Privy Council Appeal No. 57 of 1994

Haneet Chandru Vaswani *Appellant*

v.

Italian Motors (Sales & Services) Limited *Respondents*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.
Delivered the 12th December 1995

Present at the hearing:-

Lord Jauncey of Tullichettle
Lord Woolf
Lord Lloyd of Berwick
Lord Steyn
Lord Hoffmann

*[Delivered by **Lord Woolf**]*

This appeal involves a dispute as to the return of a deposit paid on an abortive sale of a Ferrari motor car. The deposit was paid by the appellant to the respondents, who were the sole distributors in Hong Kong of Ferrari cars, for the purchase of a model which is called a Ferrari Testarossa.

The contract for the sale was made in writing and dated 1st May 1989. The price was £179,500. The appellant was a young man and the transaction was handled by his father on his behalf. It is not necessary for the purpose of this appeal to distinguish between the appellant and his father and in this judgment "the appellant" will be used to refer collectively to them.

The car had to be specially ordered and the deposit was 25% of the purchase price (£44,875). At that time £179,500 was the price shown in the respondents' price list for this type of car. The respondents refused to give the appellant a discount on that price

because, as they explained in a fax of 20th April 1989, the car would be built to his order and the same car was being offered "ex London" at £190,000, which would "make our offer to you look very attractive!!".

By the beginning of June 1990 the car was ready for delivery. The respondents requested payment of the balance of the purchase price. They calculated this as amounting to £168,141.66. That figure was based on an increased sale price of £218,800. Initially, the appellant did not question the increase in price, but he was clearly unenthusiastic about completing the transaction. It was suggested his plans had changed and he was no longer returning to live in Hong Kong. The respondents insisted on the transaction proceeding. They did, however, offer to assist in reselling the car after it had been paid for and registered. In addition the appellant was offered for a limited period a discount, but this offer was not accepted.

On 4th July 1990, the appellant asked whether the increase amounted to "15% the factory increase and the rest increase in road tax?". The following day an explanation was given which referred to two increases, the first of 10.5% and the second of 4.7% and attributed the balance of the increase to a change in the rate of tax. The explanation did not expressly answer the question whether changes were a "factory increase".

The appellant gave assurances that he would complete the sale, but these were not kept. By a fax of 6th July 1990 the respondents gave notice that unless completion took place on 10th July 1990, the respondents would treat the contract as at end and they would forfeit the deposit. Despite an assurance by the appellant that the balance would be paid on the morning of 10th July no further payment was made and his then solicitors were informed by the respondents' solicitors on 10th July that the deposit was forfeited, that their clients were proceeding with disposal of the vehicle and the appellant would be liable for any loss that the respondents suffered.

The appellant then changed his solicitors and it was his new solicitors who for the first time challenged the right of the respondents to receive the sum which they had demanded. Correspondence between the solicitors followed but the dispute not having been resolved the appellant commenced proceedings in Hong Kong for the return of his deposit. He alleged misrepresentation and repudiation.

The respondents originally counterclaimed to recover the damages which they alleged they had suffered as a result of their resale of the car. At the trial this counterclaim was disposed of by

an agreement between the counsel who were then appearing on behalf of the parties. The agreement was that the counterclaim would not be relied on in return for the appellant conceding that if he did not succeed on the allegations of misrepresentation or repudiation, the respondents were entitled to retain the deposit.

On 12th July 1993, the trial judge, Deputy Judge Gould, rejected the appellant's allegations of misrepresentation and this part of his decision has not been challenged. The judge, however, decided the issue of repudiation in the appellant's favour and ordered the return of the deposit. The Court of Appeal allowed the respondents' appeal. The three members of the court were agreed that on the correct interpretation of the contract the respondents were entitled to charge the increased price which they had claimed from the appellant. In addition Penlington J.A. decided that, even if the respondents were in error in claiming the increase, the error as to the price was made *bona fide*, it did not adversely affect the appellant and it did not amount to a repudiation of the contract.

On this appeal two issues have to be considered. The first is whether the respondents were entitled to insist on payment of the increased price for the car. This issue turns on the proper construction of the contract. The second issue is whether the respondents repudiated the contract. The second issue only arises if the appellant succeeds on the first issue. The appellant contends that, by demanding payment of a sum in excess of that to which they were entitled, their subsequent forfeiture of the deposit and resale of the car, the respondents repudiated the contract of sale and this repudiation was accepted by the appellant.

Mr. Goldsmith (who did not appear in the courts below) argued a third point on behalf of the appellant. This point was that the respondents were not entitled, even if the appellant was wrong as to the construction of the contract, to forfeit the deposit. This contention was based on the language of the relevant terms of the contract. Mr. Sumption (who also did not appear in the courts below) contended that it was not open to the appellant to take this point because of the agreement reached by counsel during the hearing before Gould D.J. Their Lordships accept that Mr. Sumption's contention is correct. Mr. Goldsmith is not entitled to rely on this argument which, in view of their Lordships' conclusions on the arguments which were open to Mr. Goldsmith, was in any event unlikely to assist the appellant.

The Construction Issue

In order to answer the construction issue it is necessary to refer to a number of the terms of the contract. They are set out on the respondents' standard sales form which was used for the contract. This is a single page document. On the back of the document are the majority of the standard terms. On the face of the document various details of the contract have been inserted. After the printed word "Price" there is typed:-

> "Sterling £179,500 at contract signing, subject to clause noted hereunder. (Inclusive of first registration tax at prevailing 90% rate)."

Below these words there is the following important clause printed in red:-

> "(The price appearing upon this document is based upon the manufacturer's current price, specification and present freight and exchange rates. The price is subject to adjustment should there be any change in the manufacturer's current price or freight rates prior to shipment or should there be any change in exchange rates prior to delivery or in any of the other cases set out in Condition 4 and 5 on the reverse hereof and the price ruling at the date of delivery will be invoiced.)"

This clause read literally firstly explains on what the price of £179,500 is "based". It then identifies the different circumstances which will trigger the sellers' right to adjust that price and finally and critically it identifies the adjusted price as being "the price ruling at the date of delivery".

At the foot of the front page there also appears in red print "Notes", which are in the following terms:-

> "This Contract, (and the relative Hire Purchase Agreement, if any) is the sole basis and evidence of the transaction referred to herein. No verbal qualification of any kind will be recognised. Customers are therefore requested, in their own interests, to satisfy themselves, before signature, that the terms of Contract and the conditions governing this sale, which are detailed on the back of this Contract, are in accordance with their wishes. Alterations cannot be made thereafter."

Of the conditions on "the back of this Contract" it is here necessary to set out conditions 4 and 5:-

"4.(a) If, for any reason whatsoever, the manufacturers should make any changes in their specifications or models or should discontinue the production of the model/s sold under this contract so that the Sellers are unable to make delivery thereof, the Sellers shall not thereby incur any liability to the Buyer but shall, in any such case, deliver to the Buyer the current model/s closest in line to the model ordered which is available for delivery in Hong Kong and the Buyer shall be bound to take delivery and to pay the purchase price for the new model (including any increase by reason of an increase in the manufacturer's price or other circumstances referred to in Condition 5 hereof) provided that the total price for the model delivered shall not be more than 15% higher than the price specified on the face of this contract.

(b) Discontinuance by the manufacturer of production of the model ordered shall not operate to terminate the contract or give the Buyer any right of rescission if the Sellers are able to make delivery of the model ordered and the Buyer shall be obligated to accept delivery of the model ordered on the terms and conditions hereof notwithstanding such discontinuance and/or the introduction of a new model.

(c) If the manufacturers should make any changes in their specifications or models or should discontinue production of the model ordered and the Seller is unable to make delivery of the model ordered or another available model which is close in line thereto, this Contract shall be cancelled and the deposit shall be refunded to the buyer without interest, costs or compensation.

5. In the event of war, war-like operations, civil commotion, strikes, floods, currency exchange fluctuations or any other circumstances beyond the control of the Sellers resulting in changes in the cost to the Seller of the goods, ready for delivery in Hong Kong, the Seller shall be entitled to adjust the price to reflect the amount of all such changes."

The difference between the parties is principally as to the meaning to be given to the words "price ruling at the date of delivery" in the clause printed in red. The interpretation of the Court of Appeal, supported by Mr. Sumption, is that these words refer to the respondents' sellers' list price at the date of delivery, which is the £218,800 the respondents required the appellant to pay. Mr. Goldsmith, on the other hand, supports the interpretation adopted by the trial judge. This is that these words only allowed the respondents to pass on any increase in

cost to which they have been subject which is referred to in conditions 4 and 5 and possibly the red printed clause. On the evidence before the judge on the appellant's interpretation the price should have only been increased by £22,127 instead of the £39,300 increase claimed by the respondents.

As Godfrey J.A. points out this contract is not felicitously drafted. Both the rival interpretations give rise to difficulties. The form may have been adapted from one or more standard contracts intended for use on the sale of more popular vehicles. However, the approach of the Court of Appeal, when applied to the specialist and extremely expensive and exclusive car which is the subject of this contract, produces results which it is unlikely the parties could have intended. It gives the respondents, who, even though they were sole agents in Hong Kong, would sell very few of these cars during any one period, a remarkably extensive power to adjust their profit margin in a quite arbitrary manner.

The respondents are in a totally different situation from a manufacturer or concessionaires or agents dealing with a mass produced car. In the case of this exotic vehicle the respondents would not issue a price list which would have wide general application. This is a situation where the price list could be set at a level which would favour an individual transaction. The situation is unlike that which exists with the general marketing of a popular mass produced vehicle where it is necessary to market the car at a list price which is competitive and could apply to a large number of sales.

While the respondents were found to be acting in a *bona fide* manner, this does not alter the fact that on their interpretation of the contract, if they had wanted to, they could have increased the price in the list quite arbitrarily without running any real risk of adversely affecting any other sale.

The respondents' interpretation involves there being a conflict between the red printed clause and condition 4(a). This is because it results in the ceiling of 15% which that condition imposes not having any application, even when the cause of the increase is one to which the ceiling expressly applies. It is also in conflict with the ordinary meaning of the concluding words of condition 5 which restrict the right to adjust the price so as to "reflect the amount" of the specified changes to which the condition refers. In addition, if the adjustment was to be governed by "the price ruling at the date of delivery" in a price list issued by the respondents, what was the purpose of setting out in the red printed clause the manner in which the original price had been calculated and the triggering events which refer to conditions 4 and 5? It would suffice to set out that the adjusted price was to apply.

Their Lordships therefore reject the respondents' and the Court of Appeal's interpretation. The respondents were not entitled to demand an increase based on their price list at the date of delivery whatever the circumstances. In general they were limited to increasing the price in accordance with conditions 4 and 5 so that it reflected the increases in costs to which they had themselves been subjected by the circumstances identified in the red printed clause or conditions 4 or 5.

The Repudiation Issue

It is therefore necessary to consider the second issue. There are here features of this case which make this issue by no means straightforward. There is the fact that the respondents were acting *bona fide* in seeking the higher price although they did not initially put forward the claim on the basis that the price in their price list was conclusive under the contract. The other feature is that it appears to be reasonably clear that even if the respondents had demanded the correct balance of the purchase price this would not have been paid by the appellant.

The respondents were given the right to forfeit the deposit under condition 8 which is in these terms:-

> "8. If after having been notified by the Sellers of their readiness to deliver the goods the buyers fails (a) in the case of a cash transaction to pay for goods within seven (7) days, or (b) in the case of a deferred terms transaction to comply with Clause 3 above within seven (7) days, the Sellers shall be entitled to forfeit without notice any deposit paid to them by the Buyer, without prejudice to any other remedy hereunder. In the event of the buyer failing to comply with the clause the sellers shall be at liberty on their own account to sell or otherwise deal with and dispose of the goods in such manner as they may deem fit and the buyer shall be liable for all losses and expenses that the sellers may incur thereby."

If the respondents had demanded the payment of the correct sum then they would have had the right to forfeit the deposit and resell the car. The respondents having demanded a sum in excess of that due their primary argument is based on the proposition that it does not amount to a repudiation of a contract to assert a genuinely held but erroneous view as to the effect of the contract. That this can be the position is good sense and already subject to considerable judicial support. The position is accurately set out by Lord Wilberforce in *Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.* [1980] 1 W.L.R. 277 at page 283, where he also warned that:-

"Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations."

While therefore here the request for the payment of an excessive price would not in itself amount to a repudiation, if the conduct relied on went beyond the assertion of a genuinely held view of the effect of the contract the conduct could amount to a repudiation. This is the position if the conduct is inconsistent with the continuance of the contract. Then the *bona fide* motives of the party responsible do not prevent the conduct being repudiatory. Again the position is clearly expressed by Lord Wilberforce, this time in a case concerning a charter party, *Federal Commerce and Navigation Co. Ltd. v. Molena Alpha Inc.* [1979] A.C. 757. At page 780 Lord Wilberforce, having described how the owners subjected the charterers to irresistible pressure to pay over sums of money that the charterers had deducted pending the outcome of an arbitration, states the position in these terms:-

"It is thirdly irrelevant that it was in the owners' real interest to continue the charters rather than to put an end to them. If a party's conduct is such as to amount to a threatened repudiatory breach, his subjective desire to maintain the contract cannot prevent the other party from drawing the consequences of his actions. The two cases relied on by the appellants (*James Shaffer Ltd. v. Findlay Durham & Brodie* [1953] 1 W.L.R. 106 and *Sweet & Maxwell Ltd. v. Universal News Services Ltd.* [1964] 2 Q.B. 699) do not support a contrary proposition, and would only be relevant here if the owners' action had been confined to asserting their own view - possibly erroneous - as to the effect of the contract. They went, in fact, far beyond this when they threatened a breach of the contract with serious consequences."

Nor is conduct, if it is repudiatory, excused because it occurs in consequence of legal advice as may be the case with the respondents' actions in this case. The position is correctly set out by Lord Denning M.R. in the *Federal Commerce* case in the Court of Appeal [1978] Q.B. 927 at page 979 in a passage of his judgment cited by Lord Scarman in *Woodar Ltd.* at page 298, which is in these terms:-

"...I have yet to learn that a party who breaks a contract can excuse himself by saying that he did it on the advice of his lawyers: or that he was under an honest misapprehension...I would go by the principle...that if the party's conduct" "contract" must be a misprint " - objectively considered in its impact on the other party - is such as to evince an intention no longer to be bound by his contractual obligations, then it is open to the other party to accept his

repudiation and treat the contract as discharged from that time onwards."

In this case while the respondents did indicate to the appellant that he should pay a sum which was excessive or the deposit would be forfeited they never went so far as to indicate to the appellant that it would be purposeless to pay the correct sum as required by condition 8. This was not therefore a case like *The Norway* (1865) 3 Moo. P.C.C.N.S. 245 where the respondents had made it clear that it was pointless to tender a lesser sum. All they had done was to put forward their calculation which had gone unchallenged. There was nothing to prevent the appellant paying the sum he calculated was due. Until he at least tendered the sum he considered was due the respondents were not required to deliver the vehicle. However in fact the appellant never called for delivery by the respondents. This was no doubt because he had made no further payment and never intended to attempt to test their willingness to deliver. The respondents did not threaten "a breach of the contract with serious consequences" as in *Federal Commerce & Navigation Co. Ltd. v Molena Alpha Inc.* [1979] A.C. 757 and there was no conduct by them which was totally inconsistent with the continuance of the contract until after the appellant had made it clear that he was not going to make any further payment. This being the situation their Lordships are of the opinion the respondents did not repudiate the contract.

The appellant's solicitors complained that a notice of readiness had not been sent by registered post in accordance with condition 21 of the contract but this was clearly a bad point since condition 21 is merely permissive. The condition states that a notice will be deemed to have been duly given if sent by registered post. The condition does not say that it has to be so given. The fact that the respondents then responded by personally giving a notice on 11th July by registered post does not alter the situation. Neither party by that time was contemplating the delivery of the car. Their concern was with the deposit.

The remaining submission of Mr. Sumption was that if the respondents' conduct was repudiatory it was never accepted by the appellant. However this point does not arise for consideration by their Lordships in view of their conclusion as to the non-repudiatory nature of the respondents' conduct prior to 10th July. After that date the appellant's new solicitors did challenge the price which had been claimed but this was too late. By then the respondents had, as they were entitled to, treated the contract as terminated.

As the appellant has failed both on his claim for misrepresentation, at first instance, and for these reasons on repudiation before their Lordships, their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellant must pay the respondents' costs before their Lordships' Board.