Privy Council Appeal No. 10 of 1976

Tai Hing Cotton Mill Limited - - - - - *Appellant*

v.

Kamsing Knitting Factory (A firm) - - - - *Respondent*

FROM

THE SUPREME COURT OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY 1977

Present at the Hearing:

LORD WILBERFORCE
LORD SALMON
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL
SIR DAVID CAIRNS

[*Delivered by* LORD KEITH OF KINKEL]

This case, which comes before the Board on appeal from the Full Court of Hong Kong, raises a question as to the proper method of assessing damages for breach of contract where the breach is an anticipatory one.

The facts are as follows. By written contract dated 23rd March 1971 the appellants, who are yarn manufacturers in Hong Kong, agreed to sell to the respondents, who carry on business there as manufacturers of cloth and knitwear, 1,500 bales of cotton yarn at the price of HK$1,335 per bale, each bale to contain 400 lb. of yarn. The contract stated that delivery was to be "Apr. 1971-Dec. 1971", but it was common ground that neither party intended this to be a binding term of the contract, their intention in fact being that the respondents should have the right to call, upon reasonable notice, for deliveries as and when they required them. Deliveries commenced in July 1971 and continued in varying amounts thereafter. From late in 1971 or early in 1972 the appellants did not supply all the quantities requested by the respondents, and from February 1973 they delivered only very small amounts. There were no deliveries after May 1973. On 21st July 1973 the respondents sent to the appellants a letter complaining about their delivery record and concluding "In order to complete the captioned contract you are earnestly requested to deliver to us daily at least 4 bales *i.e.* 1,600-lbs. starting from the 26th of this month. Your co-operation and prompt attention is absolutely essential". The appellants replied by letter dated 31st July 1973, stating that they were treating the contract as cancelled on the ground that the respondents had not taken delivery of all the goods

within the period stipulated in the contract, *i.e.* April to December 1971. The appellants now accept that they were not entitled so to do. The respondents did not accept the cancellation, but sought through the Hong Kong Chinese Textile Mills Association to put pressure on the appellants to continue deliveries. These efforts were unsuccessful, and on 28th November 1973 the respondents issued and served on the appellants a writ claiming damages for breach of contract, alleging in their Statement of Claim that the appellants' letter of 31st July 1973 constituted a wrongful repudiation of the contract. As at 31st July 1973 there were 424·20 bales of yarn remaining undelivered under the contract. The respondents' claim for damages was based upon the difference between the contract price of HK$1,335 per bale and the market price of similar yarn at 31st July 1973, which was said to be HK$3,325 per bale. The market price was proved to be HK$3,300 per bale in August 1973, but evidence was given by a witness for the respondents that the market price began to fall in September 1973, and continued to do so until January 1975 when it reached HK$1,800 per bale.

The case was tried before Briggs C. J., who on 19th February 1975 gave judgment in favour of the respondents for damages amounting to HK$451,773. He arrived at this figure on the basis of evidence that the respondents had on 30th May 1973 purchased 40,000 lb. of yarn from another source in order to make good deficiencies in the appellants' deliveries under the contract, at a price of HK$2,400 per bale. The learned Chief Justice's award represents the difference between that price and the contract price of HK$1,335 per bale, namely HK$1,065, multiplied by the number of bales undelivered under the contract, namely 424·20. He appears to have taken the view that the respondents were under a duty to mitigate their loss by purchasing the whole amount of yarn undelivered at the market price prevailing on 30th May 1973. That view was clearly untenable, since upon the evidence there was no breach of contract by the appellants until a considerably later date.

The appellants appealed to the Full Court of Hong Kong on the ground that damages should have been assessed on the basis of the prices at which the respondents had purchased yarn to make good deficiencies in contractual deliveries at dates even earlier than 30th May 1973. At the hearing of the appeal, however, they accepted that they could not maintain that submission unless it could be established that they were in breach of contract at such earlier dates. They sought leave to amend their pleadings with a view to making a case of that nature, but the Full Court refused leave.

The respondents entered a cross-appeal upon the ground that the learned Chief Justice erred in assessing the damages as at 30th May 1973, and that he should have done so on the basis of the market price of yarn on 31st July 1973, the date when the appellants repudiated the contract. By Order dated 19th September 1975, against which the appellants appeal to Her Majesty in Council, the Full Court (Huggins, McMullin and Cons JJ.) unanimously dismissed the appellants' appeal and by a majority (Huggins and McMullin JJ., Cons J. dissenting) allowed the respondents' cross-appeal. The Order accordingly fixed the damages at the sum of HK$833,553, representing the difference between the contract price of HK$1,335 per bale and the market price of HK$3,300 per bale at 31st July 1973, multiplied by the number of bales undelivered.

The principal question in the appeal is whether the majority of the Full Court were right in holding that damages for the appellants' admitted breach of contract fell to be ascertained as at 31st July 1973, the date of the appellants' repudiation of the contract, notwithstanding that the

respondents did not accept the repudiation, and rescind the contract, until they issued and served their writ in the present action on 28th November 1973.

The answer to that question turns on the proper construction of section 53 of the Hong Kong Sale of Goods Ordinance, which provides:

> "(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
>
> (3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed for delivery, then at the time of the neglect or refusal to deliver."

These provisions are identical with those of section 51 of the [United Kingdom] Sale of Goods Act 1893, except that in the latter the words "for delivery" and "neglect or" in the latter part of subsection (3) do not appear. Their Lordships do not consider that this difference can properly lead to any distinction of construction between the two enactments.

In the Full Court both Huggins J. and McMullin J. took the view that the present contract was one which did not fix any time for delivery, that the appellants on 31st July 1973 intimated their refusal to deliver the balance of the contractual goods, and that the second limb of section 53(3) consequently required that damages be ascertained by reference to market price at 31st July 1973. Cons J. dissented on this matter, and he therefore was in favour of dismissing the cross-appeal and allowing the learned Chief Justice's assessment of damages to stand.

Before this Board it was contended for the appellants that the second limb of subsection (3) did not apply to cases of anticipatory breach of contract, that damages fell to be assessed by reference to market price at the time when the goods ought to have been delivered, and that such time was a reasonable period (say, one month) after the last date upon which the respondents might have called for delivery of the balance of the contractual goods. That date was 28th November 1973, being the date upon which the respondents, by issuing and serving their writ, had accepted the appellants' repudiation and rescinded the contract. Thus the damages fell to be ascertained by reference to the market price of comparable goods at 28th December 1973, and since the respondents had led no evidence about market price on that date they had failed to prove any loss and the damages should be nominal.

In support of their proposition that the second limb of section 53(3) does not apply in cases of anticipatory breach of contract the appellants relied strongly on *Millett v. Van Heek* [1920] 3 K.B. 535: [1921] 2 K.B. 369. That case concerned contracts for the sale of quantities of cotton waste by sellers in Rochdale to buyers in Holland. The contracts were entered into in 1916, at a time when government licences were required for the export of cotton waste from the United Kingdom but were freely granted. In 1917, however, the export of cotton waste was completely prohibited. The parties then agreed that deliveries under the contract would be

resumed as soon as the export embargo was lifted, but in August 1918 the sellers wrote to the buyers refusing to be bound to make any further deliveries, and in October 1918 the buyers accepted this repudiation. The export embargo was removed in January 1919, and shortly afterwards the sellers started proceedings for a declaration that the contract had been frustrated. The buyers counter-claimed for damages. It was held in the Divisional Court, on appeal from a decision of the Official Referee upon the matter of damages, that the parties had entered into a contract for suspension of deliveries until a reasonable time after the removal of the embargo, and that after the expiration of that reasonable time deliveries should be resumed and continued in conformity with the original contracts. Bray J., delivering the judgment of the Court, went on to express the opinion that a contract providing for delivery within a reasonable time was not, within the meaning of section 51(3) of the 1893 Act, a contract for delivery at a fixed time, even if the contract was for delivery within a reasonable time after some future date. He then said (at p.542),

> " The next point was whether this case fell within the rule mentioned in the last two lines of s.51, sub-s.3. We hold that this rule cannot apply to this case. It does not apply to a case where the breach is an anticipatory breach. We hold that there is no specific rule in s.51 within which the present case falls, except the rule in sub-s.2, and that this case must be decided according to that rule, but with the light thrown upon it by sub-s.3."

This judgment was affirmed by the Court of Appeal (Bankes, Warrington and Atkin LL.J.) upon the ground that the second limb of section 51(3) had no application to the case of an anticipatory breach by repudiation of the contract before the time for performance arrives, the question whether a contract for delivery within a reasonable time is not a contract for delivery at a fixed time being reserved. Atkin L.J. (at p.376 of the report in [1921] 2 K.B.) said,

> " I think that the construction of s.51, sub-s.3, of the Sale of Goods Act, 1893, contended for by the appellants would, if it were admitted, introduce a very serious anomaly into the administration of the law relating to the sale of goods, because the position is this: It is admitted that, if a contract is made for the sale of goods deliverable in the future by specified instalments at specified dates, and before the time has arrived for performance the contract is repudiated, and the repudiation is accepted, the damages have to be measured in reference to the dates on which the contract ought to have been performed. That is beyond controversy. The law was so laid down by Cockburn C. J. in *Frost v. Knight* (1872) L. R. 7 Ex. 111, in the Exchequer Chamber, and it was the law at the time when the code of 1893 was passed: and there is no reason to suppose that the code intended to alter it. The Lord Chief Justice said (at p.113) 'The promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.' Therefore, if it was such a contract as I have suggested for delivery by fixed instalments at fixed times, then, although the action is brought in respect of the accepted repudiation, the damages would have to be assessed with reference to those fixed times. But it is said that, if no times have been expressed in the contract, and the contract would

> be construed by law as one for delivery by reasonable instalments over a reasonable time; even though those times might be ascertained as a question of fact by the jury, the plaintiff suing may not merely have an option, but is compelled, to fix his damages in reference to the market price at the time when the repudiation takes place. That, it seems to me, would introduce an anomaly entirely without any kind of principle to justify it. I am satisfied that the code never intended to make that distinction, or to vary what was the rule of law at the time when it was passed, a rule which has been recorded in countless decisions since the doctrine of repudiation of contract has received its development in *Frost v. Knight* (*supra*)— namely, that the damages are to be fixed in reference to the time for performance of the contract subject to questions of mitigation. Therefore, I think that the view taken by the Divisional Court is right on this point."

As Atkin L. J. rightly said, there was in 1921 ample authority for the proposition that in cases of rescission of a contract providing a fixed time for performance by acceptance of a repudiation, damages are to be assessed as at the time fixed for performance (subject to considerations of mitigation of loss), and not as at the date of repudiation. In addition to *Frost v. Knight* (*supra*) decisions in point were *Brown v. Muller* (1872) L.R. 7 Ex.319 and *Roper v. Johnson* (1873) L.R. 8 C.P.167. Both these cases were concerned with contracts for the delivery of goods by instalments at fixed times. In the first case the time for delivery of the final instalment had passed by the time the action was tried, but in the second it had not. These cases were decided before the passing of the 1893 Act. In *Melachrino v. Nickoll and Knight* [1920] 1 K.B.693 two contracts for the sale of Egyptian cotton seed provided for the goods to be shipped from Alexandria by a particular steamship expected to be ready to load during December 1916. On December 14th the sellers repudiated the contracts and the buyers accepted the repudiation on the same day. Bailhache J. held that the contracts were, within the meaning of section 51(3) of the 1893 Act, contracts for delivery at a fixed time, the time being fixed by reference to the arrival in the United Kingdom of the nominated steamship. He further held that the damages were to be assessed by reference to the market price of comparable goods at the date of that event, saying (at p.699)

> " In my opinion the true rule is that where there is an anticipatory breach by a seller to deliver goods for which there is a market at a fixed date the buyer without buying against the seller may bring his action at once, but that if he does so his damages must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract. If the action comes to trial before the contractual date for delivery has arrived the Court must arrive at the price as best it can."

In *Garnac Grain Co. Inc. v. H. M. F. Faure & Fairclough Ltd.* [1968] A.C. 1130 the same principle was enunciated by Lord Pearson (at p.1140) with the concurrence of all the other Lords of Appeal who participated in the decision.

Mr. Gatehouse for the respondents, while accepting that the second limb of section 51(3) of the Sale of Goods Act 1893 and of section 53(3) of the Hong Kong Ordinance did not apply to cases of anticipatory breach where the contract stipulated a fixed time for delivery, argued that it did apply to such cases where no fixed time was stipulated, and that *Millett v. Van Heek* (*supra*) was wrongly decided. He referred to a number of cases decided between the passing of the 1893 Act and the date of

Millett v. Van Heek (*supra*), which all appear to have this in common, that no specific reference was made to the relevant provisions of the Act and that it was not contended that the damages fell to be ascertained as at the date when the goods ought to have been delivered. In *Ashmore & Son v. C. S. Cox & Co.* [1899] 1 Q.B. 436 the contract was for the sale of a quantity of Manilla hemp, to be shipped from the Philippine Islands by sailing vessel between 1st May and 31st July 1898. The Spanish-American war prevented the sellers from shipping between these dates, but in September they shipped hemp by steamer and declared it against the contract. The buyers refused to accept this declaration, and on 4th November the sellers stated that it was the only declaration they were in a position to make. The buyers thereupon started proceedings for breach of contract. Liability was contested and on the matter of damages the only dispute was as to whether these should be ascertained as at 27th October or as at 4th November. Lord Russell of Killowen C.J., in the Commercial Court, held that the sellers were in breach and that the measure of damages was the difference between the contract price and the market price on 4th November, being the date upon which he found the sellers to have repudiated the contract. In *Kidston & Co. v. Monceau St. Fiacre Ironworks Co. Ltd.* (1902) 18 T.L.R. 320 a contract for the sale of iron to be shipped from Antwerp to Japan in May and June 1901 provided for specifications to be given in the beginning of May. The buyers delivered specifications between 12th and 15th May, and the sellers by letters dated 13th, 15th, 16th and 18th May refused to perform the contract. Kennedy J. held that the specifications were delivered in due time, and that the sellers were therefore in breach of contract. He assessed damages on the basis of the market price of iron between 14th and 18th May, no different dates being suggested by the defendants. Finally, in *Hartley v. Hymans* [1920] 3 K.B. 475 the main question for decision was whether a buyer of goods had impliedly agreed to waive his right to insist on the final date for delivery stipulated in the contract. McCardie J. decided that question against the buyer and accordingly held that the latter had wrongfully repudiated the contract. He assessed the damages, which were agreed, as at the date of the buyer's repudiation, saying that this point was covered by *Tyers v. Rosedale and Ferryhill Iron Co.* (1875) L.R. 10 Ex. 195. In fact, in the latter case Cockburn C.J., with the concurrence of the other judges of the Exchequer Chamber, expressly reserved his opinion (at p.199) on the question whether damages should be assessed at the date of repudiation or at the later dates upon which deliveries ought to have been made under the contract. The former date was contended for by the plaintiffs, and produced a result more favourable to the defendants than the later dates.

In their Lordships' opinion the cases referred to by Mr. Gatehouse are not authoritative upon the point at issue and have in themselves no persuasive effect. The force of Mr. Gatehouse's argument resides essentially in the plain terms of the second limb of section 51(3). Their Lordships are attracted by the consideration that this may have been enacted in order to provide a universal rule of simple application for cases where the contract fixes no time for delivery, as where delivery is to be within a reasonable time or on demand by the purchaser. In such cases there may be great difficulty in determining when the contract ought to have been performed, and there could be much convenience in assessing damages as at the date of repudiation by the seller, assuming the buyer accepts it. Further, if the enactment is not intended to apply to a repudiation in such cases, it is difficult to see what content it can have. It could not apply, in cases where delivery is to be made on demand by the buyer, to a refusal to deliver following on a demand duly made, because the demand, having been made in accordance with the contract, would fix

the time for delivery. It might be intended to apply, where delivery is to be made within a reasonable time, to a refusal to deliver intimated at the expiry of the period of reasonable time, but if so nothing significant would have been added to the first limb. It may well be, however, that the enactment was introduced into the subsection without consideration in depth of the juristic position, and that on analysis it proves, exceptionally, to have no content whatever. It would be surprising if the first limb of one and the same subsection were intended to be a specific application of the general principle in the preceding subsection, and the second limb to be a radical departure from it. If Parliament had intended to introduce a new rule of the nature contended for, their Lordships would have expected this to be done by clearer and more specific language than appears in the second limb of subsection (3).

Atkin L.J., in the course of that part of his judgment in *Millett v. Van Heek* (*supra*) which dealt with the question whether the second limb of section 51(3) applied to cases of anticipatory breach, expressed the view (at p.377) that it was anomalous that a plaintiff should not only have the option, but be compelled, to fix his damages in reference to the time when the repudiation takes place. It appears to their Lordships that a plaintiff in such a case is not necessarily so compelled. He is not required to accept the repudiation, and if he does not do so the repudiation has no effect. He may wait until there has been an actual failure by the defendant to perform the contract, either on account of an unmet demand or on account of a reasonable time having elapsed without delivery. In this event the damages would be assessed, not at the date of the unaccepted repudiation, but at the date of the actual failure to perform. A more important consideration, in their Lordships' view, is that if the plaintiff did accept the repudiation, and if the market were to fall substantially up to the time when in the event the contract ought to have been performed, the plaintiff would be placed in a better position than if there had been due performance. This would represent an important inroad on a fundamental principle of assessment of damages, namely, that they should be no more than compensatory.

In the result, their Lordships have not been satisfied that *Millett v. Van Heek* (*supra*) was wrongly decided, and considering that the decision has stood for fifty-seven years without being subjected to any published criticism, and has no doubt been acted on in many cases, they are of opinion that it ought to be applied in the present case. Their Lordships therefore affirm the principle that the second limb of section 51(3) of the 1893 Act and of section 53 (3) of the Hong Kong Ordinance, does not apply in any case of anticipatory breach of contract.

It follows that the majority of the Full Court in the present case were wrong to assess damages on the basis of the market price of cotton yarn on 31st July 1973. The applicable rule for ascertaining the measure of damages is that contained in section 53 (2) of the Hong Kong Ordinance, namely that it is " the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract." As their Lordships have noticed, the contract here was for delivery of the cotton yarn in such instalments as might be demanded by the respondents upon reasonable notice. It was common ground between the parties that the period of reasonable notice for delivery of the balance of 424·20 bales of yarn was one month. Some suggestion was made that, when the respondents by their letter dated 21st July 1973 " earnestly requested " the appellants to deliver 4 bales a day from 26th July onwards, this constituted a demand for delivery in terms of the contract. But upon a consideration of the whole terms of the letter their Lordships are of opinion that it

cannot be so construed. The respondents did not accept the appellants' repudiation of 31st July, and at any time thereafter could have demanded delivery of the balance of yarn on one month's notice. That situation continued until 28th November 1973, when the respondents issued and served their writ, thereby accepting the repudiation and rescinding the contract. 28th November was thus the last day upon which the respondents could have given reasonable notice requiring delivery of the yarn, and in their Lordships' opinion the appropriate date upon which to consider the market price of yarn for the purpose of assessing damages was one month thereafter, namely 28th December 1973.

A difficulty, however, arises in respect that the respondents based their case entirely on the market price of yarn at 31st July 1973, while the appellants contended at the trial and before the Full Court that the market price should be taken at a date or dates substantially earlier. In the result, the evidence about market price at the end of December 1973 is minimal, to say the least of it, consisting entirely in the following passage in the cross-examination of Miss Mui, a witness for the respondents (p.75 of the Record).

"Q. Madam, do you agree with me that the price of yarn in Hong Kong began to fall round about September 1973?

A. September 1973?

Q. Yes.

A. A little only.

Q. It began to fall all the way down until now. It keeps on dropping.

A. Correct.

Q. Do you agree. . . .

COURT: What is the price now a bale?

A. In some cases, $1,800 per bale, approximately.

Q. Some even lower?

A. Perhaps."

Counsel for the appellants contended that, since the respondents had failed to prove the market price of yarn at the appropriate time, namely the end of December 1973, they had failed to prove any loss at all, and damages should therefore be nominal. Their Lordships are unable to accept that contention. The evidence is that the market price of yarn was HK$3,300 in August 1973 and that thereafter it fell steadily until it reached HK$1,800 in January 1975. It is apparent on any view that the respondents suffered substantial loss, though the material to enable it to be precisely quantified is lacking.

Other possible courses canvassed in the course of the argument were (*a*) to order a retrial of the case on the matter of damages, (*b*) to restore the figure of damages fixed by the learned Chief Justice, and (*c*) to fix a new figure on the basis that the market price of yarn declined steadily and constantly between September 1973 and January 1975, and that therefore the point which the decline had reached at the end of December 1973 is capable of ascertainment.

Their Lordships are not disposed to order a new trial. Amendment of the pleadings would be required, and the delay, trouble and expense which would be involved in further proceedings do not appear to their Lordships to be consonant with the due administration of justice. The

problem about the figure of damages fixed by the learned Chief Justice is that it was plainly arrived at upon a wrong basis, and that is now common ground between the parties. In the result, their Lordships have come to the conclusion that the ends of justice would best be served if they were to fix a new figure of damages as best they can upon the available evidence, such as it is. Counsel for the respondents was prepared to accept that if a steady decline in the market were assumed, this would result in a market price of HK$2,900 per bale at the end of December 1973, that being HK$1,565 more than the contract price. Multiplying this by the number of bales undelivered, 424, produces a figure of HK$663,560. In their Lordships' view, this is in all the circumstances the reasonable course to follow.

Their Lordships are therefore of opinion that the appeal should be allowed to the extent of varying the sum awarded by the Full Court in name of damages from HK$833,553 to HK$663,560, with interest at the rate of 8% from 28th November 1973 to the date of the Order in Council disposing of this appeal. As regards the matter of costs, it is to be observed that the argument upon which the appellants have succeeded was not advanced before the learned Chief Justice and did not form any part of their grounds of appeal in the Full Court. In the circumstances their Lordships think it appropriate that the awards of costs made by the Courts below should remain undisturbed, and that the appellants should have one half only of their costs before this Board.

Their Lordships will humbly advise Her Majesty accordingly.

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In the Privy Council

TAI HING COTTON MILL LIMITED

v.

KAMSING KNITTING FACTORY (A FIRM)

DELIVERED BY
LORD KEITH OF KINKEL

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