12 of 1977

In the Privy Council

ON APPEAL

FROM THE FULL COURT OF HONG KONG

CASE FOR THE APPELLANTS

No. 10 of 1976

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BETWEEN

TAI HING COTTON MILL LIMITED ... ... *Appellants*

and

KAMSING KNITTING FACTORY ... ... *Respondents*
(a firm)

CASE FOR THE APPELLANTS

Record

1. This is an appeal from a decision of the Full Court of Hong Kong (Huggins J. President, McMullin J. and Cons J.) whereby they unanimously dismissed an appeal by the Appellants against an order of Briggs C.J. ordering the Appellants to pay damages to the Respondents for breach of a contract for the sale of goods, but by a majority (Huggins and McMullin JJ.) allowed a cross-appeal by the Respondents from the same order and thereby increased the amount of the damages ordered to be paid by the Appellants from HK$451,773 and interest to HK$833,553 and interest and ordered the Appellants to pay the costs of the appeal and cross-appeal.

2. The Appellants submit that

(*a*) the Respondents' cross-appeal should not have been allowed by the Full Court because on the facts found by Briggs C.J. it was not well founded in law, and

(*b*) the order of Briggs C.J. should be set aside on the ground (accepted by both sides in the Full Court) that on the facts found by Briggs C.J. the calculation and award of damages by Briggs C.J. is wrong in law.

3. Shortly the points involved in this appeal are

(i) whether the Appellants were in anticipatory or in actual breach of their contractual obligations to deliver to the Respondents a balance of 424.20 bales of cotton yarn sold by the Appellants to the Respondents but not delivered; and

(ii) if the Appellants were in anticipatory breach, whether the second part of s.53(3) of the Hong Kong Sale of Goods Ordinance (which is similar to s.51(3) of the Sale of Goods Act 1893 save for the addition of the words "neglect or" which in the Appellants' submission add nothing material, and the words "for delivery") applies to such breach or whether, as the Appellants submit, in such case damages are calculated by the difference in price between the contract price and the price ruling in the market at the time for performance;

(iii) in either event at what date the damages fall to be calculated; and

(iv) whether the Respondents had led any evidence upon which such calculation could be made, and if so what the amount should be, and if not what the consequence of this should be.

4. The material evidence and facts found by Briggs C.J. and accepted for the purpose of this Appeal by the Appellants are as follows:—

p. 185 p. 233 (*a*) By a contract reduced to writing dated 23rd March 1971 the Appellants, who are yarn manufacturers in Hong Kong, agreed to sell to the Respondents, who are manufacturers of cloth and knitwear in Hong Kong, 1,500 bales of cotton yarn at a price of $1,335 per bale. Each bale was to contain 400 lbs of yarn.

(*b*) Although the contract stated that delivery was to be "April 1971 - l. 10 December 1971" neither party intended that this should be a binding term of the contract but intended that the Respondents should have the right to call for deliveries as and when they required them upon reasonable notice.

p. 187 l. 32 p. 188 l. 21 p. 56 l. 1-4 p. 57 l. 26 p. 58 l. 30 p. 189 l. 3 p. 189 l. 13 (*c*) Deliveries commenced in July 1971 and continued in varying amounts thereafter. From the latter half of 1971 or 1972 onwards the Appellants did not supply all the quantities requested by the Respondents. As from February 1973 the Appellants supplied only very small amounts. The last delivery was in May 1973.

p. 240 p. 190 l. 11 (*d*) By letter dated 21st July 1973 the Respondents "earnestly requested" the Appellants to deliver 4 bales a day from 26th July onward.

p. 241 p. 190 l. 20 (*e*) By letter dated 31st July 1973 the Appellants gave notice that they were treating the contract as cancelled. The Appellants were not entitled so to do.

p. 85 l. 20 p. 190 l. 29 p. 244 (*f*) The Respondents did not accept this cancellation but on the contrary complained to the Hong Kong Chinese Textile Mills Association requesting them to write to the Appellants "to fulfil the contract and deliver the yarn that is owing". The Association did so by letter dated 18th September 1973. The Respondents made a further similar request by letter dated 31st October 1973, but the Appellants made no further deliveries.

p. 7 (*g*) Accordingly the Respondents issued their Writ on 28th November 1973 with their Statement of Claim endorsed thereon. There was no further communication between the parties before issue of the writ. The Writ was served on the same day.

p. 12 l. 8 (*h*) By paragraph 19 of their Statement of Claim the Respondents alleged that the said letter of 31st July 1973 constituted a wrongful repudiation of the said contract by the Appellants but the Respondents did not then and have never since alleged any acceptance
p. 106 by them of such repudiation. On the contrary they wanted the yarn delivered.

p. 190 l. 41 (*i*) At 31st July 1973 there remained undelivered 424.20 bales of yarn
p. 12 l. 8 at H.K.$1,335 per bale. The Respondents by paragraph 19 of their Statement of Claim claimed the difference between this price and the market price of such yarn as at 31st July 1973, namely, H.K.$3,325 per bale. In evidence the Respondents proved a market price of
p. 46 l. 10 H.K.$3,300 per bale of yarn in August 1973. They also proved that
p. 75 l. 3 the price of yarn in Hong Kong began to fall round about September 1973 and continued to fall until January 1975.

p. 46 l. 18 (*j*) No other evidence was given as to market price beyond 23rd August 1973 and Counsel for the Respondents stated that he did not consider evidence as to later market prices relevant.

5. In evidence given on behalf of the Respondents it was stated that
p. 58 l. 30 the Appellants had from the latter part of 1971 onward failed to supply all the quantities requested by the Respondents and that because of this the Respondents had purchased yarn elsewhere. In particular the Respondents
p. 245 purchased 40,000 lbs. of yarn (being 100 bales) on 30th May 1973 at
p. 111 l. 35 ff H.K.$2,400 per bale of 400 lbs.

6. The Learned Chief Justice at first instance was asked by the Respondents to assess damages by reference to the difference between the contract price of H.K.$1,335 and the market price obtaining on 31st July
p. 191 l. 27 1973, the date of the Appellants' "cancellation". However he accepted a submission that it was the duty of the Respondents to mitigate their damage and that they in fact did so by purchases of yarn. He treated the Respondents' purchase on 30th May 1973 as such mitigation and, based upon this, awarded
p. 192 l. 10 the Respondents damages based on the difference between the price of this purchase, namely, H.K.$2,400 per bale and the contract price of H.K.$1,335 per bale. In this way he arrived at an award of damages of H.K.$451,773 and interest thereon.

p. 197 7. The Respondents by their Respondents' Notice on their cross-appeal to the Full Court contended that the damages should be assessed either by the difference between the market price on 31st July 1973 of H.K.$3,300 and the contract price of H.K.$1,335 for the entire balance undelivered on this date, or by such difference for all except 100 bales, and for such remaining 100 bales by the difference between the contract price of H.K.$1,335 and

the price of H.K.$2,400 at which the Respondents in fact purchased 100 bales on 30th May 1973.

8. On the hearing of the Respondents' cross-appeal the Appellants conceded that the Learned Chief Justice's assessment of damages could not stand. Since by 30th May 1973 there had been neither repudiation nor acceptance thereof, the Respondents' purchase of that date must be irrelevant to the assessment of damages, unless the Appellants' earlier failure to supply all the yarn requested by the Respondents was relied upon as a breach of contract. The Respondents did not so allege. An attempt by the Appellants
p. 199 to make such a case by applying for an amendment of their Defence in the Full Court was not allowed by the Full Court. The Appellants do not now seek to disturb this refusal of leave to amend.

9. The Full Court by a majority consisting of Huggins J. and McMullin J. (Cons J. dissenting) allowed the Respondents' cross-appeal. Both Judges did so by applying the second limb of s.53(3) of the Sale of Goods Ordinance, Cap. 26 of the Laws of Hong Kong, though they arrived at their result by slightly different paths. Both Judges calculated the damages which they awarded to the Respondents by taking the market price on 31st July 1973 (H.K.$3,300) and deducting from this the contract price (H.K.$1,335) and multiplying this difference by the figure of 424.20 being the number of bales contracted to be sold but not delivered by this date.

10. Section 53 of the Sale of Goods Ordinance provides as follows:—

"53. (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."

11. Section 53 of the Hong Kong Sale of Goods Ordinance is identical in terms with Section 51 of the English Sale of Goods Act, 1893 save for
p. 222 l. 10-42 the addition in sub-section 53(3) of the words "neglect or". It is respectfully
p. 227 l. 17-20 submitted that McMullin and Cons JJ. are correct in holding that these additional words make no difference and that Huggins J. is wrong in law in holding otherwise.

12. The Appellants submit, however, that whatever may be the true meaning of the second limb of Section 53(3) of the Sale of Goods Ordinance, the Respondents' damages cannot in law be assessed by reference to the 31st

July 1973, nor is their assessment governed by the second limb of Section 53(3).

13. Both the Learned Chief Justice and the Full Court appear to have treated the Appellants as being in anticipatory breach on 31st July 1973 by reason of the Appellants' letter of that date. They treated this as a "refusal" within the meaning of the second limb of Section 53(3). However the Respondents' own evidence showed clearly that the Respondents did not accept that repudiation at the time (and they do not so plead), but on the contrary the Respondents sought to hold the Appellants to the contract. Nevertheless by their Statement of Claim the Respondents pleaded, and at the trial and on appeal they relied solely on, repudiation on 31st July 1973. A repudiation not accepted is of no effect in law. See for example Heyman v Darwins Ltd. [1942] A.C. 356 at pp.361 and 396. The Respondents' writ or its service must no doubt be treated as an acceptance of the Appellants' continued repudiatory conduct. That writ was, however, only issued and served on 28th November 1973. There was nothing prior to this which could have constituted or was relied upon as acceptance of the Appellants' repudiation. Consequently the contract was repudiated at earliest on 28th November 1973 and not before and there could in any event be no earlier liability on the part of the Appellants for damages.

p. 85 l. 20-24 and letters p. 242 and 244

14. Until at least that date the Appellants were under a continuing obligation to make deliveries to the Respondents as and when required to do so by the Respondents. It must be implied in this that the Appellants were entitled to reasonable notice of the Respondents' requirements. What such reasonable notice might be would depend on the quantity required. If the Respondents wished the entire balance delivered at once it is submitted that reasonable notice would be at least one month. That this was the requisite minimum notice was indeed admitted in the Respondents' evidence. Consequently the earliest date at which the Respondents could have called on the Appellants to deliver the entire contractual balance would have been one month after 28th November 1973, *i.e.* 28th December 1973. This, therefore, is the earliest date upon which the goods ought to have been delivered and is therefore the earliest correct date in accordance with Section 53 at which to calculate the difference between the market price and the current price of the goods not delivered. There was no refusal to deliver relevant to any assessment of damages in this case since the accepted repudiation absolved the Appellants from any duty to deliver and replaced this by a duty to pay damages.

p. 91 l. 27 to p. 92 l. 22

15. The above accords with the unanimous judgments of all the Judges in Millett v Van Heek [1920] 3 K.B. 535 (Bray J. and Salter J.) and [1921] 2 K.B. 369 (Bankes, Warrington and Atkin L.JJ.) who all held (after full argument) that the latter part of Section 51(3) of the Sale of Goods Act (and therefore the latter part of s.53(3) of the Hong Kong Ordinance) had no application to anticipatory breach. It also accords with the authorities prior to the passing of the Sale of Goods Act 1893 such as Frost v Knight (1872) L.R. 7 Ex. 111 at p.112 per Cockburn C.J., Brown v Muller (1872)

L.R. 7 Ex. 319 at 323 per Kelly C.B. and Roper v Johnson (1873) L.R. 8 C.P. 167 at 180 per Brett J., and with the statement of the law in Melachrino v Nicholl [1920] 1 K.B. 693 at pp.697 and 699 since the passing of that Act. To adapt the words of Brett J. in Roper v Johnson (supra) "the election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages . . . when you come to estimate the damages, it must be by the difference between the contract-price and the market-price at the day or days appointed for performance, and not at the time of breach." It also accords with the recent exposition of the law by Lord Pearson in the House of Lords in Garnac Grain Co. Inc. v H.M.F. Faure & Fairclough [1968] A.C. 1130 at p.1140 with which exposition the remainder of their Lordships agreed.

16. The suggestion is made in the Judgments under appeal that Millett v Van Heek (supra) is not consistent with Hartley v Hymans [1920] 3 K.B. 475 at p.496. It does not appear whether the point was there argued. It is at least possible that this was not the case in view of the fact (*a*) that the quantum of damages was agreed and (*b*) that Mr. Cyril Atkinson K.C. (as he then was) appeared for the Plaintiffs in Hartley v Hymans and also appeared in Millett v Van Heek for the Defendants. Millett v Van Heek was heard by the Divisional Court on 21st and 22nd July 1920. The Judgment in Hartley v Hymans was given on 30th June 1920. Yet Mr. Atkinson does not appear to have supported his argument by any reference to Hartley v Hymans either before the Divisional Court or in the Court of Appeal. It seems unlikely that he would not have done so if it had been open to him so to do. Furthermore none of the earlier cases cited in the preceding paragraph appear to have been cited to McCardie J. in Hartley v Hymans. McCardie J. appears to have relied in support of his view solely on the decision of the Court of the Exchequer Chamber in Tyers v Rosedale and Ferryhill Iron Co. (1875) L.R. 10 Ex. 195. This case, however, is not an authority on the point, for it is plain that the defaulting sellers in that case expressly took no objection to having the damages assessed as at December 1871 and that they did so because such an assessment was advantageous to them. See the statement by Herschell Q.C. for the Defendant sellers at p.197 and the judgments of Cockburn C.J., Blackburn J. and Brett J. It is true that Martin B. in the course of a dissenting Judgment in the Court below, (1873) L.R. 8 Ex. 305 at 319, expressed a view contrary to that for which the Appellants contend, but it is submitted that Martin B. was wrong in this and indeed himself agreed that the law was otherwise in Brown v Muller (1872) L.R. 7 Ex. 319 at p.323. It is respectfully submitted that Hartley v Hymans cannot be treated as a persuasive authority against the above submissions.

17. To hold the contrary (as the Full Court have done) would mean that a seller who refuses to deliver goods before the time for delivery has arrived can effectively impose an anticipatory breach upon his buyer on any date of his choosing simply by announcing in advance and unilaterally that

when the date comes he will not make delivery. It would, on this view of the law, be idle for the buyer to decline to accept the repudiation and to seek to hold the seller to his contract, for on this view the damages would nevertheless be fixed irreversibly by reference to the market price on the date of the seller's announcement, *i.e.* his refusal. Yet it is clear law that a buyer may at his election either accept a repudiation or hold the repudiating party to the contract and that if he does the latter the contract remains alive for all purposes and the repudiation is of no effect. A repudiation not accepted is not a breach of contract and gives rise to no damages. Hence in the present case the 31st July 1973 is an irrelevant date for the assessment of damages and to have regard to market value on that date, as the Full Court did, is in any event wrong.

18. The Respondents elected to lead no evidence of market value on
p. 46 l. 18 any material date. The onus of doing so was on them. In these circumstances the Appellants respectfully submit that the Respondents' claim must be limited to nominal damages.

19. Even if, contrary to the submission of the Appellants, it were right to have regard in assessing damages to the date of breach rather than the date when performance should have been made, that date in the present case cannot be earlier than 28th November 1973 for before this there was no acceptance of the Appellants' repudiation but on the contrary a refusal
p. 242 and on the part of the Respondents so to do and a deliberate holding of the
p. 244 Appellants to their contract. There was no evidence what the market price was on 28th November 1973, though there was evidence that it was lower
p. 75 l. 3 than in August 1973. Since the Full Court arrived at their assessment by reference to the market price on 31st July 1973, their order must in any event
p. 224 l. 10 be wrong and, as McMullin J. himself accepted, the Respondents' cross-appeal ought to have been dismissed.

20. Although both the Learned Chief Justice and the Full Court treated this case as one of anticipatory breach and although it was so presented by the Respondents throughout, it might be possible to regard it as a case of actual breach. This could only be done if one were to treat the Respondents'
p. 240 letter of 21st July 1973 with its "earnest request to deliver . . . daily at least 4 bales . . . starting from 26th" July 1973 as a call for such deliveries and as thereby fixing such daily deliveries as contractual delivery dates. In that event delivery would have become contractually due daily at the rate of 4 bales from 26th July 1973 until such date as would have exhausted the undelivered balance of 424.20 bales, *i.e.* 106 days later on 8th November 1973. This is before there was any acceptance of the alleged repudiation. The result would be that on each of these days the Appellants committed an actual breach of contract by failing to deliver 4 bales (except on the last day when the failure would relate to 2.20 bales). The Appellants' liability on this basis would be one which would depend on the market price on each of these days. It would fall to be computed by the difference between the contract price and the daily market price of 4 bales on each of these days. The above would accord with what was laid down as being the law in Brown v Muller (1872) L.R. 7 Ex. 319 and Roper v Johnson (1873) L.R. 8 C.P. 167.

21. However, in the submission of the Appellants it would be wrong now to decide the case on this basis since (*a*) it was not so pleaded by the
p. 228 l. 10 Respondents, and (*b*) was never suggested by them. On this issue it is submitted that Cons J. was plainly right. Further (*c*) the Respondents in
p. 91, 92 evidence by Mr. Mui accepted that they had to give at least 1 month's notice for whatever quantity of goods they required and the letter of 21st July 1973 only gave at most five days. The Appellants have never been able to investigate or to meet such a case and in particular have never had an opportunity of submitting (and if necessary leading evidence) that the letter of 21st July 1973 did not constitute reasonable notice and of considering whether (on the assumption that despite Mr. Mui's admission it did constitute reasonable notice) the Respondents could be said to have been in breach of their duty to mitigate damages and, if so advised, pleading and (after proper discovery) alleging this.

22. If nevertheless this Honourable Court should hold that the above is the correct view of this case, the Appellants submit that by reason of the
p. 46 l. 18 Respondents' aforesaid election the only evidence as to market price before the Court related to August 1973. The Court has no evidence as to what happened to the market in September, October and November 1973, save
p. 75 l. 1-9 that the Respondents' Miss Mui conceded that from September 1973 the price of yarn in Hong Kong kept falling until the date of the trial. Nor does it know what if any purchases were made by the Respondents to replace the quantities not delivered in these months. It is therefore impossible to say what, if any, damage the Respondents might have suffered. The onus of proving damage and the quantum of this was throughout on the Respondents. In the Appellants' submission the Respondents have failed to discharge this onus and have put no or no sufficient material before the Court upon which their damages on the above basis (if any) could be assessed. Accordingly the Appellants submit that on this alternative basis also the Respondents would be limited to the recovery of nominal damages.

23. The Appellants accordingly respectfully submit that the Order of the Full Court allowing the Respondents' cross-appeal from the Order of Briggs C.J. should be set aside; and that likewise the order of Briggs C.J. should be set aside; and that judgment should be entered for the Appellants herein alternatively should be entered for the Respondents for nominal damages only; and that the Respondents should in any event be ordered to pay the costs of this Appeal and of all costs below, for the following amongst other

REASONS

(1) That the repudiation by the Appellants constituted by their letter of 31st July 1973 was not accepted until issue of the Respondents' writ on 28th November 1973;

(2) That accordingly there was no neglect or refusal or failure to deliver prior to 28th November 1973 at earliest;

(3) That accordingly the contract remained in being until at least immediately before 28th November 1973 and the Appellants remained under a duty to deliver until on that date at earliest when the Respondents accepted the Appellants' repudiation and thereby put the Appellants in anticipatory breach;

(4) That damages in such a case fall to be calculated by the difference between the contract price and the market price at the time when delivery should have been made, which, on the facts found and to be assumed in this case would not be before the end of December 1973 at the earliest;

(5) That the Respondents elected to call no evidence of market price later than August 1973 and accordingly have failed to prove any damage;

(6) That in the only possible alternative the Appellants were under a duty to deliver 424.20 bales at a daily rate of 4 bales from 26th July 1973 to 8th November 1973 and failed to do so;

(7) That accordingly the damages for failure to deliver must be calculated for 4 bales on each of these days at the difference between the contract price and market price obtaining on such day, but that again the Respondents elected to call no or no sufficient evidence as to this;

(8) That in any event, as the Respondents neither pleaded their case on the above alternative basis nor sought to argue it on such basis, and as the letter of 21st July 1973 did not constitute adequate notice, it is not now open to the Respondents to claim damages on such basis;

(9) That the majority of the Full Court were wrong in law in holding that the second limb of Section 53(3) of the Sale of Goods Ordinance of Hong Kong applied to cases of anticipatory breach and should be reversed;

(10) That Cons J. was right in law in wishing to dismiss the Respondents' cross-appeal; and

(11) That the assessment of damages by Briggs C.J. was wrong in law and in fact, and conceded to be so by the Respondents.

Dated the 18th day of November, 1976.

JOHN WILMERS
BROOK BERNACCHI
MARTIN LEE
Counsel for the Appellants.

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and

KAMSING KNITTING FACTORY
(a firm)
Respondents

CASE FOR THE APPELLANTS

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