1/85

IN THE PRIVY COUNCIL
ON APPEAL FROM THE SUPREME
COURT OF WESTERN AUSTRALIA
IN PROCEEDINGS NO. 2121 of 1980

No.31 of 1984

B E T W E E N:-

METRO MEAT LIMITED	Appellant and Cross-Respondent (Defendant)
- and -	
FARES RURAL CO. PTY LIMITED	Respondent and Cross-Appellant (First Plaintiff)
- and -	
RACHID FARES	Respondent (Second Plaintiff)

CASE FOR THE RESPONDENTS AND FOR THE CROSS-APPELLANT

Record

INTRODUCTION

1. These are consolidated appeals from a judgment dated 2nd February 1983 of the Supreme Court of Western Australia (Olney J.). By Order of Pidgeon J. dated 18th August 1983 the Appellant and the Cross-Appellant were granted final leave to appeal to Her Majesty in Council from the said judgment of Olney J., and it was further ordered that the two appeals be consolidated. p.451 p.456a

2. In the Case, the Appellant and Cross-Respondent Metro Meat Limited, the Defendant in the action, is referred to as "the Seller"; the Respondent and Cross-Appellant Fares Rural Co. Pty Limited, the First Plaintiff in the action, is referred to as "the Buyer"; and the Respondent Rachid Fares, the Second Plaintiff in the action, is referred to as "Mr. Fares".

3. By his said judgment and Order, Olney J. p.451

(A) On the Buyer's claim -

(i) declared among other things that:-

p.452 L.2 (a) a contract entered into between the Buyer and the Seller on 2 July 1979 included a term that the Buyer would buy and the Seller would sell 20,000 tonnes of meat comprising 12,000 tonnes of lamb and 8,000 tonnes of hogget;

p.452 L.4 (b) by custom and usage the Seller had the option to supply and be paid for any lesser or greater quantity within a range of 10% below or above the stated tonnages; and

p.452 L.14 (c) the said contract was discharged by 28 April 1980 by the Buyer's acceptance of the Seller's repudiation thereof; and

(ii) ordered among other things that:-

p.453 L.1 (a) the Seller pay to the Buyer damages to be assessed; and

p.453 L.9 (b) the Seller pay the Buyer's costs of the action (including the costs of interrogatories) to be taxed with a certificate for second counsel and with liberty to apply as to the basis of taxation and as to the limits contained in Order 66 Rule 16 and generally;

and

(B) On the Seller's counterclaim ordered among other things that:-

p.453 L.17 (i) the Buyer pay to the Seller US $314,012; and

p.453 L.25 (ii) the Counterclaim against Mr. Fares should stand dismissed out of Court;

p.453.L.19 (iii) the Buyer pay the Seller's costs of the counterclaim (including the costs of interrogatories) to be taxed with a certificate for second counsel and with liberty to apply as to the basis of taxation and as to the limits contained in Order 66 Rule 16 and generally; and

(C) further ordered that:-

p.454.L.6 (i) any damages to which the Buyer might become entitled should be set off against the said sum of US$314,012 and the balance after such set-off should be paid by the party from whom to the party to whom the same should be due; and

p.454 L.11 (ii) the Taxing Officer should set off the costs of the Buyer on the claim and of the Seller on the counterclaim and should certify to which of them

the balance after such set-off was due and such balance should be paid by the party from whom to the party to whom the same should be certified to be due.

4. The Buyer and Mr. Fares submit that Olney J. was correct in making the declaration referred to in paragraph (A) (i) (c) of the preceding paragraph, and the Orders referred to at (A) (ii) (a) and (b), and (B) (ii). The Buyer and Mr. Fares submit, however, that the Learned Judge erred in making the declarations referred to at (A) (i) (a) and (b), and the orders referred to at (B) (i) and (iii) and (C).

5. The Buyer submits that Olney J. should have

(i) declared that the contract included a term that the Buyer would buy and the Seller would sell 22,000 tonnes of meat comprising 13,200 tonnes of lamb and 8,800 tonnes of hogget; and

(ii) ordered that:-

(a) the counterclaim against the Buyer stood dismissed out of the Court; and

(b) the Buyer have liberty to apply in respect of any costs incurred in defending the counterclaim additional to costs recovered pursuant to the order referred to in paragraph 3(A) (ii) (b) above.

THE ISSUES : THE PARTIES' PLEADED CASES

6. The Buyer is a company incorporated in Western Australia and controlled by Mr. Fares, who has at all material times carried on business under the name "Rachid Fares Enterprises". Mr. Fares was joined as Second Plaintiff in the action when the Seller pleaded, in its original Defence, that the contract at issue was entered into by him personally rather than on behalf of the Buyer. Olney J. rejected this contention on the part of the Seller. p.589L.24

7. The Seller is a company incorporated in South Australia and registered as a foreign company in Western Australia, the business of which is the production and sale of meat.

8. The action concerns a contract which the parties agreed was concluded orally on 2nd July 1979 between Mr. Fares and Mr. Kenneth Dingwall ("Dingwall") for the Seller. The contract was for the supply of frozen lamb and hogget carcasses, which were required by the Buyer (or Mr. Fares) in order to meet Mr. Fares' obligations under a contract which Mr. Fares was negotiating (and in due course concluded) with the Iranian Meat Organisation ("IMO"). This

p.776 contract ("the IMO Contract") required Mr. Fares to sell to the IMO about 20,000 tonnes first-grade Australian frozen carcasses, comprising about 12,000 tonnes of lamb and about 8,000 tonnes of hogget, plus or minus 10% at Seller's option, C & F Iranian port. The IMO Contract required Mr. Fares to provide to the IMO an irrevocable bank guarantee in an amount of up to US$3,660,000 to secure his
p.476 performance under the IMO Contract, which guarantee was provided by Mr. Fares' Bank and required payment by it immediately on receipt of notice from Bank Melli Iran.

9. The Buyer and Mr. Fares contended in their pleadings and before Olney J. that the contract of 2nd July 1979 required the Seller to supply a total quantity of 13,200
p.589 tonnes of lamb and 8,800 tonnes of hogget. By its Defence dated 9th January 1981 the Seller denied that the total quantity of meat was as alleged by the Buyer, but did not at that stage plead any positive case as to what the quantity was; nor did the Seller plead any such positive case in its
p.591 Amended Defence dated 20th March 1981. In its Re-amended
p.599 Defence dated 21st April 1982, however, the Seller alleged
p.600L.4 that the total quantities to be bought and sold were 10,000 tonnes of lamb and 8,000 tonnes of hogget.

10. The Buyer and Mr. Fares contended throughout that the terms of the contract as to delivery of the aforesaid total quantities of meat were that the Seller would make delivery of the carcasses free alongside ship at Adelaide and/or Freemantle as follows:

(i) 2,000 to 3,000 tonnes at the end of August/ beginning of September 1979 in one bottom

(ii) about 4,000 to 4,500 tonnes at the end of October 1979 in one bottom

(iii) thereafter deliveries of 4,000 to 4,500 tonnes each at such times as would enable the vessel engaged by the Buyer to ship the total quantities agreed to be supplied in consecutive trips to Iran.

11. Again, the Seller made no positive case as to the specific quantities of meat to be delivered f.a.s. Adelaide
p.601L4-8 and/or Freemantle until its Re-amended Defence dated 21st April 1982, wherein it was alleged that the delivery terms agreed orally on 2nd July 1979 were

(1) 2,000 tonnes at the end of August 1979
(2) 4,000 tonnes at the end of September 1979
(3) 4,000 tonnes at the end of December 1979
(4) thereafter, 2 further shipments of 4,000 tonnes each.

12. The Buyer and Mr. Fares contended throughout that the price payable for the meat was US$1,375 per tonne for lamb

and US$1,230 for hogget, f.a.s. In its original Defence dated 9th January 1981 and its Amended Defence dated 20th March 1981 the Seller admitted that the price was as pleaded by the Buyer. By its Reamended Defence dated 21st April 1982, however, the Seller alleged (for the first time) as follows with regard to the price agreed orally on 2nd July 1979 :

> "..... it was agreed that the contract prices for lamb and hogget would be the prices which the Iranian Meat Organisation (I.M.O.) had agreed to pay to the Second Plaintiff [viz. Mr. Fares] for lamb and hogget, less an agreed margin, freight allowance and conditional rebate, amounting to US$465 per tonne for both products. The Second Plaintiff represented to the Defendant [viz., the Seller] on the 2nd July 1979 that the I.M.O. had agreed to pay US$1840 per tonne for lamb and $150 less than this amount per tonne for hogget. On that basis the contract prices were calculated at US $1375 per tonne for lamb and US$1225 per tonne for hogget. The net contract price for hogget was subsequently agreed at $1230 per tonne for hogget as evidenced by payments made by the Second Plaintiff. In fact, the I.M.O. had agreed to pay US$1850 per tonne for lamb and US $1800 per tonne for hogget. The correct contract prices were therefore US$1385 per tonne for lamb and US$1335 per tonne for hogget, subject however to the "rebate" pleaded in sub-paragraph (v) hereof." p.600L7-30

13. The Buyer and Mr. Fares contended throughout that the terms of the contract agreed orally on 2nd July 1979 were evidenced in writing by, inter alia, a telex from the Buyer to the Seller dated 3rd July 1979 and a telex from the Seller to the Buyer dated 19th July 1979. The telex dated 3rd July 1979 read as follows: p.475

> "GOOD AFTERNOON L.5
>
> THANK YOU FOR YOUR ASSISTANCE IN OUR NEGOTIATIONS ON FREIGHT.
>
> COMPLEMENTING THE INFORMATION GIVEN IN THE TELEX SENT TO YOU YESTERDAY, MR. DINGWALL AND US HAVE FINALLY AGREED ON FAS PRICES FOR LAMB AND HOGGET AS WELL AS ON SPECIFICATIONS AND PROGRAM OF DELIVERIES BEFORE OUR LAWYER SIGNED THE AGREEMENT WITH I.M.O. IN TEHRAN AND SUBSEQUENTLY SUBMITTED THE 10 PER CENT BANK GUARANTEE.
>
> FOR GOOD ORDER'S SAKE HEREAFTER ARE THE MAIN POINTS ON WHICH WE AGREED:

A.
QUANTITIES:
13,200 METRIC TON LAMB AND 8,800 METRIC TONS HOGGET CARCASES

B.
PRICES:
USDLR 1,375/METRIC TON FAS FOR LAMBS
USDLR 1,230/METRIC TON FAS FOR HOGGET

C.
SPECIFICATIONS:
YOUNG LAMBS, AGED 6-11 MONTHS, CARCASE WEIGHT ABT 12KGS TO ABT 18KGS, MEAN AVERAGE WEIGHT ABT 15 KGS FOR THE TOTAL CONTRACT. YOUNG HOGGETS, AGED 1-2 YEARS, CARCASE WEIGHT 12-22 KGS, MEAN AVERAGE WEIGHT ABT 17 KGS FOR THE TOTAL CONTRACT. CARCASES MUST BE CLEAN WITHOUT HEAD, LEGS, TAIL, OFFALS, KIDNEYS AND KIDNEY FAT.
ABT 80 PER CENT MALE, ABT 20 PER CENT FEMALE. THE CARCASES SHOULD BE OBTAINED FROM GOOD QUALITY ANIMALS KILLED ACCORDING TO ISLAMIC RITE, THE CERTIFICATE OF ISLAMIC KILLING MUST BE CERTIFIED BY ISLAMIC GROUP IN AUSTRALIA AND BY THE EMBASSY OF THE ISLAMIC REPUBLIC OF IRAN.

D.
PROGRAM OF DELIVERIES:
ABT 2,000 - 3,000T (PREFERABLY 3,000T) TO BE LOADED END AUGUST BEGINNING SEPTEMBER 1979, IN ONE BOTTOM. ABT 4,000/4,500 TO BE LOADED END OCTOBER 1979, IN ONE BOTTOM, SAME VSL TO EFFECT CONSECUTIVE TRIPS UNTIL FINALISING CONTRACT.

WE ALSO AGREED WITH MR. DINGWALL THAT IF VSL IS DISCHARGED IN LESS THAN 40 DAYS WE WOULD PAY METRO MEAT A BONUS WHICH WILL BE LEFT TO OUR DISCRETION BECAUSE, DUE TO DIFFICULTIES IN CONTRACT INCLUDING BIG RISKS OF SLOW DISCHARGING PROVOKING DELAYS WHICH WILL NOT BE COMPENSATED BY DEMURRAGES,. MR. DINGWALL ACCEPTED A LAST MINUTE DISCOUNT ON LAMB PRICES.

NOW WE ARE LOOKING FOR VSLS TO SUIT THE DELIVERIES PROGRAM AND WILL KEEP YOU INFORMED.

THANK YOU AGAIN FOR YOUR COOPERATION AS ALWAYS.

BEST PERSONAL REGARDS

RACHID FARES"

p.480 The telex dated 19th July 1979 read as follows:

"MESSAGE TO: FARES RURAL CO, PERTH L.1
FROM: METRO MEAT LTD., ADELAIDE.
WE WISH TO CONFIRM THE TERMS AND CONDITIONS OF CONTRACT FOR IRAN AS UNDER:-

A.
QUANTITIES:
13,200 METRIC TONS LAMB AND 8,800 METRIC TONS HOGGET CARCASES

B.
PRICES:
USDLR 1,375/METRIC TON FAS FOR LAMBS
USDLR 1,230/METRIC TON FAS FOR HOGGET

C.
SPECIFICATIONS:
YOUNG LAMBS, AGED 6-11 MONTHS, CARCASE WEIGHT ABT 12 KGS TO ABT 18KGS, MEAN AVERAGE WEIGHT ABT 15KGS FOR THE TOTAL CONTRACT. YOUNG HOGGETS, AGED 1-2 YEARS, CARCASE WEIGHT 12-22 KGS, MEAN AVERAGE WEIGHT ABT 17KGS FOR THE TOTAL CONTRACT.
CARCASES MUST BE CLEAN WITHOUT HEAD, LEGS, TAIL, OFFALS, KIDNEYS AND KIDNEY FAT.
ABT 80 PER CENT MALE, ABT 20 PER CENT FEMALE. THE CARCASES SHOULD BE OBTAINED FROM GOOD QUALITY ANIMALS KILLED ACCORDING TO ISLAMIC RITE, THE CERTIFICATE OF ISLAMIC KILLING MUST BE CERTIFIED BY ISLAMIC GROUP IN AUSTRALIA AND BY THE EMBASSY OF THE ISLAMIC REPUBLIC OF IRAN.

D.
PROGRAM OF DELIVERIES:
ABT 2,000 - 3,000T (PREFERABLY 3,000T) TO BE LOADED END AUGUST BEGINNING SEPTEMBER 1979, IN ONE BOTTOM. ABT 4,000/4,500T TO BE LOADED END OCTOBER 1979, IN ONE BOTTOM, SAME VSL TO EFFECT CONSECUTIVE TRIPS UNTIL FINALISING CONTRACT.

ACCORDINGLY WE WILL SHIP MAXIMUM TONNAGE AVAILABLE BY THE FIRST VESSEL AT THE BEGINNING OF SEPTEMBER.

REGARDS
IAN PHILLIPS
EXPORT MANAGER"

The Seller denied throughout that the said telexes "fully or completely or accurately" evidenced the contract.

14. It was common ground that a total of almost 10,834 tonnes of meat were delivered by the Seller in three shipments, comprising approximately 7,533 tonnes of lamb and approximately 3,301 tonnes of hogget, and that the Seller was paid a total of US$14,417,700.13 by the Buyer.

15. The third shipment was the last made by the Seller and the Buyer and Mr. Fares contended that the Seller repudiated
p.3L.25 the contract, in the circumstances alleged in paragraph 6 of the Reamended Statement of Claim. The Seller denied this allegation.

16. By its Reamended Defence and Counterclaim the Seller
p.12.L.26 alleged that it was an express condition of the contract made on 2nd July 1979 that "in the event that ships carrying [the Seller's] goods in pursuance of the contract discharged within a 40-day period [Mr. Fares] would pay an additional $30 per tonne immediately upon the discharge of such
p.28.L.8 vessel". The Seller particularised this allegation as follows:

> "Rachid Fares said that he wanted deducted from the price which he said was payable by the IMO, the sum of $30.00 per tonne to cover possible delays in the discharge of the shipments. Kenneth Dingwall said that the Defendant agreed to such deduction provided that such sum was repaid to the Defendant in the event that the vessels were discharged within 40 days. Rachid Fares said that he agreed to this arrangement."

p.18L.11 The Seller counterclaimed the sum of US$208,637 pursuant to this alleged express condition. The Buyer and Mr. Fares denied that this express condition formed part of the
p.20 contract. In response to the Seller's allegations they pleaded as follows:

L.18 "In the course of a telephone discussion on the 2nd July 1979 between Dingwall on behalf of the Defendant and the Second Plaintiff on behalf of the First Plaintiff alternatively on his own behalf during which discussion the contract pleaded in paragraph 3 of the Amended Statement of Claim was concluded:

(i) Dingwall said, in effect, that the Defendant was prepared to supply lamb at US$1,405.00 per tonne,

(ii) the Second Plaintiff asked, in effect, whether the Defendant could supply lamb at US$1,355.00 per tonne,

(iii) It was agreed that the Defendant would supply lamb at a price of US$1,375.00 per tonne,

(iv) Dingwall asked whether, in effect, if the contract proceeded satisfactorily the Defendant could be paid some part of the US$30.00 per tonne by which the Defendant had reduced its original asking price namely US$1,405.00 per tonne,

(v) the Second Plaintiff asked, in effect, what part of the US$30.00 the Defendant was seeking,

(vi) Dingwall replied, in effect, that the Defendant wanted US$15.00 per tonne,

(vii) the Second Plaintiff said, in effect, that if the whole delivery went through without any problems and if the ships could be discharged in Iran in under 40 days from loading and departure from Australia and if the entire transaction was a profitable one consideration would be given to paying the Defendant some part of the said US$30.00 per tonne.

(c) In the premises, there was no concluded or binding agreement between the Defendant and the First Plaintiff alternatively the Second Plaintiff for the payment of the whole or any part of the said US$30 per tonne in respect of lambs supplied by the Defendant pursuant to the said contract".

17. The Seller further alleged by its Reamended Defence and Counterclaim that there was - p.13

"an oral agreement between the Defendant and the Second Plaintiff made in January 1980 at the Second Plaintiff's request, whereby the Defendant would purchase 843 tonnes of lamb from the Western Australia Lamb Board and ship this with the third shipment upon the Second Plaintiff's undertaking to pay US$125.00 per tonne immediately upon such shipment. The said request was made by the Second Plaintiff with a view to the completion of a full cargo for the vessel carrying the third shipment which had been chartered by the Second Plaintiff and/or its nominees and for the avoidance of dead freight and was acceded to by the Defendant to assist the Second Plaintiff;" L.4

The Seller counterclaimed the sum of US$105,375 pursuant to the alleged oral agreement. The Buyer and Mr. Fares denied that there was an oral agreement as alleged by the Seller and alleged by their Reply and Defence to Counterclaim that the Seller was obliged to deliver between 4,000 and 4,500 tonnes of meat in respect of the third shipment, and that: p.18.L.16 p.22.L.5

"(c) On the 21st December 1979 the Defendant advised the First Plaintiff alternatively the Second Plaintiff (such advice being given orally by Dingwall on behalf of the Defendant to J. Blanco Villegas on behalf of the First Plaintiff alternatively the Second Plaintiff and by telex from the Defendant to the First Plaintiff) in effect that the Defendant expected to be able to deliver only 2,750 tonnes in respect of the third shipment. L.10

(d) On the 30th December 1979 the First Plaintiff by telex advised the Defendant that lamb was available

from W.A. Lamb Board and insisted that the Defendant supply and deliver about 3,800 tonnes of meat in the third shipment.

(e) In the course of a telephone discussion between Dingwall on behalf of the Defendant and the Second Plaintiff on behalf of the First Plaintiff alternatively on his own behalf on or about the 1st or 2nd January 1980:

(i) Dingwall said, in effect, that the Defendant had agreed to purchase 843 tonnes of lamb from the W.A. Lamb Board at a premium of US$250.00 per tonne and Dingwall asked whether the Defendant could be paid some subsidy in respect of that premium,

(ii) the Second Plaintiff said, in effect, that if the remainder of the said contract with the Defendant was completed without any difficulties and on schedule consideration would be given to paying to the Defendant some part of the said premium.

(f) In the premises it was agreed between the Defendant and the First Plaintiff alternatively the Second Plaintiff that subject to the due completion and fulfilment by the Defendant of the said contract with the First Plaintiff alternatively the Second Plaintiff consideration would be given to paying to the Defendant some part of the said premium.

(g) By reason of the matters alleged in paragraph 6 of the Amended Statement of Claim and the Defendant's failure to complete and fulfil the said contract the Defendant did not become and is not entitled to any additional sum in respect of the said 843 tonnes of lamb."

p.14 L.9 18. The Seller contended that its failure to deliver the balance of the meat required by the contract was justified by the Buyer's (or Mr. Fares') refusal to pay the sums of $208,637 and $105,375 alleged to be due as explained in p.17 L.3 paragraphs 16 and 17 above. The Seller contended that the refusal of the Buyer (or Mr. Fares) to pay the said sums (other than on the basis of conditions unacceptable to the Seller) was itself a repudiation of the contract, in respect of which the Seller counterclaimed damages.

SUMMARY OF THE ISSUES

19. The issues before Olney J. can be summarised as follows:

p.394 L.4 (1) who were the contracting parties? The learned judge decided that the contracting parties were the Buyer and the Seller.

(2) what were the quantities of meat which the Seller agreed to supply? The learned judge decided that the total quantity was neither 22,000 tonnes, as alleged by the Buyer and Mr. Fares, nor 18,000 tonnes, as alleged by the Seller, but 20,000 tonnes plus or minus 10% at Seller's option. p.394L.8

(3) What were the delivery terms? This issue involved two determinations; the size of the instalments and the dates for instalment deliveries.

The latter question appears to have been resolved by the learned judge's finding: p.428L.10

"I am satisfied on the evidence that as originally contemplated the timetable for the delivery of the meat was as stated in Exhibit 1. In this regard I am of course referring only to the timing of shipments and not the tonnages."

The former question was resolved only by the following:

"I accept that it was agreed that the first shipment would be less than the later ones and that it was contemplated that five shipments in all would be made." p.429L.11

(4) What were the provisions of the contract as to price? The learned judge decided this issue in favour of the Buyer. He held:

"The price agreed to be paid for lamb was US$1,375 per tonne f.a.s. and for hogget US$1,230 per tonne f.a.s. These prices were firm figures and in no way dependent upon prices paid or to be paid by the.....IMO, the cost of freight, the Plaintiff's profit margin or any other factor." p.394.L.14

Moreover, the learned judge held that Mr. Fares

"did not make any statement of a promissory nature to Dingwall in relation to the price to be received upon resale of the meat, the cost of freight, the profit margin or the price then being paid to the [WALMB] for meat supplied to the IMO". p.394L.21

(5) Did the Seller repudiate the contract? The learned judge decided this issue in favour of the Buyer and Mr. Fares. p.395L.17

(6) Did the Buyer agree to pay a sum of $30 per tonne in respect of goods discharged within 40 days? This issue came to be known as the "Prompt Discharge Bonus" point, and is hereinafter so described. The learned judge held that the Buyer was contractually obliged to pay a Prompt Discharge Bonus at a rate to be set by it, that p.395L.3

the Buyer (through Mr. Fares) "set the bonus at $30 per tonne for all meat shipped", and that the sum of US$208,637 counterclaimed was therefore due (subject to set off) to the Seller.

(7) Did the Buyer agree to pay the sum of US$125 per tonne in respect of the 843 tonnes of meat purchased by the Seller from the West Australian Lamb Marketing Board ("WALMB") to increase the quantity available for the third shipment? This issue came to be known as the "WALMB subsidy" point, and is hereinafter so described. The learned judge held that the Buyer did
p.395L.12 unconditionally agree to pay this subsidy to the Seller, and that the sum of US$105,375 counterclaimed was (subject to set off) due to it.

p.448L.24 (8) Did the Buyer repudiate the contract? The learned judge decided this issue in favour of the Buyer.

SUBMISSIONS OF THE BUYER AND MR. FARES

ISSUE (1) : WHO WERE THE CONTRACTING PARTIES?

20. This is a question of fact upon which there was ample evidence to justify Olney J.'s conclusion. It is submitted that there are no grounds for allowing an appeal against the judge's decision on this point.

ISSUE (2) : WHAT WERE THE CONTRACTUAL QUANTITIES?

21. It is submitted that the learned judge should have
p.475,480 treated the telexes of 3rd July 1979 and 19th July 1979 as conclusive of this issue. Three arguments (the first 2 of them being related) are advanced in support of this submission.

22. First, it is submitted that, as a matter of law, evidence was not admissible and should not have been admitted by the learned judge to contradict what is said in the telexes as to contractual quantities - or any other contractual matter - since the giving of such evidence contravened the so-called "parol evidence rule". Having declined to rule on the objections of counsel for the Buyer and Mr. Fares during the hearing to the giving of such evidence, the judge dealt with the matter thus in his
p.427L.27 judgment: "For the Plaintiffs it was argued that irrespective of what was actually agreed the two telexes exhibits 1 and 2 subsequently became conclusive evidence to the contrary. This is, of course, something different from what is pleaded. Both parties say that the contract was oral and was made on 2nd July 1979. The Plaintiffs say that the oral contract was evidenced in writing, such writing being inter alia the telexes exhibits 1 and 2. The pleading itself suggests that there are other writings evidencing the contract but none were proved. The Plaintiffs have failed

to satisfy me that the two telexes do accurately reflect what was agreed orally between Fares and Dingwall as to the quantity of meat to be supplied by Metro Meat. This is not to say that the telexes do not in other respects reflect what was agreed to. Whether they do or not depends upon what is found on the evidence to have been agreed."

His Honour further found: "I find that Exhibit 2 was sent by Phillips with the intention of confirming the terms as he thought them to be of the contract..." p.417 L.31

23. It is submitted that the judge was wrong in law in failing to hold that the "parol evidence rule" applied to a document (Ex. 2) which he found was intended to confirm the terms of an antecedent oral agreement.

It is well recognised that the parties to an oral contract may afterwards reduce to writing all or some of the express terms of their oral contract with the intention that the writing constitute the conclusive record of those terms. If the writing was so intended, then the Courts will give effect to that intention. Therefore if the Seller's telex of 19 July 1979 was created with such intention, the Buyer was entitled to rely on it as a conclusive record of the terms set forth in it, in particular, the term as to quantities. How is a Court to tell whether the telex was created with such intention? p.480

24. It is submitted that the proper test is that enunciated by Lord Greene M.R. in Hutton v. Watling (1948) 1 Ch. 398, 403-04, in a context similar to the present. His Lordship there said,

> "The first thing we have to do... is to construe that document. The true construction of the document means no more than that the Court puts upon it the true meaning, being the meaning which the other party to whom the document was handed... would put upon it as an ordinary intelligent person construing the words in a proper way in the light of the relevant circumstances... What then would the purchaser when she received the document have thought it meant as an ordinary reasonable person, intelligently understanding the English language and construing it in the light of the relevant circumstances? She could only have understood that the vendors were deliberately and solemnly recording the terms of an agreement ... into which they had entered... In my opinion , when once the document is construed and understood it is only susceptible of one interpretation. This is that it was intended by the signatories to be, and was represented to the purchaser to be, a true record of the contract and was so accepted by the purchaser. When once that is ascertained it appears to me that the idea of letting in parol evidence to prove an antecedent oral agreement different in its terms fails".

p.480 25. It is submitted that when the telex of 19 July 1979 was received, the meaning which those directing the affairs of the Buyer would put on its words as ordinary reasonable persons intelligently understanding the English language and construing its words in a proper way in the light of the relevant circumstances was that the Seller by them had intended solemnly and deliberately to record among other things the term as to quantities on which it had earlier agreed. It is clear that the reference to quantities in the telex was represented to the Buyer to be such a record and was so accepted by it. Accordingly, Olney J. applying the test of Lord Greene M.R. in Hutton, should have held that the reference in the telex to quantities was conclusive as to what had been agreed upon in that respect.

26. The learned judge heard detailed evidence as to the circumstances in which Mr. Phillips of the Seller sent the telex of 19th July 1979, and in particular evidence as to conversations between Mr. Phillips (who was Export Manager of the Seller) and Mr. Blanco Villegas (a Director of the
p.175-7 Buyer). Mr. Blanco Villegas attested that he telephoned Mr. Phillips on about five separate occasions specifically seeking confirmation by telex of the terms of the contract
p.362 L10 of 2nd July 1979. Mr. Phillips whilst conceding that telephone conversations between himself and Mr. Blanco Villegas preceded the sending of the telex, gave a version of those conversations irreconcilable with that asserted by
p.417 Mr. Blanco Villegas. Olney J. rejected Mr. Phillips' evidence on this point, and accepted that of Mr. Blanco Villegas.

27. Insofar as the learned judge may have based his decision on the lack of evidence that Phillips had been told by Dingwall what were the contractual quantities which Dingwall had agreed with Mr. Fares, it is submitted that the absence of such evidence would have been irrelevant. What was relevant was that there was no evidence that those directing the affairs of the Buyer knew (if it be the fact) or even suspected that the telex's author had not been told by Dingwall what had been agreed upon. The Buyer is not to be deprived of the benefit of the parol evidence rule merely because of what might have been irresponsible conduct by the telex's author in sending the telex without first speaking to Dingwall. It was entitled to assume (and acted on the assumption) that the telex's author would not have sent the telex unless he had informed himself appropriately.

28. The second submission of the Buyer and Mr. Fares on this issue is that even if the telexes of 3rd and 19th July 1979 were not, as a matter of law, conclusive of the contractual terms which they purported to record, the learned judge should have treated them as overwhelmingly strong evidence of what Mr. Fares and Dingwall had in fact
p.418 L12 agreed on 2nd July. In saying "To the extent that the parties are in issue as to what was agreed [the telexes] are of little help in resolving the dispute" the learned judge

fell into error. It will be recalled that the Buyer's case throughout was that the quantities agreed upon were as stated in the telexes, viz 13,200 tonnes of lamb, and 8,800 tonnes of hogget, making a total of 22,000 tonnes of meat. That remained the Buyer's case throughout the trial. The Seller did not allege until 21st April 1982 that the agreed quantity was 18,000 tonnes.

29. Olney J. evidently disbelieved Dingwall's evidence that the total quantity agreed was 18,000 tonnes - Dingwall's evidence on this matter (and on other matters) being (it is submitted) demonstrably unsatisfactory. For example, Dingwall had at one stage asserted in an affidavit that the total quantity was 20,000 tonnes plus or minus 10% at Seller's option; he disavowed this earlier sworn assertion in his evidence. There was no evidence on which to base a decision that the total quantity was 20,000 tonnes, a quantity for which neither side had contended. The evidence of Mr. Fares was to the effect that he and Dingwall had discussed 20,000 tonnes in negotiation during the telephone conversation, but that they had ultimately agreed on 22,000. That this is the proper interpretation of Mr. Fares' evidence at pp. 68 and 118 is reinforced by his assertion "although the contract (with the Iranian Meat Organization) foreseen for about 12,000 tonnes for lamb and about 8,000 tonnes for hogget, I always take the maximum margin from the supplier.....". p.611 L.5 p.330-337 p.117 L.16

30. Thirdly, the Buyer and Mr. Fares submit that there was no justification for Olney J.'s declaration that "By custom and usage [the Seller] had the option to supply, and to be paid for, any lesser or greater quantity within a range of 10% below or above the stated tonnages": p.425 L.4-8

(a) no such custom and usage was pleaded or alleged by the Seller; Dingwall's evidence as to the agreed quantities was inconsistent with the existence of such custom and usage; there was simply no evidence at all from which the existence of such a custom and usage could have been inferred.

(b) Further, if it be relevant, Dingwall asserted in evidence that he had not agreed with the Second Plaintiff that the quantities to be delivered could be increased or decreased by ten percent at Seller's option. It is submitted that he would not have denied such agreement if it had been implied into contracts like that the subject of the present dispute by custom and usage, the more so in circumstances where to assert the existence of such a custom was to the Seller's advantage. He was the Managing Director of the Seller at all material times and had earlier given evidence of involvement in the meat trade since at least the late 1960's. p.333 L.17

ISSUE (3): WHAT WAS THE DELIVERY TERM?

31. So far as the times for delivery are concerned, the Buyer and Mr. Fares submit that the learned judge was correct on the facts.

32. So far as the quantities to be shipped are concerned, the Buyer and Mr. Fares deal with this issue very shortly. It is submitted that the judge should have regarded the terms of the telexes of 3rd and 19th July 1979 as conclusive
p.475,480 of this issue.

ISSUE (4) : WHAT WERE THE PROVISIONS AS TO PRICE?

33. It is submitted that Olney J.'s decision on this question of fact was correct:

(a) the prices contended for by the Buyer and Mr.
p.394 Fares, and found by the learned judge to have been
pp.475,480 agreed, were those specified in the telexes of 3rd and 19th July 1979

p.589 L.14 (b) the Seller originally admitted that those were the
p.600 L.7 agreed prices, and only alleged otherwise in its Reamended Defence dated 21st April 1982 (which was
p.776 served after the Seller had seen the terms of the contract between Mr. Fares and the IMO, and the translation thereof.)

(c) there was abundant oral evidence to support the factual finding of the learned judge.

The Buyer and Mr. Fares respectfully adopt Olney J.'s
p.418 reasoning in his judgment under the heading "The Terms of the Contract: Prices".

ISSUE (5) : REPUDIATION BY THE SELLER

p.14 L.9 34. The Seller's pleaded justification for refusing further deliveries of meat was the refusal of the Buyer (or Mr. Fares) to pay the amounts claimed by the Seller in respect of the Prompt Discharge Bonus and the WALMB subsidy. The Seller claimed that this refusal was a repudiatory breach by the Buyer (or Mr. Fares), which discharged the Seller from
p.395 any obligation to make further deliveries. Olney J. held (wrongly, in the submission of the Buyer and Mr. Fares) that the Seller was entitled to the sums claimed in respect of the Prompt Discharge Bonus and the WALMB subsidy.
p.395 Nevertheless, the learned judge held that it was the Seller and not the Buyer who had repudiated the contract. It is submitted that, even on the footing that the Seller was entitled to the Prompt Discharge Bonus and the WALMB subsidy, the learned judge's decision on this issue was correct.

35. Olney J. said: "I do not think it was open to Metro Meat to refuse further supply simply because those amounts were outstanding. At the time both payments were very much disputed but in any event they related to matters which were peripheral to the contract and in the case of the WALMB subsidy, quite independent of it. ..... I have no doubt that as at 24th April 1980 Fares was willing able and anxious to continue to purchase meat from Metro Meat for the purpose of fulfilling their respective obligations under the agreement. Fares had a particular reason for doing this because of the guarantee he had given to the IMO. I am equally certain that 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 renegotiate the price." p.447 L.1

36. It is submitted that the above passage reflects an entirely correct approach, in law, to the linked questions of whether the Buyer's refusal (mistaken, as the judge held) to pay the Prompt Discharge Bonus and the WALMB subsidiary constituted a repudiatory breach by it of the whole contract, and of whether, on the contrary, it was the Seller which was using these matters as an excuse to avoid obligations which it had become commercially inconvenient to perform. The issue of whether a party has evinced an intention to refuse further performance of, or to repudiate a contract is one of fact: Woodar Investment Development Ltd. v. Wimpey Constructions U.K. Ltd. (1980) 1 All E.R. 571 at p.575 per Lord Wilberforce. A mere assertion of an erroneous view of a party's contractual obligations is not, without more, a repudiation of the contract: Woodar Investment supra at pp. 575/6 and the cases there cited. There was nothing to prevent the Seller from taking action to recover the Prompt Discharge Bonus and the WALMB subsidy. The Seller would have been paid by means of Letter of Credit for the remaining meat which it was due to deliver, as it had been for the first 3 shipments.

ISSUE (6) : THE PROMPT DISCHARGE BONUS

37. It will be recalled that the Buyer's telex of 3rd July 1979 included the following:

> "FOR GOOD ORDER'S SAKE HEREAFTER ARE THE MAIN POINTS ON WHICH WE AGREED." p.475 L.14

Then followed four points under the headings:- Quantities, Prices, Specifications and Program of Deliveries. The fourth of these points read as follows:-

> "ABT 2,000-3,000T (PREFERABLY 3,000T) TO BE LOADED END AUGUST BEGINNING SEPTEMBER 1979, IN ONE BOTTOM. ABT 4,000/4,500T TO BE LOADED END OCTOBER 1979, IN ONE BOTTOM, SAME VSL TO EFFECT CONSECUTIVE TRIPS UNTIL FINALISING CONTRACT." p.475 L.33

Then following the fourth of these points appears this passage:-

p.475 L.37

"WE ALSO AGREED WITH MR. DINGWALL THAT IF VSL IS DISCHARGED IN LESS THAN 40 DAYS WE WOULD PAY METRO MEAT A BONUS WHICH WILL BE LEFT TO OUR DISCRETION BECAUSE, DUE TO DIFFICULTIES IN CONTRACT INCLUDING BIG RISKS OF SLOW DISCHARGING PROVOKING DELAYS WHICH WILL NOT BE COMPENSATED BY DEMURRAGES, MR. DINGWALL ACCEPTED A LAST MINUTE DISCOUNT ON LAMB PRICES."

p.431 L.14 Olney J. held that the quoted passage reflected what had been agreed between the parties on the preceding day.

38. On 17 March 1980, at a time when there were doubts on the Buyer's part as to the Seller's intent to effect delivery of the remaining quantities, Mr. Fares sent Dingwall a telex which said in part:-

P.562

"REGARDLESS OF THE CONSIDERATION WHETHER AMOUNTS ARE DUE OR NOT DUE AND IN ORDER TO AVOID FURTHER DISCUSSIONS, WE ARE PREPARED TO PAY A BONUS OF U.S. DLRS 30 PER TON ON ALL 3 (THREE) SHIPMENTS ALREADY EFFECTED AND ON THE SHIPMENTS TO FOLLOW....BUT WE NEED TO BE ASSURED THAT YOU ARE GOING TO SUPPLY THE REMAINING TONNAGE.

IN FACT YOUR ATTITUDE GIVES US SERIOUS DOUBTS AS TO YOUR INTENTIONS IN THIS RESPECT.

AS YOU KNOW, IF THE REMAINING TONNAGE IS NOT SUPPLIED, THE DAMAGES THAT WOULD OCCUR WOULD BY FAR EXCEED ANY AMOUNTS OF BONUS...

WHILE WE HAVE ALREADY PROPERLY ENSURED THE PAYMENT FOR METRO, IT IS ALSO OUR RIGHT TO BE ENSURED THAT THE REMAINING TONNAGE WILL BE SUPPLIED.

CONSEQUENTLY:

A.
PLEASE CONFIRM THAT METRO WILL SUPPLY THE REMAINING TONNAGE, CONFIRMING ALSO THE DATES OF THE 2 (TWO) FORTHCOMING SHIPMENTS OF ABOUT 4,000 TONS EACH.

B.
FROM OUR SIDE, WE CONFIRM THAT, AS SOON AS WE HAVE YOUR CONFIRMATION, THE PAYMENT TO METRO OF THE U.S. DLRS 30 PER TON BONUS ON THE 3 (THREE) FIRST SHIPMENTS... WILL IMMEDIATELY BE EFFECTED."

p.434 L.2 The learned judge held that by this telex the Seller "set" a sum of $30 per tonne in respect of the Prompt Discharge Bonus.

39. It is submitted that Olney J. erred both in holding that the agreement regarding the bonus had created a contractual obligation on the Buyer and in holding that this obligation had been performed insofar as a bonus had been set by the telex of 17 March 1980. p.562

40. So far as the question whether the agreement recorded in the telex of 3 July 1979 created a contractual obligation p.475
in the Buyer is concerned, it is submitted that the agreement is analogous to that dealt with by the High Court
10 of Australia in Placer Development Ltd. v. The Commonwealth (1969) 121 C.L.R. 353. In that case the Defendant had agreed with the Plaintiff in a written contract to pay to a third party in respect of timber imported by it "a subsidy... of an amount or at a rate determined by...(it)... from time to time" provided a certain condition was met. It was held by the Court that the agreement did not give rise to a contractual obligation in the promisor. This result did not depend on the fact that the promisor was the Commonwealth, but rather on the application of ordinary
20 contractual principles. Kitto J.'s conclusion (at 357) was as follows:-

> "The Commonwealth's promise is, in substance, a promise to pay such subsidy if any as may be decided upon from time to time...
>
> It therefore does not create any contractual obligation."

Taylor and Owen JJ. expressed themselves to the same effect (at 361).

41. If contrary to the above submission it be held that the
30 agreement did create a contractual obligation in the Buyer, then it is submitted that

> (a) the Buyer did not by the telex of 17th March 1980 p.562
> purport partially to perform that obligation by setting the bonus. It is submitted that the proper interpretation of the telex is that, rather than purporting to be the exercise of the discretion to set the bonus (as Olney J. held it to be), it amounts to p.434 L.2
> the offer of a further contract to exercise the discretion under the first contract in a particular way
> 40 in the future in return for the giving of an assurance by the Defendant that it would perform the first contract; alternatively,
>
> (b) if the Buyer did by its telex of 17th March 1980 perform its obligation to set a bonus, it did so and was entitled to do so, in terms which were conditional, namely, that the Seller confirm that it would perform its outstanding contractual obligations. The Seller having failed to meet that condition, the obligation to pay on the part of the Buyer did not arise;

(c) in the further alternative, if the Buyer did by its telex of 17th March 1980 purport partially to perform the obligation to set a bonus subject to a condition, which was ineffective, the telex did not operate at all, since the purported condition could not properly be severed from the fixing of the bonus. It is not to be supposed that the Buyer would have fixed the bonus had it believed that the condition which it imposed would be held ineffective.

ISSUE (7) : THE WALMB SUBSIDY

p.10 L.16 42. It was the Seller's pleaded case that it had agreed to deliver the meat the subject of the contract in five instalments, the third of which was to be of 4,000 tonnes. p.534 However by telex dated 21 December 1979 Dingwall had asserted instead an obligation on the part of the Seller to deliver 3,800 tonnes in the third instalment and had also asserted that the Seller held 2,750 of the requisite 3,800 tonnes, leaving a short-fall of 1,050 tonnes. It was in the context of Dingwall's assertion that he held 1,050 tonnes less than he was obliged to deliver that the Buyer advised p.535 the Seller of 900 tonnes of lamb available for purchase from the WALMB and that Mr. Fares agreed with Dingwall sometime p.436 L.33 during January 1980 (as the judge found) that the Buyer would pay the Seller an extra US $125 per tonne for meat supplied by the Seller in the third instalment which it had purchased from the WALMB.

43. Mr. Fares' agreement to pay an extra US $125 per tonne was given in return for the Seller's promise to supply meat which it was already obliged to supply under the contract made on 2nd July 1979. Olney J. appears to have based his decision on this issue on Dingwall's evidence, which he p.436 L.26 summarised as follows: "Dingwall on the other hand said in effect that there was no obligation on Metro Meat's part to purchase more than a very small quantity in order to bring the total consignment in the third shipment up to the amount of its minimum commitment to that stage and that he would not have purchased the additional lamb from the WALMB without a firm commitment from Fares to pay the $125 per tonne subsidy". It is respectfully submitted

(a) that this is not an accurate precis of Dingwall's evidence

(b) that the passage quoted overlooks the fact that the Seller's pleaded case was that it was obliged to deliver 4000 tonnes of meat in the third instalment

(c) that the passage quoted ignores the fact that Dingwall accepted, at the time Mr. Fares agreed to the WALMB subsidy, that there was a shortfall in respect of the third shipment of 1050 tonnes.

Accordingly, there was no justification for Olney J.'s finding (if he did so find) that the Seller was not at the time of the agreement already obliged by the terms of its contract with the Buyer to supply the meat which it later acquired from the WALMB.

43. The performance of an existing contractual obligation owed by A to B is not good consideration for a fresh promise by B to A: Stilk v. Myrick 6 Esp. 129, as considered and explained in Pao On v. Lau Yiu Long (1980) AC 614.

ISSUE (8): DID THE BUYER REPUDIATE THE CONTRACT?

44. This is the mirror image of Issue (5). It is respectfully submitted that Olney J.'s decision of it was right, for the reasons given in Paragraphs 34 - 36 hereof.

45. The Buyer and Mr. Fares submit that the appeal of the Seller should be dismissed with costs, and that the cross appeal of the Buyer should be allowed with costs, for the following amongst other

REASONS

1. Because Olney J. rightly decided that the parties to the contract of 2nd July 1979 were the Buyer Fares Rural Pty Ltd. and the Seller Metro Meat Limited.

2. Because Olney J. ought to have decided, on the basis of the telexes of 3rd and 19th July 1979, and in the absence of any satisfactory evidence to the contrary, that the total quantity of meat which the Seller agreed to supply was 22,000 tonnes.

3. Because Olney J. ought to have held that the agreed delivery schedule was as specified in the said telexes.

4. Because Olney J. correctly decided that the contract prices were as contended for by the Buyer and Mr. Fares.

5. Because Olney J. correctly decided that the Seller repudiated the contract.

6. Because Olney J. ought not to have held that the Buyer was contractually obliged to pay a discretionary Prompt Discharge Bonus; alternatively, the learned judge ought to have held that the Buyer did not purport by its telex of 17th March 1980 to fix a bonus; alternatively, that the Buyer did fix the bonus subject to a condition never fulfilled by the Seller; alternatively, that the Buyer although purporting to fix a bonus, failed to do so because of the inclusion of an ineffective condition.

7. Because Olney J. ought not to have held that the Buyer entered into any enforceable obligation to pay the Seller the WALMB subsidy.

8. Because Olney J. correctly decided that the Buyer had not repudiated the contract.

R.J. BURBIDGE Q.C.

LESLIE KATZ

ANTHONY BOSWOOD

No.31 of 1984

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA IN PROCEEDINGS NO. 2121 of 1980

B E T W E E N:-

METRO MEAT LIMITED	Appellant and Cross-Respondent (Defendant)
and	
FARES RURAL CO. PTY. LIMITED	Respondent and Cross-Appellant (First Plaintiff)
and	
RACHID FARES	Respondent (Second Plaintiff)

CASE FOR THE RESPONDENTS AND FOR THE CROSS-APPELLANT

SIMMONS & SIMMONS
14 DOMINION STREET
LONDON EC2M 2RJ

Ref: 7/A.2467/JL 2343(a)
Tel: 01-628 2020