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IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 66 of 1982

Between:

SUVA RUBBER STAMP COMPANY Appellant

and

A.M. SATTERTHWAITE & CO. LTD. Respondent

G.P. Lala & N. Nand for the Appellant
D. Williams for the Respondent

Date of Hearing: 23rd March, 1983
Delivery of Judgment: 25th March, 1983

JUDGMENT OF THE COURT

Gould V.P.,

This is an appeal from a judgment of the Supreme Court of Fiji dated the 29th October, 1982, in an action in which judgment was given for the respondent company against the appellant firm for the equivalent in Fiji currency of the sum of NZ$3,984.05 and costs, for goods sold and delivered.

The former was the original plaintiff and the latter the original defendant and for convenience we will continue to refer to them as such in this judgment.

At the hearing in the Supreme Court one witness was called for the plaintiff and two for the defendant, and

the action was tried mainly upon statements of facts agreed between the parties. We will endeavour to condense those which are relevant. The plaintiff is a New Zealand company and the defendant a firm carrying on business in Suva, Fiji. By various sale notes and correspondence during 1974 and early 1975 the plaintiff agreed to sell and the defendant to buy 4.1 tonnes of printing paper at Stg. £535 per tonne C.I.F. Suva to be shipped to Suva, Fiji, terms 60 day term bill and 90 day term bill both at 8% per annum through the Bank of New Zealand, Suva. Thereupon :-

1. On the 15th January, 1975, the goods were shipped aboard the MV "Neder Lek" at London for carriage to Suva in 14 bales marked SRA SUVA FIJI (which marks also appeared in the Bill of Lading). The defendant's marks are "SRS SUVA FIJI".

2. The ship arrived at Suva on the 12th March, 1975.

3. Invoices and shipping documents were sent by the plaintiff to their bank (the A.N.Z.) in Suva which received them on the 1st April, 1975; they were sent to the defendant's bank (B.N.Z.) Suva on the 2nd April, 1975.

4. By reason of the Bills of Exchange accompanying the other documents having been drawn in sterling instead of New Zealand currency they were returned to the A.N.Z. Bank; amended bills were sent from Auckland and received by A.N.Z. Bank Suva on the 14th April, 1975. They were forwarded (date unspecified) to B.N.Z. Suva and presented to the defendant on the 23rd April, 1975. The two bills were term bills in accordance with the contract.

5. The defendant signed the acceptance and took possession of the documents, which included the relevant Bill of Lading and insurance policy, on the 24th April, 1975.

6. On the 4th April, 1975, the cargo was gazetted (Sale Note 4/75) by Her Majesty's Customs for sale. The

date of sale was given as the 23rd April, 1975, and the final date for removal of the cargo from the Customs was the 21st April, 1975.

7. The bills of exchange were dishonoured by non payment.

Evidence was given that the goods were not in fact sold on the 23rd April, 1975, but were sold on the 22nd May, 1975, and could have been removed up to 48 hours before sale. There remained a balance of proceeds of $342.95 after payment of expenses, but this was not claimed.

The defendant called evidence that after accepting the documents it handed them to their Customs Agents to clear the goods. An employee of the agents testified that on being handed the documents he went through the "auction list" and referred to the Royal Gazette and "found goods already sold. That is all I did". The agents returned the documents to the defendant, which sent them back to its own bank.

Our attention was called by Mr. Lala, counsel for the defendant, to section 72 of the Customs Act (Cap. 196) which enables the Customs to sell unclaimed goods not removed within twelve weeks from the date of entry, after due notice. As the "Neder Lek" arrived in Suva on the 12th March, 1975, twelve weeks had not expired by the 23rd April, nor even by the 22nd May. No explanation of this appears in the evidence.

The learned Judge in his judgment criticised the Customs Agents for doing nothing but look at the Royal Gazette. An auction is an offer for sale. Though an auction has taken place it does not necessarily follow that all goods have been sold. Had they prepared the necessary papers, inquired as to completion of sale, or whether there were any surplus proceeds they would have found the error. The goods were at that time still available for collection.

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In his findings the learned Judge rejected a number of defences. One was that the goods were not correctly marked. There was in fact a slight variation from the marks shown on the defendant's letterhead and while, as the learned Judge observed, the evidence does not disclose any specific stipulation in the contract that the mark SRS was to be used we think the circumstances imply that that was the intention. As the learned Judge found, the defendant had ample notice of the marks actually used on all the documents. They had written notice on the 17th February, 1975, of when the ship was due to leave the United Kingdom and could have anticipated when it was due to arrive in Fiji. The variation in marks did not deceive the defendant's Customs Agent and as the latter did not attempt to sight the goods any alleged error in the marks was not the cause of the loss on sale of the goods.

This was made Ground 4 of the Notice of Appeal to this Court. We agree with the learned Judge and find the ground to be without merit.

A defence that the defendant did not receive the documents until after the goods were sold was rejected as not established. It is plain on the facts as we have related them above, that from and after the date of the acceptance of the documents by the defendant the goods remained extant and available for collection for something like four weeks.

It is difficult to see in the Statement of Defence any specific defence other than that based on the belief, which turned out to be ill founded, that the goods had been auctioned before the documents were accepted. The learned Judge however, in dealing with the case as a whole, based himself to a material degree upon the nature of the transaction, which was admittedly a C.I.F. contract. The defendants, he said, had asserted a breach of it by delay

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in tendering the documents. Ground No. 3 of the appeal is to the same effect.

The nature of such contracts is well known and can be illustrated from text books. The learned Judge quoted from Kennedy's C.I.F. Contracts (3rd Edn.) pp. 2,4. A comprehensive passage from Sassoon on C.I.F. and F.O.B. Contracts (2nd Edn.) para. 2 is as follows. It is based on Manbre Saccharine Co. Ltd. v. Corn Products Co. Ltd. /1919/ 1 K.B. 198, 202 and Comptoir d'Achat v. Luis de Ridder Limitada (The Julia) /1949/ A.C. 293, 312.

> " The essential feature of a c.i.f. contract is that delivery is satisfied by delivery of documents and not by actual physical delivery of the goods. 'All that the buyer can call for is delivery of the customary documents. This represents the measure of the buyer's right and the extent of the vendor's duty. The buyer cannot refuse the documents and ask for the actual goods, nor can the vendor withhold the documents and tender the goods they represent.'
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> 'The vital question .....' said Lord Porter in an oft-cited opinion, 'is whether the buyers paid for the documents as representing the goods or for the delivery of the goods themselves.' On the same occasion Lord Simonds stated that the 'salient characteristic' of a c.i.f. contract was that 'the property in the goods not only may but must pass by delivery of the documents against which payment is made.'
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> On presentation of the shipping documents, if they are complete and regular, the buyer is bound to pay the price, irrespective of the arrival of the goods; but by paying he is not precluded from subsequently rejecting the goods or recovering damages for breach of the contract of sale if on examination the goods are found not to be in accordance with the contract. If the goods are lost in transit or arrive in a damaged condition the buyer ordinarily has his remedy under the policy of insurance or against the ship-owner under the contract contained in the bill of lading. Whether in any particular case either of these remedies is available to him depends upon the terms of the policy of insurance and the bill of lading. "

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In Chitty on Contracts (24th Edn. - Specific Contracts) in paragraph 4513 there is the following succinct statement :

> "Overseas trade. The fact that the goods are to be shipped under a c.i.f. or an f.o.b. or similar contract is a strong indication that the property and the risk may pass at separate times. Thus in a c.i.f. contract the risk is transferred on shipment or as from shipment, but the presumption is that the property does not pass until the shipping documents are handed over. "

What happened in the present case was that the documents arrived and were duly accepted. The risk had already passed on shipment; the property passed on acceptance. The defendant had his right to reject the goods if they were found not to be in accordance with the contract. But in any event it was bound to pay the price on acceptance of the documents and this it refused to do. If its actions amounted to rejection of the goods there was no basis shown for the rejection as there was no evidence that they were not in accordance with the contract. As is apparent from the proved and admitted facts the defendant was under a complete misapprehension as to the existence and availability of the goods, and the error was its own or that of its agent.

Mr. Lala's argument before this Court was that the defendant had two rights of rejection, one appertaining to the documents and one to the goods. He relied upon the judgment of Devlin J. in Kwei Tek Chao v. British Traders and Shippers Ltd. /1954/ 2 W.B. 459. That was a case in which subpurchasers found that the goods had not been shipped in time and repudiated their contracts. The Bills of Lading had been altered and were not correct. The sellers contended that any breach of contract had been waived by the buyers having accepted the goods. Devlin J. found that the buyers were entitled to damages.

The effect of this case is summarised in Sassoon (op. cit.) in paragraph 495, as follows :

> " A distinction must be drawn between two different rights of rejection arising from two different breaches, viz., a right pertaining to the documents where these are not in order and a right to reject the goods where the goods do not conform to the contract. It was his view that the property in the goods passed only conditionally on the acceptance of the documents and all dealings with the documents were dealings merely with the conditional property so that the right of rejection was upon transfer of the documents lost in respect of the documents alone. This did not necessarily entail the loss of a right to reject the goods. "

Mr. Lala seeks to rely upon an alleged breach of contract by reason of the documents having been delivered late. We will assume for the sake of the argument that the delay might have amounted to such a breach. It was not however a concealed breach such as was the case in the Kwei Tek Chao case, where the documents had been altered. The defendant knew that the ship had arrived. Whether or not it expected the papers earlier does not appear. It had the opportunity of perusing the papers, in which, by the way, the slight error in the marks was apparent. It was a straightforward case without complications arising from subpurchasers. It was open to the defendant (if it considered it had cause) to reject the documents on the ground of delay. But instead it accepted them. What is now being submitted, is that it is not bound by that acceptance because it could have rejected them. In a case such as the present in which the quantum of the delay was fully known at the time of acceptance we cannot accept that as a valid proposition of law, or as arising out of the judgment in the Kwei Tek Chao case.

It was mentioned in argument that the defendant had returned the documents, but this was confined to returning them to its own bank. There is no evidence as to what happened after that. It is apparent from the pleadings, and the evidence and agreed facts that the

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whole attitude of the defendant was dictated, after its acceptance of the documents, not by any question of their late arrival but by the supposed non-availability of the goods. We would add that in the Kwei Tek Chao case the remedy granted was an action for damages and not the right to resist an action for the price of the goods. This ground of appeal therefore fails.

Ground 1 of the appeal as formulated was hardly pursued. Mr. Lala mentioned the possibility of action by the defendant, if the transaction were set aside, for money had and received to its use. He was unable, so far as the Court could understand, to develop this into a ground of appeal.

For the reasons we have given the appeal fails and is dismissed with costs.

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Vice President

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Judge of Appeal

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Judge of Appeal