

Metro Meat Limited

Appellant

v.

1. Fares Rural Co. Pty. Limited
2. Rachid Fares

Respondents

(and Cross Appeal)

FROM

THE SUPREME COURT OF WESTERN AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 21ST JANUARY 1985

Present at the Hearing:

LORD SCARMAN

LORD DIPLOCK

LORD ROSKILL

LORD BRIGHTMAN

SIR DENYS BUCKLEY

[Delivered by Lord Diplock]

This appeal and cross-appeal from the Supreme Court of Western Australia (Olney J.), arises out of an oral contract for the sale by instalments by Metro Meat Ltd ("the sellers") to Fares Rural Co. Pty. Ltd. ("the buyers") of a quantity of frozen sheep meat of which three-fifths was to be lamb and two-fifths hoggets ("the carcasses"), free along side vessel ("F.A.S.") at one or two ports, Adelaide/Fremantle, for shipment to Bandar Shahpour in Iran. The main issue in the appeal is whether the sellers in April 1980 committed an anticipatory breach of this contract which justified the buyers in treating it as rescinded and claiming damages on that basis; but there were subsidiary issues as to payments due by the buyers to the sellers before the date of the rescission.

The oral contract was made on 2nd July 1979 in a telephone conversation between Mr. Fares on behalf of the buyers and Mr. Dingwall on behalf of the sellers. There was a dispute before the trial judge as to whether Mr. Fares was contracting as agent for the buyers, or as principal on his own behalf as

contended by the sellers. Olney J. decided this issue against the sellers; and, although it figured in the sellers' written case on their appeal to this Board, it was abandoned at the oral hearing. There was likewise a dispute before the learned judge as to the quantity of carcasses to be delivered by the sellers to the buyers under the oral contract. His finding that the quantity was 20,000 tonnes with a tolerance of ten per cent more or less at sellers' option and not, as the buyers claimed 22,000 tonnes, was strongly challenged in the cross-appeal to this Board by the buyers; but in their Lordships' view that challenge fails.

The background to these disputes is that on 2nd July 1979, when Mr. Dingwall made the oral contract on behalf of the sellers, he was well aware that the carcasses were required by the buyers to enable Mr. Fares (their managing director and major shareholder) to perform a matching contract ("the matching contract") which he had negotiated, but not yet signed, with the Iranian Meat Organisation ("the I.M.O.") which had a monopoly for the import of meat into Iran. Under the matching contract, which was backed by a performance bond to the amount of US\$4 million, Mr. Fares personally undertook to sell to the I.M.O. 20,000 tonnes of carcasses, (10% more or less at sellers' option) cost and freight ("C. and F.") Bandar Shahpour. The sellers had themselves also done business direct with the I.M.O. and were familiar with the fact that the standard terms as to quantities, upon which the I.M.O. entered into contracts for the purchase of imported meat, provided for a tolerance of 10% more or less at sellers' option. The effect of such a tolerance in a contract for 20,000 tonnes is that the seller's *obligation* to deliver is limited to 18,000 tonnes, though he has an option to deliver up to 22,000 tonnes; while the buyer's *obligation* to accept delivery extends to 22,000 tonnes, though he has no right to require delivery of more than 18,000 tonnes.

A contract for the sale of goods for export on F.A.S. terms, more particularly when it provides for delivery by instalments from more than one port of shipment, calls for co-operation between the buyer and the seller in arranging a loading and shipping schedule so as to accommodate it to the reasonable business interests of each party. Olney J., in the very useful summary of the decisions on the various issues raised between the parties with which he prefaces his judgment, speaks of the contractual requirement for the parties to act in co-operation on these matters as arising "by custom and usage". Their Lordships doubt whether the ascription of this term of the contract to "custom and usage" is technically correct. It is a term which, in the absence of express and detailed provision for these

matters in the contract, must needs be implied to give business efficacy to the transaction.

The shipping schedule, as eventually fixed, provided for five shipments by consecutive voyages in a single vessel chartered by the buyers from the Blue Star line, the Almeria Star. The parties did in fact co-operate in the shipping arrangements for the first three instalments totalling 10,843 tonnes which took place in September and November 1979 and January/February 1980 respectively. The sellers however refused to co-operate in shipping the two remaining instalments needed to bring the total tonnage up to 18,000 tonnes, which was the minimum quantity that the sellers were obliged to deliver to the buyers F.A.S. under the oral contract of 2nd July 1979, and that corresponded with the minimum quantity that Mr. Fares was himself obliged to deliver to the I.M.O. under the matching contract. It was this refusal that was relied upon by the buyers as an anticipatory breach entitling them to rescind the contract. This the buyers elected to do; and their right so to elect was upheld by the learned judge. His finding on the rescission issue is the subject of the sellers' appeal to this Board.

It may not be without significance to observe that by the beginning of 1980 the market price of frozen lamb and hoggets had risen; so it was to the sellers' business advantage to find excuses for getting out of their contract or, as Mr. Dingwall put it "re-negotiating the price" of the remaining instalments. The excuses relied upon involved subsidiary issues, to two of which it is necessary for their Lordships to advert because they figured in the buyers' cross-appeal to the Board.

In the conversation on 2nd July 1979 between Mr. Dingwall and Mr. Fares at which the oral contract was made there was some hard bargaining over prices. As the buyers had bought goods F.A.S. for sale C. and F. by Mr. Fares under the matching contract, the profitability of the latter contract was dependent upon keeping the charges incurred for freight, including demurrage and dead freight, as low as possible.

Conditions at the port of Bandar Shahpour were such that there was risk of considerable delay in unloading and consequently of incurring high charges for demurrage. So far as demurrage was concerned the bargain struck was, as the judge found, correctly recorded in a telex sent by Mr. Fares on the next day to a Mr. Phillips, the sellers' export manager as follows:-

"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 demurrage. Mr. Dingwall accepted a last minute discount on lamb prices."

This discretionary addition to the purchase price was referred to by the learned judge as "the prompt discharge bonus" a nomenclature that their Lordships will adopt.

So far as dead freight was concerned this arose only in connection with the third shipment in January/February 1980. The buyers were anxious to load a complete cargo for the third consecutive voyage of their chartered vessel. The sellers were unable to deliver a complete cargo of carcasses of their own manufacture. Before the trial judge it was a matter of dispute as to how far, (if at all), the shortage fell short of the sellers' contractual obligation as respects that instalment to deliver carcasses alongside the vessel at Adelaide and/or Fremantle but unless additional carcasses were loaded a liability for dead freight would be incurred. There was available on the market at Fremantle from the Western Australia Lamb Marketing Board ("the W.A.L.M.B.") 843 tonnes of lamb at a price which on the rising market was substantially higher than the price payable by the buyers to the sellers under the contract of 2nd July 1979. The trial judge found as a fact that, in a telephone conversation between Mr. Dingwall and Mr. Fares early in January 1980, it was agreed that if the sellers would buy and deliver alongside the vessel the 843 tonnes from the W.A.L.M.B. the buyers would pay to the sellers an additional US\$125 per tonne for the tonnage so delivered. This was referred to by Olney J. as "the W.A.L.M.B. subsidy".

It is convenient at this point to list the various issues that were decided by the learned judge and on which the losers, whether they were the buyers or the sellers, have proceeded with an appeal to this Board. These are:-

- (1) whether the contract was an oral contract or was reduced into writing contained in various telexes passing between the parties in July 1970 ("the oral contract issue");
- (2) what were the quantities agreed to be supplied under the contract ("the quantities issue");
- (3) what was the agreed delivery schedule ("the delivery schedule issue");
- (4) the prompt delivery bonus issue;
- (5) the W.A.L.M.B. subsidy issue; and

(6) whether the buyers were entitled to elect to treat the contract as rescinded, because of an anticipatory breach of a fundamental term of the contract by the sellers ("the repudiation issue").

Each of these issues, with the possible exception of the repudiation issue, involve what are predominantly questions of fact which depended on the oral evidence of witnesses about telephone conversations which they had with one another and upon numerous telex messages which passed between the parties during the ten months July 1979 to April 1980 while the contract was being performed by both parties. These were very much matters for the trial judge who saw and heard the witnesses examined and cross-examined in the course of a five-day hearing. In his admirably lucid judgment Olney J. followed the helpful pattern of first stating seriatim his findings on each of the issues that had been in dispute at the trial before him. (These, in addition to the six enumerated above, included three others which have not been pursued on this appeal). The initial statement of the conclusions which the judge had reached was followed by a detailed analysis of his reasons for reaching each conclusion. Those analyses incorporated extracts from the evidence both written and oral, and explained the conclusion which he had reached on all relevant conflicts of oral evidence which depended upon his assessment of the credibility of witnesses whom he had seen and heard. Their Lordships have given careful consideration to his analysis and have, in addition at their own request, been referred in chronological order to all contemporary telexes (not confined to those specifically reproduced in Olney J.'s judgment) which, in the view of counsel for either party, were capable of throwing any light upon the terms of the contract or the way in which it was being performed during the relevant period from July 1979 to April 1980. Since these in their Lordships' view have served only to confirm the conclusions to which the judge's own analysis of the evidence had led him and with which their Lordships find themselves in full agreement, they see no need to quote any citations from documents additional to those already included in the judgment appealed from.

It is convenient to take the judge's findings on issues (1), the oral contract issue and (2), the quantities issue, together, since the buyers' criticism of them both was based largely on the contents of two telexes dated respectively 3rd and 19th July 1979 which are set out in the learned judge's judgment. If the judge's finding in their favour on the repudiation issue should be upheld by this Board it would be to the buyers' interest that, for the purpose of assessing their damages for

repudiation the contract quantity which the sellers were contractually obliged to deliver but had failed to do so on a rising market, should be as high as possible. The buyers accordingly sought to rely upon a figure of 22,000 tonnes (viz 20,000 plus 10%) referred to in these telexes as being a fixed contractual tonnage without any tolerances either way.

Their Lordships have already had occasion to mention that on issue (1) Olney J. found that the contract was made orally on 2nd July 1979 in the telephone conversation between Mr. Dingwall and Mr. Fares. He added in his summary of findings that the two telexes relied on by the buyers "do not accurately express the terms agreed nor were they intended to constitute conclusive evidence of the contract". In his finding on issue (2) that the contractual tonnage was 20,000 tonnes with a tolerance of 10% more or less at sellers' option, he referred also to this tolerance as being "by custom and usage" - an expression which here again in the context may not be technically accurate. But, as the judge's later detailed reference to the evidence on this issue shows, there was ample justification in the evidence of the subsequent conduct of the parties for a finding that, in their oral agreement upon 20,000 tonnes as being the amount of goods to be delivered F.A.S. by the sellers, both parties understood and intended this to be subject to a tolerance of 10% more or less at the sellers' option. Their Lordships have already pointed out the effect of such a tolerance on the respective obligations of buyer and seller to give and accept delivery of the goods. It applied not only to the contract of 2nd July 1979 but also to the matching contract. This makes it understandable that, in a context of dealing with the obligation of a party who was buyer under either contract to accept delivery from the seller, it should not be thought inappropriate to use the maximum figure of 22,000 tonnes, whereas in a context of dealing with the obligation of the seller under either contract to make delivery reference to the minimum figure of 18,000 might well occur. Having perused for themselves the relevant telexes, in which quantities are mentioned either in connection with the total quantity of carcasses to be delivered or in connection with individual instalments, their Lordships have no hesitation in upholding the findings of Olney J. on issues (1) and (2).

The judge's finding on issue (3), the delivery schedule issue, that it was ultimately agreed that shipment was to be by five instalments, by consecutive voyages in a single vessel, was not challenged by either party on the appeal to this Board.

Turning to issue (4), the prompt delivery bonus issue, the oral contract of 2nd July 1979, as recorded in the passage from the telex which their Lordships have quoted, included a promise by the buyers to pay a bonus on the price of carcasses comprised in any instalment that was unloaded at Bandar Shahpour in less than 40 days, but left the amount of the bonus on each such shipment to the buyers' discretion. These were terms relating to individual instalments and were collateral to the main contract of sale of 20,000 tonnes. The condition which brought the term into operation was satisfied in respect of each of the first three instalments; it was unloaded in less than 40 days. The learned judge was not concerned, and neither are their Lordships, with the interesting question of what would have been the contractual rights of the parties before the buyers exercised the discretion reserved to them to fix the amount of the bonus. By telex of 19th March 1980 they in fact fixed the bonus in respect of all three shipments that had already been delivered at US\$30 per tonne, and this left as the only remaining relevance of the prompt delivery bonus its effect upon issue (6), the repudiation issue.

Their Lordships need not pause long upon issue (5), the W.A.L.M.B. subsidy. This was, as the learned judge found, a collateral contract made early in January 1980 shortly before the loading of the third shipment began in Adelaide. The judge's finding of fact is not open to challenge before the Board. But it was strenuously argued for the buyers that there was no consideration for the promise, any relevant consideration being in the past. In their Lordships' view this submission cannot be sustained. There was ample consideration since the obligations in relation to the third shipment still remained to be performed in the manner then agreed.

This brings their Lordships to issue (6), the issue of repudiation. Olney J.'s summary of his findings on this issue are:

"By its letter of 24th April 1980 and its subsequent conduct defendant [sc. the sellers] repudiated the contract. Such repudiation was accepted by the contracting plaintiff [sc. the buyers]."

This letter, and one of 21st April 1980 to which it was a reply, are set out in full in the judgment.

In his detailed summary of the evidence upon which this conclusion was based, Olney J. traced the history of the communications between the parties from 13th January 1980, when the Almeria Star was half-way through loading the third shipment at

Adelaide, to the buyers' telex asking for confirmation that the sellers would make the fourth instalment available for shipment between 25th April to 15th May 1980 and the fifth and last shipment between 15th to 30th July. This telex received an evasive reply referring to the likelihood of political sanctions being imposed against the future export of meat from Australia to Iran. The discharge of the third shipment was completed at Bandar Shahpour on 28th February 1980, and about the same time the sellers ceased to produce any more lamb or hoggets to fulfil their contract with the buyers.

Their Lordships do not find it necessary to repeat the learned judge's detailed examination of the communications that passed between the parties after the cessation of production by the sellers and before their letter to the buyers of 24th April 1980 which he held to be an anticipatory breach by the sellers of a fundamental term of the contract. The effect of these communications may be summarised by saying that the attitude of the sellers was that they would not even discuss arrangements for shipment of further instalments of carcasses much less commit themselves to shipping any further carcasses, at the contract price, until they had received payment for the prompt delivery bonus on all three shipments and the W.A.L.M.B. subsidy. The learned judge found, in a finding that was based on Mr. Dingwall's oral evidence, that by the date of the repudiatory letter of 24th April 1980 and probably for some little time before Mr. Dingwall had reached the firm resolve not to proceed with the contract unless he could re-negotiate the price.

Olney J. found that time was not of the essence for payment by the buyers either of the prompt delivery bonus or of the W.A.L.M.B. subsidy on the third shipment. Indeed payment of the former could not be due until the amount had been fixed, and this did not occur until the telex of 19th March 1980 when it was accompanied by an offer of immediate payment provided that the sellers would proceed to perform their contractual obligation to co-operate in making arrangements for shipping the fourth and fifth instalments, the necessity of which, as the sellers were well aware, had become urgent if Mr. Fares was to avoid the risk of forfeiting his US\$4 million performance bond. As regards the W.A.L.M.B. subsidy the earliest date at which this became due was on completion of loading of the third instalment at Fremantle on 5th February 1980, and within six weeks of this immediate payment was offered in the telex 19th March 1980 subject to the proviso already mentioned. Matters came to a climax in the letter by the buyers of 21st April 1980 and the reply by the sellers of 24th April. It was the terms of this letter that the learned judge held made it an

anticipatory breach of a fundamental term of the oral contract of 2nd July 1979, which the buyers treated, as they were entitled to do, as rescinding that contract. From this conclusion, and the judge's reasons for it, their Lordships see no reason to differ.

Their Lordships accordingly, would uphold the decisions of Olney J. on each of the issues which have been the subject of this appeal and cross-appeal to Her Majesty in Council. They will humbly advise Her Majesty that the appeal and cross-appeal should be dismissed and the judgment of the Supreme Court affirmed. There should be no order as to the costs of the proceedings before this Board.





