14, 1960



IN THE PRIVY COUNCIL No.18 of 1958

ON APPEAL

FROM THE COURT OF APPEAL OF THE COLONY OF SINGAPORE ISLAND OF SINGAPORE

B E T W E E N

HONG GUAN & COMPANY LIMITED
... ... (Plaintiffs) Appellants

and

R. JUMABHOY & SONS LIMITED
... ... (Defendants) Respondents

# CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal by leave of the High Court of the Colony of Singapore, Island of Singapore, against the judgment of the Court of Appeal of the said High Court dated 15th November 1957 Rigby and Wee Chong Jin J.J., Knight Ag. C.J. dissenting, dismissing with costs the Appellants appeal from the judgment of Tan Ah Tah J. dated 9th October 1956 whereby the Plaintiffs' claim was dismissed with costs. p.71 ll.15-37 p.65 p.46 ll.1-26

2. The primary question for decision in this appeal is whether, as the Respondents contend and as the trial Judge and a majority of the Court of Appeal have held, the Respondents were in the events which occurred excused from delivering the goods the subject-matter of the contract by the term of the contract "subject to shipment". The secondary question, which only arises if the Appellants succeed upon the issue of liability, is whether the Appellants are entitled to recover more than nominal damages. The facts and the law relevant to each of these questions are

materially different and the Respondents accordingly propose to divide their Case into two parts.

PART 1. The Issue of Liability

3. The Respondents are merchants who at the time of the matters in question were the
p.30 ll.29-30 largest importers and stockists of cloves in Singapore. Their Chairman had advance knowledge that the 1950 crop of cloves in Zanzibar would be unusually large. The
p.31 ll.38-39 Respondents contracted to sell about 760 tons
p.35 l.35 - for shipment in November 1950, of which 665
p.36 l.18. tons were sold under what were referred to at the trial as "definite" or "unconditional" contracts and the remainder under contracts containing the term "subject to shipment". The Respondents also sold about 500 tons for shipment in December 1950, of which 275 tons were sold under "definite contracts" and the balance, which included the cloves with which this appeal is concerned, "subject to shipment".

4. On 7th November 1950 the Respondents agreed to sell to the Appellants 50 tons of
p.72 Zanzibar cloves, second grade, December shipment at $94½ per picul ex buyers' godown "subject to force majeure and shipment". The Respondents'
p.31 ll.15-28 Chairman explained in evidence that the words "subject to shipment" were included because he was not sure that he would be able to obtain the cloves to fulfil the contract, an unexpectedly early rainfall having made picking a slow process. He further explained that cloves are only sold by the suppliers after they have been picked and that the interval of time between picking and shipment was only 2 to 3 weeks. This evidence was unchallenged.

5. In the event the Respondents' shippers
p.31 l.41 to were only able to ship 350 tons of cloves in
p.32 l.4; p.32 November and December 1950 of which 300 tons
ll.39-43. were shipped in November on board the s.s. "Tjibadak" and 50 tons were shipped in December on board the s.s. "Ettrick Bank". This latter parcel was intended for shipment aboard the "Tjibadak" in November but was shut out. These 350 tons of cloves were delivered to those who had bought from the Respondents under "definite" contracts in proportion to the amount purchased. The Respondents discharged the remainder of their obligations under the "definite" contracts

by purchasing cloves in Singapore or by paying compensation to the buyers. No cloves were delivered or compensation paid to the Appellants or others who were parties to "subject to shipment" contracts and by a letter dated 29th December 1950 the Respondents' Solicitors informed the Appellants "your shipment was not effected by the Zanzibar suppliers. Your contract was made subject to force majeure and shipment in consequence of which please consider your contract cancelled." p.33 ll.40-2 p.76 ll.28-43

6. On the issue of liability the Respondents contention was and is that as the only cloves shipped were shipped in fulfilment of contracts which were not expressed to be "subject to shipment", they were under no obligation to deliver the 50 tons of cloves to the Appellants. The Appellants on the other hand contended that the Respondents were obliged to deliver 50 tons of cloves to the Appellants if that quantity or more were shipped during December consigned to the Respondents in Singapore.

7. The trial judge and the majority of the Court of Appeal upheld the Respondents' contention; the relevant passages in the judgments being as follow:-

Tan Ah Tah J. (the trial Judge):- p.42 l.48-p.43 l.17.

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

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 point of fact the 350 tons proved to be quite inadequate to fulfil such contracts. Applying the dictum of Porter J. to the present case it follows that the Defendants are under no obligation to supply the cloves to the Plaintiffs under the contract in question. 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."

Wee Chong Jin J. (in the Court of Appeal):- after referring to the judgment of the late Lord Porter in Hollis Bros. & Co. Ltd. v. White Sea Timber Trust Ltd. continued:-

p.50 l.21 - p.51 l.9.

"In my opinion, the learned trial judge was correct in relying on the passage in the judgment of Porter J. namely '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.' In my view the true effect of the judgment of Porter J. as to the meaning of the words 'subject to shipment' is this:-

> 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'.

In view of the learned trial judge's findings of fact, and applying what I conceive to be the true effect of the judgment of Porter J., there was no sale by the Respondents and they were not obliged to deliver the 50 tons cloves to the Appellants. I might add that if buyers choose to contract to purchase goods and to be bound by a clause such as "subject to shipment" they must take the consequences of being completely in the hands of their sellers as to whether their sellers would exercise the option of shipping or not shipping and as to whether their sellers have at the moment of shipment other contracts in fulfilment of which these goods are shipped by the sellers. Of course, if the goods are in fact shipped and the sellers have at the moment of shipment no contracts in fulfilment of which these goods are shipped, then the buyers, in such an event, are entitled to delivery."

Rigby J. (in the Court of Appeal) after referring to the Hollis Bros. & Co. Ltd. v. White Sea Timber Trust Ltd. and citing the passage from the Judgment in that case that "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", continued:-

"Whilst it may well be true to say that in using the words quoted above, Porter, J., was not seeking so much to establish a general principle of law as dealing with the particular clauses then under consideration before him and endeavouring to reconcile and explain their apparent inconsistencies, in my view the learned trial Judge was fully justified and perfectly correct in accepting that passage as an accurate and general proposition of the law and adopting it to the facts of the case before him. As Counsel for the Respondents pointed out, if the Appellants' contention is correct that once the seller has, in fact, shipped the goods by a December shipment then the buyer is entitled to have them appropriated to his contract irrespective of other contracts that the seller may have with other buyers, then there is, in effect, no distinction between an unconditional contract and one containing the words "Subject to shipment". p.55 l.14 to p.56 l.8.

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. In this case there was no evidence whatsoever to establish the fact that at the time of the shipment there was any intention, whether express or by necessary inference, that the goods were to be appropriated to the Appellants in execution of the contract. Alternatively - to paraphrase the words used by Porter, J. - there was no evidence that at the time of shipment "they were free goods ..... unattributed to any contract." On the contrary there was, in my view, abundant evidence before the learned trial Judge which fully justified him in holding that the total quantity of 350 tons carried on the two vessels was clearly shipped in

fulfilment of what the learned trial Judge referred to as "definite contracts which contained no condition as to shipment".

8. In a dissenting judgment Knight Ag. C.J. referred to Hollis Bros. & Co. Ltd. v. White Sea Timber Trust Ltd., cited the passage from the judgment in that case that "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" and continued:-

p.81 l.48 to p.62 l.43.

"The trial Judge apparently read into this passage the meaning that if the seller had shipped in fulfilment of other contracts he need not supply a consignee under a contract which was subject to shipment, but in my opinion, this is not what Porter J. said. As I see it these words really mean that the seller must supply unless the goods were shipped in fulfilment of other contracts where different considerations may arise.

If the trial Judge's interpretation was 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 price 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"?

In my opinion the Respondents are seeking to show in the words "subject to shipment" something that they do not mean in the usual sense of those words. 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? Again, if the Respondents meant to contract with the Appellants only if they obtained the cloves and gave no undertaking that they would obtain them - surely this too could have been very simply embodied in the contract? 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."

9. The Respondents respectfully submit that Knight Ag. C.J. erred in thinking that the words "subject to shipment" would, if the Respondents' construction were adopted, leave Sellers free to ascertain the market price of goods at or immediately before the arrival of the vessel and then either to enforce or ignore the contract in accordance with commercial expediency. The constructions contended for by each of the parties render the time of shipment the decisive moment in determining whether the agreement remains executory and unenforceable or whether it becomes effective. The issue between the parties is simply whether, as the Appellants contend, the shipment by a seller of any goods of the contract description during the shipment period automatically renders effective all contracts by that seller on "subject to shipment" terms or whether, as the Respondents contend, a "subject to shipment" contract only becomes effective when goods are shipped by or on behalf of the seller either in fulfilment of the "subject to shipment" contract or in fulfilment of no other contract for the sale of such goods.

10. The Respondents submit that the learned trial Judge and the majority of the Court of Appeal were right in the construction which they adopted. The alternative construction produces a situation in which a seller who has sold, for example, 10 parcels of 50 tons each "subject to shipment" cannot safely ship any goods unless he can ship 500 tons. Such a construction is, it is submitted, commercially absurd.

## PART II. The Issue of Damages

11. This issue, of course, only arises if the Appellants succeed upon the issue to which the first Part of the Respondents' Case has been directed. On this issue the following further

facts and matters may become relevant:-

p.74 (1) On 24th November 1950 the Appellants entered into two contracts in identical terms each for the sale of 25 tons of Zanzibar second grade cloves shipment December 1950 at $99 per picul "subject to the safe arrival of the steamer and alls force majeurs". The buyers were Messrs. Makhanlall & Co. and Messrs. Penachand & Co.

(2) The Respondents did not know of these sub-sales until proceedings were being contemplated by the Appellants.

p.76 ll.1-24 (3) In reply to a letter dated 29th December 1950 from the Respondents' solicitors stating that, in consequence of the failure of the Zanzibar suppliers to effect shipment, the contract between the parties was cancelled, the Appellants' solicitors wrote on 3rd January 1951 stating that they had been instructed to issue forthwith a writ for damages for breach of contract and enquiring whether the Respondents' solicitors had instructions to accept service. The Respondents' solicitors replied that they had instructions to accept service.

p.77 l.26 - p.78 l.17

p.77 l.18-31

p.81 l.24 - p.82 l.34 (4) The Appellants did not inform their sub-buyers that they would be unable to perform the sub-contracts until 18th January 1951.

p.34 ll.31-6 p.41 ll.37-42 p.57 ll.20-34 (5) The Appellants did not buy goods in Singapore with which to perform their sub-contracts.

(6) The Statement of Claim as originally delivered on 7th April 1951 claimed damages on the basis of the difference between the contract price and the market price of 2nd Grade Zanzibar Cloves in December 1950 and January 1951. This latter price was alleged to be $230 per picul (an advance of $135½ over the contract price of $94½) and the damages claimed accordingly amounted to $113,820.00.

p.3 ll.18-30

(7) The sub-buyers made claims against the Appellants which were settled in August 1951 by the Appellants paying Messrs. Makhanlall & Co. $28,000.00 and Messrs. Penachand & Co. of $15,000.00. The settlement with Messrs. Mackhanlall & Co. was effected with the assistance of the Respondents' Chairman. p.17 ll.37-9

(8) On 27th October 1955 the Appellants applied for and obtained leave to amend their Statement of Claim claiming in the alternative special damages based upon the amounts paid by them to their sub-buyers in settlement of claims under the sub-contracts and to limit their claim to $48,280.00. pp. 7, 10.

(9) The evidence of the Respondents' Chairman that the Respondents bought cloves in Singapore in order in part to perform their "definite contracts" was unchallenged and, it is submitted, establishes the existence of a market in which such goods could be bought. p.34 ll.27-30 p.131.

(10) There was no evidence of the Singapore market price of cloves of the contract description at the end of December 1950.

12. Having found for the Respondents upon the issue of liability, it was unnecessary for the learned trial Judge to consider the question of damages. However he did so and was of opinion that the Appellants could not recover from the Respondents the amounts which they had to pay to their sub-buyers and to their own Solicitors. The trial Judge's reasons for this opinion may be summarised as follows:-

(1) The Respondents did not know of the existence of the sub-contracts until more than a month after they had been entered into. p.43 ll.26-29

(2) On 7th November 1950 when the contract was entered into between the parties to this appeal, neither party contemplated that the goods would be re-sold by the Appellants before delivery or that the Appellants loss upon non-delivery by the Respondents would be ascertained by reference to the Appellants' loss of profit upon re-sale or any other basis. p.43 ll.29-36

(3) There was at all material times an available p.44 ll.19-23

market for cloves in Singapore.

p.44 ll.33-9 (4) The terms of the main contract differed from those of the sub-contracts in that the former contained the term "subject to .... shipment" which was absent from the sub-contracts.

p.43 l.36 et seq. (5) Following the decision of the House of Lords in Williams Bros. v Agius (1914) A.C. 510 damages fall to be assessed by reference to the market value of the goods at the date of breach and not by reference to liabilities under the sub-contracts.

It is respectfully submitted that the learned trial Judge's opinion and the reasons therefor were correct.

13. In the Court of Appeal it was again unnecessary to determine the true measure of damage, in that the appeal failed on the issue of liability. However that Court also considered the matter, but, differing in this respect from the learned Judge, expressed the view that, if liability had been established, the Appellants would have been entitled to recover $46,783.80 (Knight Ag. C.J. and Wee Chong Jin J.) and would not have been entitled to recover more than $48,280.00 (Rigby J. and Wee Chong Jin J.).

14. Knight Ag. C.J., with whom Wee Chong Jin J. agreed, began his judgment on this issue by saying:-

p.62 ll.44-9 "The Appellants, however, are faced with yet another hurdle in as much as it is admitted that in the Court below there was no evidence of the market price of cloves and thus it is impossible to estimate what, if any, damages are payable following the breach of this contract".

The learned Acting Chief Justice then proceeded to estimate the damages following the breach of contract as being $46,783.80. In so doing he prefaced his conclusion by setting out the method of assessment suggested by the Appellants. This method, which appears to have been advanced for the first time in the Court of Appeal, may

be summarised as follows:-

(1) As the Appellants paid their sub-buyers Messrs. Makhanlall & Co. $28,000 as compensation for non-delivery, the current price for 25 tons of cloves cannot have been less than the sub-contract price ($41,580) plus the compensation of ($28,000) or $69,580 in all, giving a minimum current price of $165.66 per picul. p.63 ll.1-33

(2) From the current price of $165.66 per picul there falls to be deducted the main contract price of $94.50 per picul, the difference being $71.16 per picul or $29,887.20 in respect of the 25 tons the subject matter of the sub-contract with Messrs. Makhanlall & Co.

(3) Applying a similar calculation to the $15,000 paid by the Appellants to Messrs. Penachand & Co. a figure of $16,896.60 is arrived at.

(4) The damage suffered by the Appellants is thus the sum of $29,887.20 and $16,869.60 or $46,783.80.

Knight Ag. C.J. continued:-

"Now it is an elementary proposition that a party must prove his damage and as Mr. Gould pointed out the Appellants elected to sue for special damage in the Court below and when they failed are now, in effect, asking this Court to assess damages for them. This undoubtedly is true and in normal circumstances I should have been inclined to order that the trial Judge should be directed to re-open the proceedings and assess the damages payable. Unfortunately, however, Counsel have conceded that no evidence can be called to establish the market price of cloves some seven years ago and there would thus be no point in directing that such an inquiry should be held. p.63 l.34- p.64 l.25.

The fact thus emerges that the Appellants, in my opinion, are entitled to judgment on the question of liability and have established that they have suffered damage. The total sum paid by them as compensation was $43,000 - a figure arbitrated at least in part between them and their consignees by the chairman of Directors of the Respondent Company (not as in the case of Biggin

& Co. Ltd., v. Permanite, Ltd., 1950 2 A.E.R. 859 which in any event was reversed on appeal where a figure was reached on the advice of Counsel) - and it is obviously safe to assume that the Chairman and the parties were guided in reaching this figure by the market price of cloves at the relevant time: no other consideration can possibly have been material.

Would it thus be right to conclude that because there was no evidence as to the market price of cloves at the relevant dates and that the Appellants can therefore not establish, with precision, their actual damage, they are ipso facto debarred from receiving any damages at all? I do not think that this conclusion should follow. There is every reason, in my opinion, to infer that the Appellants must necessarily have lost the sum of $46,783.80 as a result of the Respondents' failure to deliver and I would allow this appeal entering judgment for the Appellants for this amount with costs here and in the Court below."

15. It is respectfully submitted that the learned Acting Chief Justice was correct in directing himself that the measure of damage was the difference between the contract and market prices at the date of breach. That date was however at latest the 3rd January 1951 when the Appellants' Solicitors wrote accepting the Respondents' Solicitors' letter of 29th December 1950 as a repudiation of the main contract. It is further submitted that the settlements made by the Appellants in respect of claims by their sub-buyers are no evidence at all of the market value on that date for the following amongst other reasons:-

p.77 l.26 - p.78 l.17.

p.76 ll.28-43

p.81 l.24 - p.82 l.9.

(1) The sub-contracts remained effective until at the earliest 18th January 1951 when the Appellants' Solicitors wrote to the two sub-buyers informing them that the main contract had been cancelled.

(2) In so far as the market price of cloves entered into the settlement figures agreed upon, it must have been the market price on or after 18th January 1951.

(3) As the Settlement figures agreed upon

differed widely although the contracts were identical, factors other than the state of the market clearly entered into consideration.

(4) The terms of the sub-contracts were not the same as those of the main contract.

16. Rigby J., with whom Wee Chong Jin J. also agreed, referred to the decision of the English Court of Appeal in Biggin & Co. Ltd. v. Permanite Ltd. (1951) 2 All E.R. 191 and continued:-

"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." p.58 l.45-p.59 l.10.

17. The Respondents would accept the view of Rigby J. as an accurate statement of the law in cases in which a Defendant is liable to indemnify a Plaintiff against claims by his sub-buyers. However it is respectfully submitted that no such liability arises in cases, such as the present, when there is an available market in which goods of the contract description can be bought. The market price of such goods then fixes the amount of the damages be they more or less than the amount paid by the Plaintiff to his sub-buyers.

18. The Respondents therefore respectfully submit that this appeal should be dismissed with costs for the following amongst other

REASONS

(1) BECAUSE on the facts found by both the Courts below the Respondents were under no obligation to perform the contract.

(2) BECAUSE if liability exists, the true measure

of damage is the difference between the contract price and the market price on or about 3rd January 1951 and there is no evidence that the market price was then any higher than the contract price or alternatively how much higher it was.

(3) BECAUSE the Order of the Court of Appeal which is appealed from is right.

C.P. HARVEY

JOHN F. DONALDSON

No.18 of 1958

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