SUPREME COURT

AKZO CHEMITE G.M.B.H.

v.

M. R. PATEL & COMPANY

[SUPREME COURT (Mishra, J.) 4 January 1979]

Civil Jurisdiction

F. G. Keil for Plaintiff.
G. P. Shankar for the Defendant.

Breach of contract by defendant refusing to complete—no evidence to assist estimation of damages—court makes own calculation.

Plaintiff an exporter of edible oil based in West Germany sued the defendant an importer of oil at Nausori, Fiji, for damages arising out of an alleged breach of contract for sale and purchase of 36 metric tons of edible oil.

The plaintiff's case was that the defendant through its agent Pacific Trading after delivery and acceptance of 6 tons of the said oil, stopped further delivery and refused to accept delivery and complete the contract.

The defendant admitted these allegations but said it was entitled to treat the contract as discharged by breach on the plaintiff's part. The defence was summarised thus—

(a) Time was of the essence.
(b) That it was an express or implied condition that the edible oil was to be of merchantable quality and fit for that purpose.
(c) The defendants were not to bear any price increases.

The trial Judge concluded that when the defendant refused further delivery it did so because of a drop in the market price and that as there was no price increase by the plaintiff, there was no breach on the part of the plaintiff for which defendant could find the contract discharged.

Further the Court stated that as a result the plaintiff was not able to sell the balance of the oil at the price in the contract fixed for it in Fiji but there was no evidence of any sale or any price at which it was or could be sold nor was there any evidence of the profit the plaintiff would have made if the sale of the contract in Fiji had been completed. Nor was there any evidence of any market price in Fiji at the relevant time which might have assisted a calculation or damages. It was the plaintiff's onus to provide this information.

In these circumstances the court sought to arrive at a loss by working out a profit on the sale at such a percentage of profit as would not do injustice to the defendant. The court then made an estimate at what the profit content would have been on the contract price. For reasons stated, it decided on 12½% of contract price.

Held: Judgment for the plaintiff was entered in the sum of D.M. 11,437 at the exchange rate prevailing at the date of judgment with costs.

(Upheld on appeal: 25 July 1979)

Case referred to:
Household Machines v. *Cosmos Exporters* (1947) 1KB 217.

MISHRA. J:

Judgment

Plaintiff is an exporter of edible oil based in West Germany. Defendant is an importer of oil based at Nausori Fiji.

Plaintiff's claim is for damages arising out of an alleged breach of contract for sale and purchase of edible oil.

The relevant part of the statement of claim relating to the alleged breach is as follows:

"4. The Defendants through the Plaintiff's agent in Fiji Pacific Trading Company by order No. 1865 dated 31st October 1974 placed an order with the Plaintiff for the supply and delivery of 36 metric tons of refined deodorized edible soya bean salad oil for shipment and at a price as follows:

6 M.Tons November	74 Shipment at DM 3080 per M. Ton CIFC
10 M.Tons February	75 Shipment at DM3050 per M. Ton CIFC
10 M.Tons March	75 Shipment at DM3050 per M. Ton CIFC
10 M.Tons April	75 Shipment at DM3050 per M. Ton CIFC

5. The said order was confirmed by the Plaintiff.

6. In pursuance of the said contract the Plaintiff, shipped and the Defendants accepted delivery of six (6) metric tons of the said oil in November 1974.

7. The Defendants through the Plaintiff's said agent Pacific Trading Company stopped further delivery of the said order by letter to the Plaintiff dated the 18th January 1975.

8. Despite repeated requests the Defendants have refused to accept delivery and complete the contract for the balance of the said order of oil of 30 metric tons."

The defendant admits these allegations but says that he was entitled to treat the contract as discharged by breach on the plaintiff's part. Paragraphs 2 and 5 of the Defence are formulated thus:

"2.That the defendants admit paragraph 4 of the Statement of Claim but says:

(a) that time was of essence;

(b) that it was an express or implied condition that the edible oil was to be of merchantable quality and fit for that purpose;

(c) that the defendant were not to bear any price increases.

.....

.....

5. That as to paragraph 7 of the Statement of Claim the defendants say that they properly rescinded the order since the plaintiff was in the breach of it as the goods were not supplied in stipulated time and there has been a price increase."

At the trial several documents (Ex. A1 to Ex. A11) were put in evidence by agreement. In addition plaintiff's counsel called two witnesses, Ramesh Patel, who was the plaintiffs agent in Fiji at the relevant time and Veer Chand who represents the plaintiff in Fiji at the present time.

No evidence was led for the Defence.

On the evidence before me I hold that there was a contract for sale and purchase of a fixed quantity of oil at a fixed price over a fixed period, instalments to be delivered in November 1974 and February, March and April 1975. No date was specified for any of the months.

Defendant accepted the delivery of the first consignment of oil of 6 metric tons but, thereafter, advised Ramesh Patel to stop further shipments under the contract. According to this witness there were only two reasons for defendant's action. He said,

"The defendant was overstocked and the price had dropped."

Defendant did not make any complaint about the quality of oil or late delivery. Defendant's own letter to plaintiff (A9) makes it clear that the drop in the market price was the main difficulty as far as the defendant was concerned. Acceptance of further deliveries at contract price would have resulted in considerable loss.

Attempts were made to vary the price but no agreement could be reached. Ramesh Patel stated that generally when an importer requests that further shipments be stopped, exporters would generally accept such cancellation. In cases where this occurred the contract would, of course be discharged. In this case, however, there is clear evidence that plaintiff affirmed the contract and would not accept cancellation.

There was some mention of the Prices and Incomes Board in cross-examination of Ramesh Patel, but I do not think it affects the situation. There was no suggestion that sale of edible oil was ever prohibited by law. Defendant's own letter (Ex A9) shows that what defendant wanted was "competitive price", not "controlled price".

I have, therefore, reached the conclusion that when defendant refused to accept further deliveries he did so for one sole reason, drop in the market price. This was caused, as Ramesh Patel says, by importation of large quantities of similar oil from

cheaper sources. There was no question of quality of oil or time of delivery. There was also no question of a price increase. There was, therefore, no breach on the part of the plaintiff for which defendant could treat the contract as having been discharged.

It was defendant himself who was in breach of the contract because to perform it would have resulted in financial loss. There was refusal on his part to accept delivery.

Plaintiff says that this refusal has resulted in financial loss to him. Paragraph 9 of the statement of claim states:

> "As a result of the said Defendants continued refusal to complete the contract the Plaintiff was forced to sell the said oil and did so on 5th September 1975. Due to the depressed market for such oil the Plaintiff was only able to obtain DM162.00 per metric ton as compared to the contract price between the Plaintiff and Defendants of DM3050.00 per metric ton."

Plaintiff, however, led no evidence of this sale. According to the evidence before me the oil in question was, as a result of defendant's refusal to accept delivery, never shipped to Fiji. Where then was it sold? And at what price? There is no evidence whatever of it.

The only evidence, that of Veer Chand is that, in Fiji, the price of this oil in September 1975 was 2190DM per metric ton. In November 1975 it fell to 2060DM. That is hardly the kind of evidence on which plaintiff's loss can satisfactorily be assessed.

Plaintiff is a dealer in oil in a big way and in 1974—5 had several customers in Fiji. As the learned Author of *Cheshire and Fifoot's Law of Contract* says (9th Edn. p. 598),

> "Where, however, the plaintiff seller is a dealer in the particular goods sold, the position may be different. In such a case what ensues from the breach in the normal course of things is that the plaintiff loses the profit that he would have made, had the sale to the particular buyer been completed, and he is entitled to be recompensed for that loss."

Again, there is no evidence before me to show what profit plaintiff would have made if the contract had been completed. All we have is the agreed purchase price.

In the absence of such evidence it may well be that the plaintiff can rely on section 51(3) of the Sale of Goods Ordinance which states:

> "51(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 of current price at the time or times when the goods ought to have been accepted or, if no time was fixed for acceptance, then at the time of the refusal to accept."

There again plaintiff has been unable to produce any evidence of what the price of such oil in Fiji was in February, March and April 1975. All we have is the price in September and November 1975. The difference of 130DM between the price in September and the price in November indicates how unsteady the price of oil in Fiji was

in 1975. These prices give little indication as to the price 6 or 8 months earlier when, according to the contract, delivery ought to have been taken. It would, in my view, be completely unsafe to base February—April prices on September—November prices, particularly when the latter suggest a rapidly falling market.

On the evidence before me, therefore, it is not possible satisfactorily to assess—

(a) what profit plaintiff actually lost from the abortive sale; or

(b) what loss he actually suffered from the resale of the oil; or

(c) what the difference was between the contract price and the current price of an importer in Fiji in February, March and April 1975.

It was for plaintiff to produce this evidence. He has not done so.

It would nevertheless be wrong to give plaintiff no relief at all. There is ample evidence to suggest a drop in price during the relevant period and there is little doubt that plaintiff lost a bargain under the breached contract. In the absence of loss, the Court must still try, so far as reasonably practicable, to recompense plaintiff for it.

The only way to do it, in my view, is to work on the assumption that the price quoted in the contract included plaintiff's profit and then to allocate a percentage which may not work injustice to defendant. Where there is no market for goods in question this method is sometimes used (see *Household Machines v. Cosmos Exporters* [1947] 1 K.B. 217 at 219).

There is ample evidence to show that oil in Fiji during the relevant period was available from several sources and the prices were extremely competitive. The margin of profit, therefore, could not have been very high. I do take into account that plaintiff is a refiner as well as an exporter. Also that the contract price includes freight, insurance and the plaintiff's profit. Considering all this, 12½% would appear to be a reasonable basis on which to calculated plaintiff's profit. 12½% of DM 3050 per metric ton would give DM 11,437.50 for 30 tons. The figure is well below the amount claimed by the plaintiff but, as I have said, it was for plaintiff to produce evidence of his loss and he has failed to do so.

Learned counsel for defendant has drawn attention to a letter headed "Sales Confirmation" from plaintiff to defendant (Exhibit A2) whereby the contract was confirmed. This document has attached to it a sheet headed "General Conditions of Sale". Clause 16 of it reads:

> "All our contracts shall be constructed and interpretated exclusively by the Law of the Federal Republic of Western Germany and all disputes arising in connection therewith shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the Rules."

Learned counsel submits that, as no evidence was produced of German Law, this claim should be dismissed. I cannot see how this clause can help him. No reference to it appears in the pleadings wherein contract is admitted and defences are particularised. The contract was made in Fiji between plaintiff's agent and defendant. No question arises as to construction or interpretation of the contract and neither party has mentioned settlement of any dispute in connection therewith.

There will be judgment for plaintiff in the sum equivalent in Fiji currency of DM11,437.50 at the exchange rate prevailing at the date of judgment. He will also have the costs of this action to be taxed if not agreed. A

Judgment for the Plaintiff. B