

Neutral Citation Number: [2003] EWCA Civ 1651
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
MERCANTILE LIST
(His Honour Judge Hegarty QC)

A3/2002/2717

Royal Courts of Justice
Strand
London WC2

Friday, 18th July 2003

Before:

LORD JUSTICE WARD
LORD JUSTICE TUCKEY and
MR JUSTICE LIGHTMAN

VIRANI LIMITED

Claimant/Respondent

-v-

MANUEL REVERT Y CIA SA

Defendant/Appellant

Computer Aided Transcript of the Palantype Notes of
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(Official Shorthand Writers to the Court)

Mr J Pickering (instructed by Senor Miguel Gallardo, London W1) appeared on behalf of the Appellant
Defendant.

Mr P Chaisty QC (instructed by Messrs Paul Ross & Co, Manchester) appeared on behalf of the
Respondent Claimant.

J U D G M E N T

(As Approved by the Court)

LORD JUSTICE WARD:

1. The short point at issue in this appeal is whether damages for breach of contract should have been expressed in euros, as the appellant contends, or in US dollars, as the judge ordered.
2. The material facts, shortly stated, are these. Virani Limited (“Virani”), the claimant, is an English company which is apparently one of the largest importers and distributors of grey and finished cloths in the European Union. They have extensive business contacts partly in Pakistan and partly in Europe. The background to the matters which brought them and the defendant company together, and which now brings them to us, was expressed by the judge in these terms:

“The cloth in question is the kind known as Lonetta. In Europe Spain is the most important manufacturer and consumer of such cloth. However, at least one group of companies in Pakistan also manufactures Lonetta. Virani had good contacts with one of this group, a company known as JK Sons PVT Limited, of Faisalabad. I shall refer to this company simply as JK. Virani also had both agents and customers within Spain. In early 1998 he asked his principal Spanish agent Alitex to advise as to the market of Lonetta cloth in Spain and was given a list of eight to ten customers with use of between 2 and 3 million metres. This must have seemed too good a business opportunity to disregard. Virani therefore embarked on negotiations for a substantial quantity of the cloth from Pakistan and at the same time sought buyers in Spain. Once it had a sufficient number of prospective purchasers it agreed to buy in consignments of about 1.3 million metres and 100,000 metres respectively from JK Limited of Pakistan. The purchase contracts were concluded at about the same time as the sale contracts.”

3. One of those onward sales was made to the defendant company in March 1998, whereby Virani sold to Manuel Revert (“Revert”) 350,000 metres of “imported Poly/Cotton Grey cloth” at a price of 285 pesetas per metre. Revert is a Spanish company which is also a substantial player in this market. It seems to be one of the leading purchasers of this kind of cloth, which it then makes up and distributes.
4. The differences between the parties arose when Revert refused to take delivery of any of the cloth, contending, among other things, that there was no concluded contract of sale. Thus Virani brought a claim against Revert for damages for breach of contract. On 1st March 2001 His Honour Judge Kershaw QC, sitting in the Mercantile Court in Manchester, part of the Queen's Bench Division, gave judgment for the claimant, Virani, for damages to be assessed.
5. Meanwhile, in May 2000, Virani had managed, in a falling market, to sell 456,000 metres of this cloth to an Italian company, Angelo Carillo, at 1.29 euros per metre.
6. The assessment of damages was heard over three days by His Honour Judge Hegarty QC, sitting as a judge of the High Court in Manchester. He gave judgment on 11th September 2002. He ordered that there be judgment for the claimant, Virani, in the sum of US \$242,900 or its sterling equivalent. In round figures that sterling equivalent is about £152,000. If the judgment had been expressed in euros, the sterling equivalent would have been about £95,000. Thus the difference between the parties is £57,000 and it is that which brings them to this court.

7. Lord Justice Longmore gave permission to appeal, saying:

“The alleged difference in value between a dollar judgment and a euro judgment is sufficiently striking for it to be right that this court has a second look into the matter.”

8. So far as is relevant to this appeal, the judge, in a judgment which dealt with a number of other matters, concluded that the proper measure of damage was as follows:

“... its primary loss is represented by the difference between the contract price and the price obtained on the sale to Carillo in May 2000.”

No complaint is made about that approach in this appeal. The dispute centres, as I have indicated, on the appropriate currency for the calculation of the damages which flowed from that breach.

9. The points of claim have been framed in dollars. The defence simply said that the US dollar exchange rate was irrelevant. The pleadings were not therefore auspiciously informative.

10. Nonetheless, Mr Virendra Nagindas Virani, a director of the claimant company, filed a witness statement in which he explained the way in which his company operated in this international market. He said:

“... the claimant company works in US \$ as being the currency by which its purchases are almost invariably effected. By working in US \$ in relation to its purchases the claimant company is able to avoid substantial fluctuations in exchange rates since it costs its sales by reference to US \$ and covers US \$ at the time of sales being entered into.”

That cover was provided by selling forward pesetas in exchange for dollars in a series of foreign exchange contracts. The way that worked was explained by Mr Virani as follows:

“On the same date [as he sold on to Revert] the claimant company covered the foreign exchange requirement in relation to this contract by selling PTS 14,250,000 in exchange for US \$92,298.72 ... The effect of the foreign exchange contracts was that we were committed to purchase the US \$ in exchange for Spanish Pesetas, but we have an option period, during which time we could complete the foreign exchange transaction by choice. If at the end of that period we had not done so the Bank would complete the transaction by debiting and crediting the relevant accounts.”

In the events which happened, with Revert not paying for this cloth, that is exactly what the bank did: they simply effected the exchange. We were told that there was no challenge to that evidence given by Mr Virani.

11. The judge dealt with the matter in this way. He reminded himself of the passage in the White Book at paragraph 40.2.2. and then he said this:

“The original contract with Revert stipulated a price in pesetas. The peseta of course is no longer currency which is in use since Spain joined the single currency at a fixed euro.

The sale to Carillo was expressed in euros. There is to some degree a difficulty in making a practical conversion between pesetas at the time when

it was fluctuating and its equivalent in euros after Spain joined the EU.

Virani is an English company but I am told and I accept that it normally sets its prices for its own purposes in US dollars and the evidence is clear that as soon as it had made the sales contract with Revert it purchased \$ forward. The contract with Revert is expressed in \$ (sic). Though Mr Revert and his company may not have been aware the price quoted to it in US\$ and quoted on the day in US\$ he knew the cloth was from Pakistan and in all likelihood fixed in US\$.

In the circumstances I conclude the currency which best expresses the claimant's loss is US\$ and judgment is to be given subject to its sterling equivalent.”

12. That recitation from the judgment is taken from a note prepared by the claimant's solicitors. It became apparent that the reference to the Revert contract being expressed in dollars was probably wrong. There is no official transcript because Manchester had lost the tape. The judge's views were sought and he has written to the court saying this:

“Whilst I cannot rule out the possibility of a slip of the tongue, I think it is highly unlikely that, at this stage of my judgment, I assumed (contrary to the fact) that the price had been expressed in dollars. That is contrary to what I had said on the previous page, only two paragraphs before the passage in question, and in various other parts of my judgment.

If it would be of assistance to the Court of Appeal, I can indicate what I think I probably said or was trying to say at this point in my judgment. I do so with some diffidence, however, as I have not had the opportunity to refresh my memory from the material which was before me at trial.

But I think that the point I was trying to make was probably to the following effect:

(i) Though the contract price was expressed in pesetas, it was based on Virani's internal costings which were calculated in dollars.

(ii) Though Revert may not have been aware of the basis on which Virani calculated the contract price or its precise dollar equivalent, it was nonetheless aware of the fact that the cloth was of Pakistani origin and was or ought to have been aware that the US dollar was the currency in which the export prices of such cloth were normally denominated.”

13. I am in no doubt at all that this was probably a slip of the pen rather than a slip of the tongue. It is obvious to me that the judge was dealing with the contract price as a price in pesetas.

14. The principles upon which the question ought to be addressed are not in dispute. They have been authoritatively settled by the speech of Lord Wilberforce in Services Europe Atlantique Sud (SEAS) of Paris v Stockholms Rederiaktiebolag Svea of Stockholm (The Despina R) [1979] AC 685. At p.700D Lord Wilberforce said:

“My Lords, the effect of the decision of this House in Miliangos v George Frank (Textiles) Ltd [1976] AC 443 is that, in contractual as in other cases a

judgment (in which for convenience I include an award) can be given in a currency other than sterling. Whether it should be, and, in a case where there is more than one eligible currency, in which currency, must depend on general principles of the law of contract and on rules of conflict of laws. The former require application, as nearly as possible, of the principle of *restitutio in integrum*, regard being had to what was in the reasonable contemplation of the parties. The latter involve ascertainment of the proper law of the contract, and application of that law. If the proper law is English, the first step must be to see whether, expressly or by implication, the contract provides an answer to the currency question. This may lead to selection of the 'currency of the contract'. If from the terms of the contract it appears that the parties have accepted a currency as the currency of account and payment in respect of all transactions arising under the contract, then it would be proper to give a judgment for damages in that currency - this is, I think, the case which Lord Denning MR had in mind when he said in Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc [1974] QB 292, 298:

'[arbitrators] should make their award in that currency because it is the proper currency of the contract. By that I mean that it is the currency with which the payments under the contract have the closest and most real connection.'

But there may be cases in which, although obligations under the contract are to be met in a specified currency, or currencies, the right conclusion may be that there is no intention shown that damages for breach of the contract should be given in that currency or currencies. I do not think that Lord Denning MR was intending to exclude such cases. Indeed in the present case he said [1979] QB 491, 514, in words which I would adopt 'the plaintiff should be compensated for the expense or loss in the currency which most truly expresses his loss'. In the present case the fact that US dollars have been named as the currency in which payments in respect of hire and other contractual payments are to be made, provides no necessary or indeed plausible reason why damages for breach of the contract should be paid in that currency. The terms of other contracts may lead to a similar conclusion.

If then the contract fails to provide a decisive interpretation, the damage should be calculated in the currency in which the loss was felt by the plaintiff or 'which most truly expresses his loss'. This is not limited to that in which it first and immediately arose. In ascertaining which this currency is, the court must ask what is the currency, payment in which will as nearly as possible compensate the plaintiff in accordance with the principle of restitution, and whether the parties must be taken reasonably to have had this in contemplation."

15. Mr James Pickering, who appears on behalf of the appellant, submits, in an argument admirably succinct and concise (as indeed was the reply to it by Mr Paul Chaisty QC), that the currency of this contract was plainly pesetas. Pesetas, therefore, is the currency which has the closest and most real connection and the damages should be assessed accordingly. He does, however, accept that the currency of the contract - part of the speech of Lord Wilberforce - is the starting point, but not necessarily the conclusive test. He, I think, has to accept that the enquiry into which currency best expresses the loss was one which the judge was entitled to make. Whilst he does not, I think, concede that that currency is dollars, his

main attack on the judgment is as to the judge's conclusion that his client knew in all likelihood that the price of the cloth was fixed in dollars. He submits that it is not open to infer from that that it was within the reasonable contemplation of these parties that the claimant had made currency deals with its bank to buy forward and protect against fluctuating currency prices in the international market.

16. It seems to me that, apart from the fact that the price was expressed in pesetas, there is nothing else in this simple sale which provides "the necessary or indeed plausible reason" why damages have to be assessed in pesetas. On the contrary, I conclude that the contract fails to provide a decisive interpretation and that consequently the proper approach in this case is as the judge held it to be: enquiring which currency most truly expressed the claimant's loss. Thus it seems to me that the test is that expressed by Lord Wilberforce at p.701C:

"... the court must ask what is the currency, payment in which will as nearly as possible compensate the plaintiff in accordance with the principle of restitution, and whether the parties must be taken reasonably to have had this in contemplation."

17. Here the evidence was all one way. The claimant company, dealing in the international market, was inevitably concerned about fluctuation in exchange rates in the parts of the world with which they had dealings. They were therefore anxious, at a time when they were endeavouring to tie up simultaneous contracts for the purchase of cloth from Pakistan and its onward sale to various customers in Spain, that their position should be as stable as it could be, and hence their ventures into the exchange market. Their price had to be paid in dollars. They had hoped to buy dollars from the pesetas which they expected from this sale. In order to compensate them fairly and put them in the position they would have been in if this contract had been fulfilled, dollars seems to me to be the currency which most accurately enables them to have that restitution. Of that there can be little doubt.
18. The appeal therefore turns upon whether it can be said that the parties must be taken reasonably to have had a dollar currency in their contemplation. This is no doubt an aspect of ordinary remoteness. One can put the test in various ways. One can ask whether it was within their contemplation as a not unlikely result of the breach. One can use different language and ask what loss to the claimant is it reasonable to suppose would have been in the contemplation of the parties as a serious possibility had they had in mind the breach when they made their contract.
19. The judge's finding that the defendant company would in all probability know that anyone who ventured into the Pakistan market would be dealing in dollars and not in rupees is a conclusion which cannot be challenged and, to be fair to Mr Pickering, he did not seek to challenge that part of the judgment. It is then a matter of inference from that finding of fact as to whether it was reasonably within the contemplation of the parties that this international trader would have protected itself by ventures into the exchange market to buy forward and protect against fluctuating exchange currencies.
20. The fact is that the defendant is a large dealer in this cloth and is as familiar as the claimant with the vagaries of exchange rates rising and falling. It must be within the reasonable contemplation of anyone engaged in foreign transactions to expect that steps will be taken to protect the value of the particular transaction by covering it in the way the claimant did. It thus seems to me to be an irresistible inference that it was within the contemplation of the parties that dollars would be the currency which most closely and truly would express any

loss suffered by the seller if the buyer did not complete.

21. In my judgment the judge was correct in his approach and in his conclusion. I would dismiss the appeal.

LORD JUSTICE TUCKEY:

22. I agree.

23. In terms of the test laid down by the House of Lords in Services Europe Atlantique Sud (SEAS) of Paris v Stockholms Rederiaktiebolag Svea of Stockholm (The Despina R) [1979] AC 685, the currency which most truly expressed Virani's loss was US dollars because it hedged its anticipated receipt of pesetas by option contracts to sell those pesetas forward for US dollars at a fixed rate of exchange. Revert must be taken reasonably to have had this in contemplation because those involved in international trade often protect themselves against fluctuation in exchange rates in this way and, as the judge found, in all likelihood it knew that the price at which Virani had bought the cloth was fixed in US dollars, the most common currency of international trade.

MR JUSTICE LIGHTMAN:

24. I agree with both judgments.

25. I would only add that in my view it is very desirable and indeed good pleading practice that a claimant seeking an order for payment of damages in a foreign currency should make plain in its pleadings both the existence of the claim and the grounds on which the claim is based. The failure to do so in this case cannot have prejudiced the defendant and has occasioned no complaint in view of the informative witness statement placed before the trial judge on behalf of the claimant. But this will not always be the case and, in a case where the failure may have prejudiced the defendant, that failure may have adverse legal consequences for the claimant.

Order: appeal dismissed with costs summarily assessed at £14,000.