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IN THE PRIVY COUNCIL NO. OF 198

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA

IN PROCEEDINGS NO. 2121 OF 1980

BETWEEN: METRO MEAT LIMITED

Appellant and Cross-Respondent
(Defendant)

AND: FARES RURAL CO. PTY. LIMITED

Respondent and Cross-Appellant
(First Plaintiff)

RACHID FARES

Respondent
(Second Plaintiff)

CASE FOR THE APPELLANT AND CROSS-RESPONDENT

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(First Plaintiff)

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Respondent
(Second Plaintiff)

CASE FOR THE APPELLANT

A. On the Appeal

Record:

p451-454

1. This is an appeal from the Judgment of the Honourable Mr. Justice Olney of the Supreme Court of Western Australia in action number 2121 of 1980 given on the 2nd day of February 1983 whereby he made certain orders and declarations and upon the claim of the Respondent and Cross-Appellant ("Fares Rural") and the Respondent ("Fares") gave judgment in favour of Fares Rural against the Appellant for damages to be assessed and upon the Appellant's

counterclaim gave judgment in the sum of US$314,012.00 in favour of the Appellant against Fares Rural and dismissed the Appellant's counterclaim against Fares.

2. The Appellant appeals against the judgment given against it on the claim and against the following orders and declarations made:

p451.24 (i) The declaration that the oral contract made on the 2nd July 1979 was made by the Appellant with Fares Rural by its agent Fares (the Appellant's contention being that the contract was made with Fares).

p452.14 (ii) The declaration that the contract was repudiated by the Appellant.

3. The circumstances out of which the appeal arises are as follows:

(a) <u>The Contract:</u>

p393.26 (i) by an oral agreement by Kenneth Dingwall ("Dingwall") on behalf of the Appellant with Fares the Appellant agreed to sell on a F.A.S. basis 12,000 tonnes of lamb and 8,000 tonnes of hogget plus or minus 10% of this quantity at the Appellant's option. It was the contention of Fares at the trail and was found by the trial Judge, that Fares contracted on behalf of Fares Rural;

p394.15 (ii) the price agreed was US$1,375 per tonne F.A.S. for lamb and US$1,230 per tonne F.A.S. for hogget;

(iii) the meat was to be supplied by the Appellant for the purposes of fulfilling a contract for the sale of meat from Fares to the Iranian Meat Organisation. The meat was to be supplied by

p394.27 the Appellant in five shipments from Australia, the exact details of the programme for the

10 delivery of meat being left to be worked out between the parties during the course of the performance of the work;

p395 (iv) The Appellant through Dingwall agreed to sell the lamb at a lesser price than he would otherwise have done upon Fares promise that in respect of each shipment discharged in Iran within 40 days a payment ("the prompt discharge bonus") would be made. At the trial it was the Appellant's contention that the prompt discharge

20 bonus was agreed at the time that the contract was made but the learned trial Judge found that the agreement was that the amount was to be determined by Fares and that Fares fixed the payment at $30 per tonne for all meat shipped.

The learned trial Judge found that there was no express agreement as to when the prompt discharge bonus should be paid and held

p434 that it should therefore be implied that it would be paid within a reasonable time.

(b) The W.A.L.M.B. Subsidy Agreement:

p395.11 (i) in early January 1980 the Appellant and Fares entered into an oral agreement ("the subsidy agreement") under which Fares agreed to pay

10 US$125 per tonne for about 900 tonnes of lamb which the Appellant was asked by Fares to purchase from the West Australia Lamb Marketing Board ("The W.A.L.M.B.");

p438.35 (ii) payment of the sum due under this agreement was unconditional and (in the absence of express

p438.33 agreement) was to be made within a reasonable time after shipment.

p437.11 (iii) the Appellant purchased 843 tonnes from the W.A.L.M.B. which quantity was shipped in the

20 third shipment;

(c) Performance under the contract:

p428.16 (i) loading of the vessel in respect of the "first shipment" comprising a total of 3,187 tonnes of

p756.14 lamb and hogget was completed in Western

Australia on about the 23rd September 1979;

p757.2 (ii) payment for the first shipment in the sum of US$4,265,618.92 was made on about the 27th September, 1979;

p756.15 (iii) loading of the vessel in respect of the "second shipment" comprising a total of 3,768 tonnes of lamb and hogget was completed on about the 28th November 1979;

p757.4 (iv) payment for the second shipment in the sum of US$4,938,414.93 was made on about the 28th November 1969;

(v) loading of the vessel in respect of the "third shipment" comprising a total of 3,879 tonnes of lamb and hogget including 843 tonnes purchased p756.17 from the W.A.L.M.B. was completed on about the 5th February 1980;

p757.6 (vi) payment for the third shipment in the sum of US$5,213,696.28 was made on about the 5th February 1980;

(vii) thereafter the Appellant declined to make arrangements for the fourth and fifth shipments until Fares paid the monies claimed as due for the discharge payments and under the subsidy agreement;

(viii)Fares refused to pay the monies claimed except upon the Appellant's guaranteeing that the total quantities due under the contract would be supplied;

p581.1 (ix) by letter dated the 21st April 1980 Fares Rural stated that in the event of the Appellant failing to notify its "intention to perform the

p582.20 contract" it would treat this as a repudiation of the contract;

p583 (x) by letter dated the 24th April 1980 the Appellant advised Fares that it had never stated or indicated that it was not prepared to meet its obligations but that it required payment before it would discuss the balance of tonnage to be shipped;

p488.17 (xi) upon receipt of The Appellant's letter dated 24th

p759 April Fares treated the agreement as discharged.

p759.17 4. The contentions put forward by the Appellant are that upon the facts as found or as they ought on the evidence to have been found and upon a proper application of the law to those facts the learned trial judge ought to have ordered and declared (and given judgment accordingly) that:

(i) the contract made on the 2nd July 1979 was made

by the Appellant with Fares and not with Fares Rural;

(ii) the contract was not repudiated by the Appellant;

(iii) the contract was repudiated by Fares by his conduct in about the end of April 1980; or alternatively

(iv) the contract was mutually abandoned by the parties at some date after April 1980.

5. The reasons put forward by the Appellant in respect of its contentions as to (a) the contracting party; (b) the repudiation by the Appellant; (c) the repudiation by Fares or the mutual abandonment of the agreements are respectively as follows:

(a) <u>The Contracting Party</u>

p396 6. The findings of the trial judge relevant to this issue are:

(i) prior to 1978 Fares on behalf of a "group" of 3 individuals had some dealings with the Appellant concerning the sale of meat and live sheep to the Middle East;

p396.1 (ii) Fares Rural was incorporated in Western Australia in 1978 and after 1978 all Fares' Australian business dealings were carried out by him on behalf of Fare Rural;

p396.24 (iii) the instant contract was made by Fares in his capacity as a director of Fares Rural;

p397.5 (iv) there was no significance in the fact that the meat agreed to be supplied by Fares was intended and in fact was used for the purpose of meeting contractual obligations entered into personally by Fares with the Iranian Meat Organisation.

The learned trial Judge made no finding that Fares had disclosed to the Appellant either through Dingwall or at all, that he was contracting as agent for Fares Rural and not on his own behalf.

7. The evidence on the issue of the contracting party was as follows:-

p458 (i) three written agreements in respect of live
p460 sheep and meat and executed in 1974 were each
p462 made between the Appellant and Fares and the
p201.30 evidence was that nothing was said by Fares to suggest that the Appellant was dealing with anyone other than Fares on those prior occasions;

(ii) there was no evidence that Fares at any time in the course of making the agreement informed the Appellant that he was doing so on behalf of Fares Rural or other than on his own behalf;

p278 (iii) the evidence of Dingwall was that he believed he

p232 was contracting with Fares personally as he had always done. Further, upon being told that after the making of the agreement this had been "transferred" to Fares Rural, he declared that he was not prepared to accept Fares Rural as the contracting party. Further, Dingwall did not accept any such "transfer" and no such transfer was found by the

10 trial Judge to have taken place;

p496 (iv) Dingwall's position was set out in the Appellant's telex to Fares dated the 3rd September 1979 (document 51);

p583 (v) Dingwall maintained this position in his letter to Fares dated the 7th April 1980 (document 46).

9. On the evidence the Appellant maintains that its contract of the 2nd July 1979 was made with Fares personally and not with Fares Rural.

(b) Repudiation by the Appellant:

20 10. The findings of the trial judge relevant to this issue were:

p429.15 (1) As to delivery

(i) it was agreed on the 2nd July 1979 that 5 shipments would be made;

p429.20 (ii) shipping arrangements were left to be worked out through the co-operation of the parties during the performance of the contract;

p435/6 (iii) on about the 3rd January 1980 Fares suggested to the Appellant that the shipping times for the 4th and 5th shipments should be revised to between March and May 1980 for the 4th shipment and the end of July or early August 1980 for the 5th shipment. The Appellant did not commit itself on this proposal.

(2) As to the discharge payment

(i) it was agreed between the Appellant and Fares that payment of $30 per tonne in respect of discharge in Iran in under 40 days was payable in respect of each

p432.35 shipment as and when that shipment had been made;

p433.10 (ii) the amount of the payment was left to Fares' discretion and on about the 17th March 1980 (document 43) Fares fixed the payment at $30 per tonne for both lamb and hoggett;

(iii) no express agreement as to the time of payment was made and by implication payment should have been made within a reasonable time. (The Appellant maintains that within the context of the trial judge's finding a reasonable time means shortly after the discharge of each shipment.)

(3) As to the W.A.L.M.B. subsidy

p437.1 10 (i) Fares agreed to pay the subsidy on the lamb purchased by the Appellant from the W.A.L.M.B. and this agreement was not conditional upon the Appellant confirming the revised shipping schedule or otherwise;

p438 (ii) no express agreement as to the time of payment was made and by implication payment should have been made within a reasonable time after shipment. (The Appellant maintains that within the 20 context of the trial Judge's finding a reasonable time constitutes a short time after the 843 tonnes was loaded as part of the third shipment.)

(4) Specifically as to repudiation

p448.10 (i) none of the matters particularised in paragraph 6 of the Statement of Claim and occurring before the 21st April 1980 evinced an unequivocal intention on the Appellant's part to repudiate its obligation under the contract;

p447.3 (ii) as at the 24th April 1980 it was not open to the Appellant to refuse further supply simply because the amounts (for the discharge payment and the W.A.L.M.B. subsidy) were still owing (and overdue);

p447.31 (iii) as at 24th April 1980 and probably for some little time before that Dingwall had "reached a firm resolve not to proceed with the contract unless he could re-negotiate the price".

(iv) the statement in the first sentence of the third last paragraph of document 46 namely:

p584 "At no time have I ever stated or indicated that Metro is not prepared to meet its obligations, however, as a matter of general policy Metro will not supply any customer with meat...if his account is overdue for payment"

p447.10 constitute an absolute denial by the Appellant of its obligations to continue to co-operate with Fares for the purpose of arranging the shipment of meat in accordance with their mutual obligations;

(v) the statement in the second sentence of the same paragraph namely:

> "when you pay what is due I will be prepared then (and only then) to discuss the balance of tonnage to be shipped"

underlined the Appellant's refusal to continue with the contract except upon its own terms and p447.15 constituted a repudiation of one of the Appellant's fundamental obligations under the contract;

p448.15 (vi) the Appellant's letter of the 24th April 1980 evinced an unequivocal intention on its part to repudiate its obligations under the contract;

(vii) the statements made in the Appellant's letter of the 24th April 1980 and its subsequent failure to meet the reasonable request of the Respondent to confirm a programme for the shipment of the p448.10 fourth and fifth shipments of meat amounted to a repudiation by it of the contract;

p488.22 (viii) after the Appellant's letter of the 24th April 1980 both parties ceased to regard themselves as being under any obligation pursuant to the contract.

11. The findings and declaration of the trial judge that the conduct of the Appellant subsequent to the 24th April 1980 constituted a repudiation of the contract is inconsistent with:

(a) the trial judge's own findings that Fares treated the letter as constituting a repudiation of the contract and that upon its receipt both parties conducted themselves accordingly;

p448.22

(b) the trial judge's declaration that the repudiation of the contract was accepted by the 28th April 1980;

p759.1 (c) the evidence of Fares that he treated the letter as putting an end to the contract.

12. In determining that the Appellant repudiated the contract the trial Judge referred to Dingwall's "firm resolve not to proceed with the contract unless he could re-negotiate the price". It was implicit in that finding that Dingwall's state of mind was relevant to the question of whether the Appellant had evinced an intention to repudiate the contract. However a further finding of the Judge was that Dingwall "was not prepared to do or say anything that

p447.32

would place the payment of the additional bonus and subsidy
p448.3 monies in jeopardy". Further, there was no evidence that Dingwall ever told Fares of such "firm resolve", and no finding by the trial Judge that he ever did so. In these circumstances the judge's finding as to Dingwall's "firm resolve" and his consideration of that matter was irrelevant to the question whether the contract had been repudiated.

13. Insofar as the Appellant's intention in this respect could be relevant to the question of repudiation it is
10 significant that whereas the Appellant had stated in its telex of the 30th September 1979 (document 51) that it would
p496 suspend production until the contract was re-negotiated in fact the Appellant proceeded with the contract and supplied the first three shipments without any such re-negotiating taking place.

14. The trial judge's construction of the paragraph in the letter of the 20th April 1980 referred to as "demonstrating a refusal by the Appellant to continue with the contract except upon its own terms" and as "constituting an absolute
20 denial by the Appellant of its obligations to continue to co-operate with the Respondent" and as evincing an "unequivocal intention on its part to repudiate its obligations under the contract" was unjustified and wrong, in particular having regard to:

p446.3 (i) the opening statement in the relevant paragraph: "At no time have I ever stated or indicated that Metro is not prepared to meet its obligations";

p446.9 (ii) the statement that upon payment of the sums due Dingwall was then prepared to discuss the balance of tonnage to be shipped;

p446.15 (iii) the expressed regret that Dingwall had missed and was not therefore able to discuss the matters in issue with Jorge Villegas;

(iv) the implied invitation that Fares himself discuss the matters in issue;

(v) the context of the letter as a whole;

(vi) the fact (as found by the trial judge) that at the date of the letter there was owing to the Appellant the sum of US$314,012 and that on the evidence of Dingwall the discharge payment in respect of the first shipment had been promised in the first week of November 1979 and again in the third week of December 1979 and the payment for the W.A.L.M.B. subsidy was promised within a reasonable time of the 3rd January 1979;

(vii) the fact that Fares had wrongfully and in breach of contract purported to make payment of the sums due to the Appellant conditional upon a guarantee of further performance on the part of the Appellant;

(viii) the fact that as at the 24th April 1980 the time

(which in any event was not of the essence) for the fulfilment of the Appellant's contractual obligations in respect of the fourth shipment had not expired and further the Appellant had (on the Respondent's own evidence) until the end of July/early August to complete the final shipment.

15. Contrary to the findings of the trial judge the Appellant's letter of the 21st April 1980 did not contain any statement or indication that the Appellant refused (then or in the future) to complete its contractual obligations but that it required payment of the monies (to which at that date it was contractually entitled) before it would take the next step in the performance of the contract. Upon the evidence before the trial judge such action was reasonable and howsoever it is regarded it fell far short of evincing an unequivocal intention on the part of the Appellant to no longer be bound by the terms of the agreement.

(c) Repudiation by the Respondent

16. The findings of the trial judge were that as at the 24th April 1980 there was due to the Appellant the sum of US$314,012.00 of which the sum of US$208,637 only was due under the contract but that such sum had only "peripheral significance in the overall relationship between the parties".

17. Contrary to the finding of the trial judge it is clearly to be inferred from the evidence of Dingwall that the Appellant regarded both recognition by Fares of the Appellant's entitlement to the sums claimed without any condition attaching and the actual payment of those sums as significant in the overall relationship between the parties. The Appellant submits that in the circumstances such attitude was reasonable.

18. Upon receipt of the Appellant's letter of the 24th April 1980 Fares treated himself as discharged from further performance. Fares did not reply to the Appellant's letter of the 21st April 1980 and thereafter purchased meat from suppliers other than the Appellant. p764

19. In the circumstances the conduct of Fares in refusing to pay the monies owing and in purchasing meat from other suppliers constituted a repudiation of his contractual obligations which repudiation the Appellant accepted.

20. If the Respondent's conduct did not constitute a repudiation of the contract then alternatively the parties by their conduct after the 24th April 1980 mutually abandoned the contract.

B. On the Cross-Appeal

1. The circumstances out of which the cross-appeal arises are as set out above.

2. Judgment was given in favour of the Appellant on its counterclaim with respect to:

(a) the prompt discharge bonus and

p.395 (b) the W.A. Lamb Marketing Board subsidy, referred to in the Appellant's Case on the Appeal.

3. The trial Judges reasons for his decision in respect of those matters appear:

p431-454 (a) as to the "bonus" at p431-454 of the Record.

p434-439 (b) as to the "subsidy" at 434-439.

4. The findings of the trial Judge with respect to the prompt discharge bonus were:

(a) that the telex from Fares to Mata, re-transmitted to

p475 the Appellant (document 10) reflected what was agreed between the parties.

p.432 (b) that he rejected the evidence of Fares that it was never contemplated that the bonus would be paid on hogget, or that the bonus would only be paid if he showed a profit on the contract;

(c) that as a matter of construction the plain meaning of the words used (in the telex) was consistent only with

an intention that any bonus payable would be payable in respect of each shipment as and when it was made.

(d) that the only discretion reserved to Fares was as to the amount of the bonus, which he ultimately fixed at $30 per tonne. That finding was supported by reference to document 43

p562 The findings on this issue were based on the trial Judge's assessment of the credibility of the witnesses and a proper construction of the terms of the relevant passage in the documents referred to, and should not be disturbed.

p436 5. The findings of the trial Judge on the subsidy was based on his assessment of the evidence of Dingwall and Fares, and he resolved any dispute in that evidence in favour of the evidence of Dingwall. That finding, based wholly or in part on his assessment of the credibility of those witnesses, ought not to be distrubed on appeal.

6. In so far as the cross-appeal may seek to vary the judgment against the Appellant with respect to the orders and declarations of the trial Judge as to the terms of the contract pertaining to:

p452.2 (a) the quantity of meat to be supplied and/or

p452.12 (b) the shipment thereof,

as the terms so found were based upon the trial Judge's assessment of the evidence of Dingwall and Fares and of the credibility of those witnesses, they ought not to be disturbed.

C.B. Edmonds.