,500 was claimed in respect of payment made in respect of costs but this claim was abandoned in a Court of Appeal.

9. In his defence the Defendant denied that the Plaintiff had suffered the alleged damage and further that the damage claimed in the amended Statement of Claim was recoverable. p.11

10. On the 17th May, 1956, the case came on for hearing before Tan Ah Tah J. A summary of the material facts relating to liability is taken from a judgment on appeal of Knight C.J.

30 "Under the terms of that contract the Respondents undertook to supply the Appellants with 50 tons of cloves by December shipment at \$94,50 per picul and in the body of the contract appeared the words :- from p.60, line 1 to p.61, line 4

'Subject to force majeure and shipment'

40 At the material time the Respondents, who are importers of cloves on a very large scale and entered into many other contracts to supply cloves to merchants, mainly for re-export to Java, where they are much in demand for mixing with tobacco, and their Chairman of Directors explained in the Court below that it was the practice of his Company to use one of three forms of contract with would-be purchasers. The first two types are not material to this appeal; but the third, which the Chairman stated was the form of contract used here, was invariably applied when his Company was not certain whether the

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goods would in fact be shipped. He explained that at the time this contract was made the Respondents did not know whether they would be able to obtain the cloves in Zanzibar because early rain had fallen on that island which made picking unexpectedly slow.

In fact, for this reason or another, shipments of cloves at the end of 1950 from Zanzibar fell far below what had been anticipated - much to the concern of the Respondents who had contracted to supply, in addition to the Appellants, many other merchants, several of them under what had been called "unconditional" contracts i.e., contracts where the words "subject to shipment" did not appear. At that time the market price for cloves was very high, though fluctuating wildly, and the Respondents ultimately were obliged to pay large sums of money to compensate those merchants with whom they had contracted to supply for November shipments.

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On December 21st, 1950, the s.s. Ettrick Bank sailed from Zanzibar carrying 50 tons of cloves for Singapore to the order of the Respondents to whom no other shipment was made during that month. On the arrival of the Ettrick Bank, on 20th January, 1951, 46 tons were supplied to purchasers of December shipment cloves who had unconditional contracts with the Respondents and the remaining four tons went to other purchasers of the November shipment. Thus no cloves were supplied to the Appellants who, in the meantime, had been rash enough to contract with other merchants to supply them with this anticipated consignment and, when they in turn were unable to supply, were forced to pay compensation".

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p.25, line 15

p.33, line 42
p.34, lines

27-30
p.35, line 15

11. On the issue of damages the Appellant proved all the material facts set out in the amended Statement of Claim and quoted in paragraph 8 hereof. In addition the Appellant proved that the settlement with the firm Makhanlall was negotiated by the Respondent and that the Respondent also paid damages to such firm in respect of a contract which they had direct with that firm. The Respondent further admitted that at the material time the market price of cloves was very high and that he had to pay substantial damages for failure to deliver cloves to other purchasers at this date.

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10 12. The Trial Judge found that there had been no breach of contract because in his view the Respondent was entitled to rely on the clause "Subject to shipment". He said "It is clear from the foregoing that the 300 tons carried on the Tjibadak and the 50 tons carried on the Ettrick Bank were shipped in fulfilment of definite contracts which had been entered into by the Defendants and which were subject to ni condition as to shipment. from p.42, line 42 to p.43, line 18

In Hollis Bros. & Co. Ltd., v. White Sea Timber Trust, Ltd., (1936) 3 All E.R. 895 Porter, J. (as he was then) said on page 900:

'My view is that if they have shipped the goods the sellers are obliged, at any rate if they have not been shipped in fulfilment of other contracts, to supply them under this Contract'.

20 As I have already stated, the total quantity of 350 tons carried on the two vessels was clearly shipped in fulfilment of what I have referred to as definite contracts which contained no condition as to shipment In my opinion the Defendants have discharged the onus which lies upon them on this issue and for this reason alone the Plaintiffs' claim must fail".

30 13. On the issue of damages Tan Ah Tah J. said "In my opinion the Plaintiffs, by neglecting to include the phrase 'Subject to shipment' in the sub-contracts, have unnecessarily exposed themselves to the claims brought against them by the two firms. That being the case, they cannot now, in my judgment, seek to obtain from the Defendants the amounts which they have had to pay to the two firms and their Solicitors". He made no assessment of damages on the Plaintiffs' alternative claim for the difference between the market and contract price of the said cloves. p.45, lines 22-28

40 14. The Appellant appealed and the appeal came on for hearing before Knight C.J. and Rigby and Wee Chong Jin J.J. and the judgment of the Court was given on 15th November 1957 dismissing the Appellant's appeal.

On the issue of liability Rigby and Wee Chong Jin J.J. agreed with the Trial Judge.

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p. 55
lines 33-34

15. Rigby J. said "In the absence of authority to guide me I venture to express the opinion that the effect of the words 'Subject to shipment' amounts to no more than an executory and unenforceable agreement which is only converted into a valid contract of sale between the parties by the seller exercising his option to ship, coupled with some evidence, direct or circumstantial, that the goods shipped were intended to be appropriated to that contract. Whether or not there is such a specific appropriation is a question of fact".

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p. 50
lines 30-40

16. Wee Chong Jin J. said "The sellers have the option to ship or not to ship. If they do not ship the goods then there is no sale. If they ship the goods, but these goods are shipped in fulfilment of other contracts, then also there is no sale. If they ship the goods not in fulfilment of other contracts then there is a sale and they are obliged to deliver and they cannot afterwards say if the market rises 'they were free goods unattributed to any contract and we are not obliged to deliver but can sell them in the market'".

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p. 62
lines 8-32

17. In a dissenting judgment Knight C.J. said "If the trial Judge's interpretation were placed upon these words, moreover, it would follow that a consignee under a 'Subject to shipment' contract would, in effect, have no rights whatsoever against the seller. The prices of cloves in Singapore, as has been admitted, fluctuates greatly and there would be nothing to prevent a seller refusing to supply his consignee at the contract price should the market price be higher than the contract price when the vessel arrived and nothing to prevent him forcing the consignee to pay the contract price if, in the meanwhile, the market price had fallen below it. This would clearly be a commercial malpractice unless intended by the parties, and, if it was so intended surely a clear and unequivocal provision to this effect should be embodied in the contract - not merely the words 'Subject to shipment'?

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If the Respondents wished to cover themselves against a failure to obtain the cloves in Zanzibar why did they not say in the contract 'Subject to shipment of 350 tons' - or whatever number of tons it was that they required to fulfil all their undertakings?

As I see it, the Appellants are right and the words 'Subject to shipment' must be strictly construed and can only mean 'Subject to shipment of 50 tons in December', which shipment was in fact made to the Respondents".

10 18. On the issue of damages Knight C.J. assessed \$46,780 as being the sum claimed in the amended Statement of Claim less the sum of \$1,500 abandoned by the Counsel for the Appellant. The said Judge did not award this sum on any principle which entitled the Plaintiff in special circumstances to claim damages flowing from the sub-contract. He merely inferred from the evidence relating to the two actions brought against the Appellant that they were settled on the basis of the prevailing market price in Singapore and from that evidence he was satisfied that the measure of damages as claimed in the original Statement of Claim would be at least the sum which he assessed. Wee Chong Jin J. agreed with Knight C.J.

P. 63

P. 51
lines 10-25

30 19. On the issue of damages Rigby J. said "In that case the Court of Appeal held that if there was evidence before the Court on which it could come to the conclusion that such a settlement was reasonable in the circumstances of the case, then it was proper for the Court to consider the amount paid on such a settlement as a maximum measure of damages: Applying that principle to this case if, in fact, the learned Judge had found that there was a breach of contract by the Respondents in failing to deliver the December shipment of cloves to the Appellants, in the absence of evidence adduced by the Appellants as to the prevailing market price at the time of the breach of contract, then, in my view, in the particular circumstances of this case, the Appellants would have been entitled to fall back upon the sums paid to the firms in settlement of the subsequent actions of those firms for breach of contract as the maximum measure of their claims for general damages and it would have been for the Court to decide whether such a settlement was reasonable in all the circumstances of the case". Rigby J. did not decide whether these settlements were reasonable nor make an assessment as to damage.

P. 58 line 36
P. 59 line 10

40 20. On the issue of liability the Appellant relies on the reasoning of Knight C.J. quoted in paragraph

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17 hereof. The Appellant contends that the other contracts entered into by the Respondent for the sale of cloves are "Res inter alios acta" and that the words "Subject to shipment" in the contract dated 7th November, 1950, can only be construed as relating to the goods the subject matter of that contract.

21. On the issue of damages the Appellant contends that it is only necessary to consider the cases which decide when the buyer may claim such damages arising from non-fulfilment of sub-sales when the buyer is seeking to recover a sum in excess of the difference between the market and contract price. It is contended in this case that the Appellant is mitigating his damage by basing his claim on the difference between the total market price of the goods and the total contract price of the goods. 10

22. The Appellant humbly submits that this Appeal should be allowed for the following among other 20

R E A S O N S

1. BECAUSE the words "Subject to shipment" in the contract dated 7th November, 1950, must be construed as meaning "Subject to December shipment of 50 tons of Zanzibar cloves, second grade, by the Respondent".
2. BECAUSE the evidence established that the Appellant suffered damages totalling at least \$46,780 and this sum was either equal to or less than the difference between the contract and market price. 30
3. BECAUSE the reasoning of Knight C.J. is right and should be supported.

IAN C. BAILLIEU.

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B E T W E E N

HONG GUAN & COMPANY
LIMITED (Plaintiff) Appellant

- and -

R. JUMABHOY & SONS
LIMITED (Defendant) Respondent

CASE FOR THE APPELLANT

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