Privy Council Appeal No. 51 *of* 1959

Adel Boshali – – – – – – – – – *Appellant*

v.

Allied Commercial Exporters Limited – – – – – *Respondent*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH NOVEMBER 1961

Present at the Hearing:
LORD HODSON
LORD GUEST
LORD DEVLIN
[*Delivered by* LORD GUEST]

The facts out of which these appeals arise have been fully set out in the judgments of Abbott J. in the Supreme Court of Nigeria and of Nageon de Lestang F.J. in the Federal Supreme Court and it is unnecessary to rehearse these facts in any detail.

The contract which resulted from correspondence between the appellant and respondent in March, 1952 was for the purchase by the appellant from the respondent of 85,000 yards " 36 inch dyed crepe Quality AS1000 grey cloth foreign origin " at 1s. 10d. per yard C.I.F. The contract is embodied in two Sale Notes, dated respectively 24th March and 1st April, 1952. After a consignment of the goods had been delivered to the appellant he rejected the remainder of the goods on the ground that they were disconform to contract. In the action No. 496/53 the appellant claimed damages amounting to £3,531 8s. 11d. for breach of contract. The respondent counterclaimed for £1,666 14s. 2d. as special and general damages for the appellant's breach of contract by non-acceptance.

In this action the Trial Judge found for the appellant and awarded damages amounting to £3,406 7s. 6d. in respect of the respondent's breach of contract, and he dismissed the counterclaim. The Federal Supreme Court held that the appellant had failed to prove breach of contract and gave judgment for the respondent on the counterclaim to the extent of £425 11s. 5d. Before their Lordships' Board the respondent was not represented and he did not lodge a printed case.

Both the Trial Judge and the Federal Supreme Court took the view that the contract was a sale by description and not a sale by sample. Their Lordships are of opinion that this was a correct conclusion. There was not in the words of section 15 (1) of the Sale of Goods Act, 1893 any term in the contract to the effect that the sale was by sample. From this conclusion however, the Trial Judge and the Federal Supreme Court arrived at different results. While the Judge held the respondent in breach of contract, the Federal Supreme Court expressed the opinion that there was no evidence that the goods did not correspond with the description. This view could only have been formed by the elimination from their consideration of the sample Exhibit "AB ". While agreeing that this was not a sale by sample, their Lordships take the view that the sample must be taken into consideration as evidence of the description given by the seller of the goods. The Trial Judge has found as a fact that the sample Exhibit "AB " had attached to it

a label "AS1000-65000". This sufficiently identifies it with the goods referred to in the letter from the respondent to the appellant dated 10th March, 1952 as "Quality AS1000" and with the goods referred to in the subsequent Sale Notes. The sample explains the description given in the contract and the parties treated the sample as an accurate description of the stipulated quality of the goods. The appellant succeeded in establishing before the Trial Judge that the shipping sample forwarded to him by the respondent was inferior in quality to the sample Exhibit "AB". Therefore, assuming that the shipping sample was typical of the bulk of the goods to be supplied, these goods did not correspond to the description of the goods given in the contract and as evidenced by the sample.

The Federal Supreme Court held that the appellant had failed to prove that the bulk of the goods did not correspond to the original sample. No test was in fact applied to the bulk of the goods, the test being restricted to the shipping sample. Their Lordships consider that there is force in the argument that as a matter of strict proof no evidence was produced as to the quality of the bulk of the goods. But the shipping sample was put forward by the respondent as a sample of the goods shipped or to be shipped and before the Trial Judge the case was conducted on the basis that the shipping sample was typical of the bulk of the goods. In these circumstances their Lordships are of opinion that it would be taking an unduly technical view to hold that the appellant's proof had failed on this point when both parties had accepted the position as indicated above. For these reasons their Lordships consider that the Trial Judge was right in holding the respondent in breach of contract and that his judgment on this point should be restored.

The Federal Supreme Court criticised adversely the Trial Judge's findings as to damages in several respects. In the first place it was said that the appellant had failed to prove any damages in regard to the goods accepted. The Trial Judge awarded damages on the basis of the loss on resale at 7d. per yard. The appellant gave evidence that the cost of the goods to him including duty and delivery charges was 2s. 4d. per yard and that owing to the inferior quality of the goods he could only obtain 1s. 9d. From these figures a loss on resale of 7d. per yard was calculated. No cross-examination was directed to this method of calculating his loss.

The Federal Supreme Court took the view that this method of calculating damages was not in accordance with section 53 (3) of the Sale of Goods Act, 1893 in that there was no evidence of the market value of the goods at the time of delivery. While it is true that the evidence of the appellant did not specifically relate the figure of 2s. 4d. per yard to the market value of the goods, in effect what he was saying was that the market value of the goods was the cost to him namely 2s. 4d. plus the profit which he could have made on the resale namely 6d., a total of 2s. 10d. per yard. From this market value the price which he obtained for the goods namely 1s. 9d. would require to be deducted leaving a loss of 1s. 1d. per yard. The Trial Judge accepting the appellant's evidence awarded damages at the rate of 6d. per yard as profit on the whole consignment of 85,000 yards. But as a figure of 6d. per yard has already been included in the market value of the goods in the first calculation, in order to avoid duplication the figure of 6d. requires to be deducted from the rate of 1s. 1d. per yard leaving a balance of 7d. per yard, being the rate at which the damages have been calculated by the Trial Judge in respect of the goods accepted. In their Lordships' view the Federal Supreme Court approached the question of damages upon the correct basis, but they took an unduly strict view of the standard of proof required. The Trial Judge arrived at a substantially accurate assessment of the damages under this head and their Lordships' view is that his award falls to be sustained.

The Federal Supreme Court took the view that the figure of 6d. per yard for loss of profit on the sale of the goods awarded by the Trial Judge rested on the *ipse dixit* of the appellant that he would have made a profit of 6d. and that this was not sufficient proof of his actual loss of profit. The only evidence as to loss of profit came from the appellant who was an expert in the trade and whose evidence was accepted by the Trial Judge. He was not

cross-examined on the basis that his claim was excessive. The Trial Judge was in their Lordships' view fully entitled in the absence of any contrary evidence to take the figure of 6d. per yard as the appellant's loss of profit.

The Trial Judge further awarded the appellant in name of damages £246 19s. being the refunds which the appellant said he had made to sub-purchasers in respect of shortages in quantity. As evidence of the shortages a Certificate of Inspection was produced showing that in some cases the yardage marked on the pieces in the bundles did not correspond to and was in fact greater than the actual yardage. But the contract as embodied in the Sale Notes was for a total length of cloth of " 85,000 yards 36 inches ": there was no evidence of any particular shortage in bundles delivered to sub-purchasers but merely an *omnibus* claim of £246 19s. Further the yardage marked on the pieces in the Certificate of Inspection was in nearly every case in excess of 36 inches. There was no satisfactory proof of the claim made in respect of the refund to sub-purchasers and it must in their Lordships' view fail.

The damages to be awarded therefore consist of:—

£1,034 8s. 6d.	being loss on resale
£2,125 0s. 0d.	being loss of profit
£3,159 8s. 6d.	

But from this sum there admittedly falls to be deducted £900, being the total of two sums of £500 and £400 paid by the respondent to the appellant on account in settlement of claims. It was never contended that these sums were in full settlement of the appellant's claim, but he must give credit to the respondent for these sums from the sums awarded as damages.

It follows from the fact that breach of contract has been established that the counterclaim must fail and that the Federal Supreme Court was in error in giving judgment for the respondent.

Before passing to the action No. 610/53 it is necessary to take note of a point raised in the judgment of the Federal Supreme Court relating to the last condition of the contracts which was in the following terms:—

> " For goods not of United Kingdom origin we cannot undertake any guarantees or admit any claims beyond such as are admitted by and recovered from the Manufacturers ".

The Federal Supreme Court held that this condition would in any event have protected the respondent from liability. Their Lordships do not agree. An exemption clause can only avail a party if he is carrying out the contract in its essential respects. A breach which goes to the root of a contract disentitles a party from relying on an exemption clause. (*Karsales* (*Harrow*) *Ltd.* v. *Wallis* [1956] 2 A.E.R. 866, Denning L. J. at page 869.) The exemption would only apply if the goods were in accordance with the contract. As they were substantially different goods, the exemption cannot avail the respondent.

The action No. 610/53 is entirely separate from the other action and consists of a claim for £967 9s. 2d. by the respondent against the appellant. It appears that the appellant was unable to pay for the first consignment of goods delivered under the contract and that he gave to the respondent two promissory notes one for £480 14s. 5d. and the other for £486 14s. 9d. against delivery of the goods. These promissory notes were dishonoured at maturity by the appellant. The appellant asked the respondent to debit his account with the amount of the two promissory notes. This was done as is shown by Exhibit " V " from the respondent's sales manager in which the amount of the two promissory notes has been debited to the appellant's account. This is not a claim by the respondent for any balance of account and in fact the appellant's account is in credit with the respondent. The Trial Judge was therefore right in their Lordships' view in holding that this action must be dismissed.

Their Lordships will therefore humbly advise Her Majesty that these appeals ought to be allowed and the judgment and order of the Federal Supreme Court of Nigeria set aside and the judgment of the Supreme Court of Nigeria restored subject to the limitation of the amount of damages for which judgment is awarded in Suit No. 496/53 to £2,259 8s. 6d. The respondent must pay the appellant's costs of the appeal to the Federal Supreme Court and of this appeal.

(84010) Wt. 8233/71 100 12/61 Hw.

In the Privy Council

ADEL BOSHALI

v.

ALLIED COMMERCIAL EXPORTERS, LTD.

DELIVERED BY
LORD GUEST

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
HARROW
1961