Privy Council Appeal No. 37 of 1965

R. P. Doobay and others – – – – – – *Appellants*

v.

Mohabeer – – – – – – – – – *Respondent*

FROM

THE BRITISH CARIBBEAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST FEBRUARY 1967

Present at the Hearing:

THE LORD CHANCELLOR
VISCOUNT DILHORNE
LORD WILBERFORCE

[Delivered by LORD WILBERFORCE]

This is an appeal by the defendants in the action from a judgment of the British Caribbean Court of Appeal. That court varied the judgment of Crane J. in the Supreme Court of British Guiana by reducing from $3,500 to $240 the amount awarded to the defendants against the plaintiff on their counterclaim. The Court of Appeal upheld the judgment of the trial judge for $9,500 in favour of the plaintiff (now respondent) in the action. The defendants appeal against both parts of the Court of Appeal's decision.

The proceedings arose out of a transaction concerning a rice mill, the property of the respondent. The first appellant R. P. Doobay (to whom their Lordships will for convenience refer as " the appellant "), who acted throughout and gave evidence on behalf of his partners, the other appellants, went, together with a Mr. Angus Whyte, himself a rice miller and owner of a similar mill, to see the mill at the respondent's premises in September 1961. It is not clear from the evidence whether the appellant paid one visit or two or (if one) on which exact date the visit was made. The appellant was shown the mill, which was a one ton multi-stage machine manufactured by the Japanese firm Sikoko and called a Kyowa mill: it included a separator. The mill was not in working order, but the respondent told the appellant that two experts were coming from Japan to put it in good working order. The appellant decided to buy it and signed three documents, of which, in the event, only the third is material. The first, dated 14th September 1961, was a letter to the respondent stating that the appellant agreed to buy the mill for $14,500 to be paid in certain instalments. The second, dated 27th September 1961, was headed " Receipt " and acknowledged payment of $3,000 in part payment of $14,500, the purchase price for the mill. This document set out the dates on which the balance was to be paid and stated that the mill was sold and delivered " as is and where is to-day " and that a proper hire purchase agreement was to be made at a later date upon which the receipt would be null and void. It was signed by the respondent and the three partners. A hire purchase agreement was in fact prepared and entered into (being the document next referred to) and it has not been disputed that thereafter the Receipt ceased to have effect. No reliance was placed on it before their Lordships.

The hire purchase agreement bore the date 27th September 1961, though in fact it was signed somewhat later. It was a hiring agreement, in what is commonly known as the *Helby v. Matthews* form, with an option for the hirers to become the owners of the mill by full payment at any time during the hire. The price of the mill was stated to be $14,500 and the balance of this amount, after deducting the down payment of $3,000, was to be paid as to $2,000 on 25th November 1961, $2,000 on 16th April 1962 and $7,500 on November [*sic*] 1962. The agreement contained a number of usual clauses including a statement that the Hirers were Bailees only and giving the owner power to retake on default: but it is necessary to refer specifically to two. By Clause 4 the Hirers agreed to keep the mill in good working order and repair, but only the owners or their agents were permitted (at the Hirers' expense) to effect the repairs. By Clause 8 it was provided that:

> " When the Hiring is terminated the Hirer shall not on any ground whatsoever be entitled to any allowance, credit return or set off for payments previously made."

An argument was based on this clause which it will be necessary to consider.

Soon after the signature of this agreement, the appellant took delivery of the machine and, with the help of Mr. Angus Whyte, installed it at the partnership factory: for this purpose he laid a concrete foundation spending, according to his evidence, $1,500 in all, including workmanship. He also bought a Lister engine to propel the mill at a cost of some $3,500. A few months later he paid an instalment of $2,000, but this was not before he had a conversation with the respondent in which, answering the appellant's complaint that the mill could not be got to work, the respondent said that the experts were coming from Japan. The experts never did come: a Mr. Neville, sent by the respondent, tried to make it work but failed; the appellant contacted the agents for another Japanese firm in British Guiana who were unable to help, and the mill in fact never operated properly. The appellant offered to return the mill and to leave the respondent with the $5,000 he had received, but this offer was rejected. After a solicitor's letter, the writ was issued on 5th December 1962.

In view of the course taken by the proceedings, some reference is required to the pleadings. The statement of claim, as amended, claimed $9,500 as the balance due upon the hire purchase agreement of 27th September 1961 *i.e.*, the purchase price ($14,500) less the deposit ($3,000) and the first instalment ($2,000). The defendants delivered a defence and counterclaim. By the defence they admitted the hire purchase agreement, said that they had spent $9,800 for the installation and in acquiring the engine for the mill, alleged that the mill never operated, and that the plaintiff undertook to get his expert to rectify the mill and was guilty of breach of warranty. Then " by way of set off and counterclaim " the defendants repeated the main averments of the defence (which included those above referred to) and claimed:

> (1) $9,800 as damages for the breach of the said agreement and in the alternative;
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> (2) as special damages:
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> (*a*) $5,000 paid as advance for the mill;
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> (*b*) $1,500 for installation;
>
> (*c*) $3,300 for the Lister engine.

At the trial before Crane J., the learned judge held that it was for the defendants to begin. The appellant himself gave evidence. In addition to proving the matters pleaded, he said that he had put 80 bags of padi, obtained from two customers, into the mill but that it broke up the rice. He had to pay these customers $8 per bag. He called Mr. Angus Whyte, who supported his evidence as to the failure of the mill to work and a Mr. Algoo, one of the two customers, who had given to the appellant, and been paid for, 30 bags of padi which the mill had damaged.

The learned judge found that the mill was delivered in a state of disrepair with a promise that it would be rectified later by an expert. He held that the defendants had never determined the bailment and that they had no answer to the plaintiff's claim, but that they were entitled to sue for damages. He disallowed the defendants' claim for $5,000 on the ground that this was excluded by Clause 8 of the hire purchase agreement. Of the other two sums claimed he allowed that for $3,500 [*sic*] as the purchase price for the Lister engine but not that for $1,500 which he considered " had not been properly established ". He disallowed a claim for $640 paid to customers in respect of damaged rice both on the ground that it had not been pleaded and because it was not recoverable as damages. He gave judgment for the plaintiff on the claim for $9,500 and for the defendants on the counterclaim for $3,500.

Both sides appealed against this judgment. The Court of Appeal took the view that the defendants had not repudiated the agreement and that at the trial they had taken the position that " they had purchased the mill and had elected to keep it ". They held that the defendants were liable for the unpaid instalments and that, there being no total failure of consideration, they could not recover the $5,000 which they had paid. The plaintiff was liable for damages for breach of warranty, but no claim had ever been made for the cost of putting the mill in good working order. The installation of the mill and the provision of an engine were the defendants' responsibility and they could not recover in respect of these items. The court awarded $240 in respect of damaged rice, even though this had not been pleaded, but disallowed all the three sums specifically claimed in the counterclaim.

In the present appeal it has not been seriously disputed that the appellants have no answer to the claim for $9,500 nor that, in principle, they are entitled to recover damages for breach of warranty. The only issue is as to the measure of such damages having regard (*inter alia*) to the pleadings.

The first point to establish is the legal relationship between the appellants and the respondent at the date of the writ. This appears to their Lordships to admit of no doubt. The hiring agreement had not been determined by the owner of the mill, nor had the hirers become the purchasers of it by an exercise of their option. The relation remained therefore that of bailor and bailee. Their Lordships are of opinion that the Court of Appeal were under a misapprehension when they held that at the trial the appellants had taken the position that they had purchased the mill. They had, it is true, not repudiated the hire purchase agreement, as they might well have done, but they had never taken the necessary steps to convert themselves from hirers to purchasers. The property in the mill remained, and remains, in the owner--the present respondent, and the damages which the hirers are entitled to recover, must be calculated on the basis of a failure by the owner to comply with his obligation to put the mill in working order.

The correct measure of these damages is not, in the view of their Lordships, the cost of so doing. This might well have been the case had the property in the mill passed to the defendants and had the defendants lost their right to return it to their vendor (see *Charterhouse Credit Co. Ltd. v. Tolly*, [1963] 2 Q.B. 683, at p. 711 per Upjohn L. J.): but this was not so: the property remained in the owner of the mill. Moreover, though in some cases of hire purchase, damages based on the cost of repairing the article hired, may be appropriate, (see *Yeoman Credit Ltd. v. Apps*. [1962] 2 Q.B. 508 which their Lordships merely quote by way of example, without entering into the grounds for the decision), that is not necessarily always so: regard must be had to the nature of the article hired, the defects in it and how they arose, and the character of the owner's obligation to make them good. The contract in this case was unusual. It was not one for the hire purchase of an article which turned out to be defective, contrary to the expectation of the hirer or to the bargain; the article was known to

be defective and was hired as such together with a contractually assumed obligation by the owner to remedy the defects. Further, the defects were such that, unless they were remedied, the mill was useless to the hirer. Finally, to remedy the defects was a matter for which the owner was wholly responsible: the evidence shows that neither the hirer himself, nor such persons as the hirer was able to consult in British Guiana, were able to make the mill work and indeed the contract itself (Clause 4) expressly deprived the hirer of the right himself to undertake repairs. All this underlines the essential character of the owner's obligation to put the mill in repair, an obligation which it was contemplated he would carry out through experts to come from Japan.

It is in relation to these circumstances that the damages recoverable by the defendants must be assessed. They have paid money, and assumed an obligation to pay further instalments, for an article from which they have derived and can derive no benefit whatever; the only damages which can compensate them for this are such as correspond in amount with the loss they have sustained which includes, in the first place, these sums. Their Lordships find support for this approach to the measure of damages in the case of *Charterhouse Credit Co. Ltd. v. Tolly* already referred to. There the trial judge had awarded damages based on the cost of remedying the defects, but the Court of Appeal decided that the hirer was entitled to reimbursement of all moneys paid or payable, less a deduction for the use of the defective article. In that case the plaintiff company had terminated the hiring midway, but this, though reducing the amount due to the plaintiff (and so ultimately recoverable by the hirer) makes no difference in principle. The decision also shows that a defendant may recover all money paid or payable by him even though he has not taken steps to repudiate the agreement.

Before considering whether, consistently with the pleadings, damages ought to be awarded on this basis it is necessary to deal with the argument, already mentioned, based upon Clause 8 of the hire purchase agreement. The learned judge held that this clause prevented the defendants from recovering the $5,000 which they had already paid. Their Lordships cannot agree with this. The Clause, by its initial words, operates " when the hiring is terminated ". *Prima facie* these words would seem to contemplate some action by one or other of the parties putting an end to the agreement, and not to a mere expiry of the period of the hiring. That this is so is, in their Lordships view, conclusively confirmed by other references in the agreement to " termination ". Thus Clause 6 confers upon the owner power summarily to terminate the hiring and Clause 1 of the owner's agreement refers to termination by the hirer. The word " terminated " in Clause 8 must refer to these specific cases, neither of which has in fact occurred, and to these cases only. The Clause therefore affords no defence to the defendants' claim for recovery of their money.

It remains to consider the pleadings. They were described by the Court of Appeal as uninspired, and their Lordships would be inclined to agree that the counterclaim was not so drafted as to cover damages based on the cost of repair. But, as regards the measure of damages which their Lordships think appropriate, the matter stands otherwise. In the first place, as regards the $5,000 which the defendants had actually paid, this is both claimed specifically under the heading of special damages, and appears to be included within the sum of $9,800 claimed as general damages. Such difficulty as there is relates to the further sum of $9,500 due on the hire purchase agreement to the plaintiff, and for which he is entitled to judgment on the claim. In law, this sum is precisely comparable with the sum of $5,000; the two together represent the hiring instalments paid or due by the defendants which, through the plaintiff's default, have been lost to them. In their Lordships view both sums ought to be considered as included in the defendants' claim. The defendants had stated in their defence reasons why they should not be liable for the outstanding $9,500: the allegations there contained were repeated in the counterclaim. Taken together, the defendants' case was clear enough: it was that they were not liable to the

plaintiff for anything and he was liable to repay them $5,000. This could be made good either by rejecting the plaintiff's claim for $9,500 and awarding the defendants $5,000 on the counterclaim; or, should the plaintiff be held entitled to judgment for $9,500 on his claim, by awarding both sums to the defendants on their counterclaim. To interpret the counterclaim in this way involves no hardship to the plaintiff; the facts on which the defendants were relying were fully pleaded, and on any view of the matter the plaintiff was faced with the defendants' contention that they owed him nothing and, *per contra,* claimed $5,000 back from him. Their Lordships therefore hold the defendants entitled, on their counterclaim, to $14,500 in respect of their commitments under the hire purchase agreement. It is hardly necessary to add (since the counterclaim can only have been brought on this basis) that the plaintiff remains the owner of the machine and the defendants cannot now take steps to make themselves the owners of it.

With regard to the other sums claimed: the defendants are not, in their Lordships' opinion, entitled to $3,300 or any sum in respect of the Lister engine: they have the engine, the purchase of it is not shown to have involved any loss, and the claim was rejected in the Court of Appeal. With regard to the cost of installing the mill, the defendants are, in principle, entitled to damages, since such expenditure has been thrown away. The learned trial judge seems to have accepted this, but held that the figure claimed—$1,500—had not been properly established. But the appellant gave evidence about this expenditure; as recorded in the judge's note he said " the cost of the installation was $1,500 including workmanship " and no challenge to this by cross-examination seems to have been made, nor did the learned judge give any reasons for holding the sum excessive. In these circumstances, the right course, in their Lordships' view, is to award to the defendants the sum claimed.

There is no cross-appeal as regards the sum of $240 awarded to the defendants.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the British Caribbean Court of Appeal ought to be varied by entering judgment for the defendants on their counterclaim for $16,240. The judgment on the claim will stand. The respondent must pay the costs of this appeal.

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In the Privy Council

R. P. DOOBAY AND OTHERS

v.

MOHABEER

DELIVERED BY

LORD WILBERFORCE

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