IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 173

Suit 813/1986

Between

Mohsin Abdullah Alesayi

… *Plaintiff*

And

Brooks Exim Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Commercial Transactions — Sale of goods; Commercial Transactions — Sale of goods

Version No 1: 11 Sep 2026 (01:05 hrs)

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Mohsin Abdullah Alesayi v Brooks Exim Pte Ltd

[1993] SGHC 173

Suit 813/1986
Yong Pung How CJ
23 July 1993

1 Cur Adv Vult

2 This is a claim for damages for breach of contract in respect of the sale of 1,000 dozens of men`s denim jeans. The facts of the case are as follows.

3 The plaintiff is a wholesaler and importer of garments and textiles in Jeddah in Saudi Arabia. The defendants are a Singapore company dealing in garments and textiles. Both parties first made contact in June of 1983 through a series of telexes culminating in an agreement that the plaintiff would purchase from the defendants 1,000 dozens of men`s denim jeans, Model No MN/101 Lot 28/9681 for the price of US$30,000. The jeans were to be in ten sizes: 26, 27, 28, 29, 30, 31, 32, 34, 36 and 38. On 7 July 1983 the defendants sent the plaintiff a document headed `Contract` which the plaintiff signed. The terms of the contract included the following:

> *Clause 3:*
>
> *Any variations in quantity, quality, design, finish, colour, ways, weight, combination, construction to the extent of ten per cent is allowed and agreed.*
>
> *Clause 10:*

> *Complaints are to be sent by registered mail together with adequate samples within 24 hours from the actual delivery to buyers accompanied by Lloyds and Carriers Survey Reports in respect of the complaints but do not exempt from their obligation to pay for goods received when the respective invoices fall due.*
>
> *Clause 11:*
>
> *It is also expressly understood and agreed that the suppliers in this contract are purely shippers in transit and are not responsible for the authenticity of the origin, Brand, Trade Mark, etc neither do the shippers assume any responsibility for the quality quality [sic] and make-up of the merchandise shipped.*

4 Pursuant to the agreement the plaintiff established in the defendants` favour two letters of credit in payment of the price of US$30,000.

5 On 22 September 1983 the plaintiff received from the defendants 1,000 dozens of jeans. The plaintiff`s purchasing manager, Hussein Mohammed Kassim Yafai (PW2), testified that, upon unloading the jeans received, they were found to be completely different from the only sample pair which the plaintiff claims was received by him from the defendants in June 1983. I will refer to this sample as P3. P3 bore the manufacturer`s label `Lot No 28/9681` as well as the model number `WN/101`. It is the plaintiff`s case that he contracted to purchase 1,000 dozens of jeans in ten different sizes corresponding to the sample P3 only. Therefore all references in the telex exchanges and in the above-mentioned contract to jeans `Style No WN/101 Lot 28/9681` were references to jeans corresponding to that one sample P3. The jeans shipped by the defendants did not correspond to the sample P3 at all.

6 On 24 September 1983, a survey of the jeans received by the plaintiff was undertaken on the plaintiff`s behalf by Aijaz Ali Khan (PW1), a surveyor for International Corporation for Trade and Contract Services (`ITCS`). ITCS were the surveyors for the defendant`s insurers. PW1 examined a randomly chosen 10% of the jeans and compared them with the sample P3, following

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which he produced two survey reports. According to the survey reports, the sample jeans P3 were `stiff, finely finished and with permanent crease`. The cutting and stitching were `of standard` and `fine quality material` was used. In PW1`s opinion, P3 represented a highly marketable product, ie it could easily be sold in the market. In comparison, the jeans received by the plaintiff were described as being made of cloth which was `coarse and of a very inferior quality`. It was `very thin`, bore no crease and was `very light in weight in comparison` to P3. The workmanship and finishing of these jeans were described as being `not very up to the mark`. Moreover the sample jeans P3 bore the label `Win Win` whereas the jeans received had no label at all. The said jeans came in only five sizes (26 to 30) whereas the plaintiff had contracted for ten different sizes.

7 Several telexes were sent by the plaintiff to the defendants stating, inter alia, that the jeans received were not `as per sample` and demanding an explanation. No reply came from the defendants until 8 October 1983 when, by letter of that date, they pronounced themselves `completely shocked` to have received the plaintiff`s complaints and made specific reference to cll 3, 10 and 11 of the contract.

8 On 23 January 1984 the plaintiff and PW2 visited the defendants in Singapore to attempt to negotiate a settlement. The attempt was unsuccessful. Further communications between the parties also failed to achieve a settlement. On 22 January 1984 the plaintiff commenced proceedings against the defendants.

9 The plaintiff claims that the defendants were in breach of contract in that they failed to supply goods corresponding to the sample P3; further that they failed to supply goods corresponding to the contractual description; and further

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that they failed to supply goods fit for the purpose for which the plaintiff required them.

10 The defendants, on the other hand, contend that the jeans received by the plaintiff were what he had in fact contracted to purchase. According to the defendants, they sent the plaintiff at least two samples of men`s denim jeans, not just one. Thus the plaintiff would have received not just the sample P3 but also another sample which I will refer to as DB4. Somewhat oddly enough, DB4 was apparently also labelled `WN/101 Lot 28/9681` like P3 but, apart from this, it represented another model of jeans altogether. DB4 is important to the defendants` defence because the defendants contend that the plaintiff in fact chose the sample DB4 in preference over the sample P3 and that the jeans received by the plaintiff corresponded exactly to DB4.

11 The defendants also produced at trial copies of two price lists (which I shall refer to as DB1 and DB2) allegedly sent together with the samples. The two price lists set out the prices of the samples and additional details such as the sizes in which the jeans were available. DB1 refers to a particular model priced at US$33 per dozen and available in ten sizes: 26, 27, 28, 29, 30, 31, 32, 34, 36 and 38; while DB2 refers to another model priced at US$37 per dozen and available in thirteen sizes: 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38. It is the defendants` contention that DB1 refers to jeans corresponding to the sample DB4 while DB2 refers to jeans corresponding to the sample P3. They argue that having been given a choice between different samples, the plaintiff in fact contracted to purchase jeans corresponding to DB4, ie the model of jeans referred to in the price list DB1; and that he received exactly what he had contracted for. The plaintiff for his part insists that he was only sent one sample and that he never received the two price lists.

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12 Having heard the testimony of witnesses for both parties and having perused the submissions of counsel, I must say that the defendants` contentions cannot be described as other than incredible. The defendants say they sent the plaintiff at least two samples, P3 and DB4. For the plaintiff to place an order therefore, it would have been not merely reasonable but plainly necessary to state in clear terms whether he wishes to purchase jeans corresponding to the sample P3 or to the sample DB4 or perhaps jeans of both models. Since according to the defendants, the two samples suffered the somewhat remarkable coincidence of being both labelled `WN/101 Lot 28/9681`, the plaintiff would have had to specify his choice by laboriously stating the details pertaining to the particular model of his choice, as given in the price lists: for example, the price of that particular model and the sizes in stock. Just quoting `WN/101 Lot 28/9681` would have been no indication of which model of jeans the plaintiff intended to purchase. Yet the telex exchanges between the parties as well as the written contract signed by the plaintiff make sole and stark reference to `Men`s Denim Jeans Model No WN/101 Lot 28/9681`. For example, the plaintiff`s first telex message to the defendants on 18 July 1983 reads: `Re Gents Jeans Styl No WN/101 Lot 28/9681 We hv offer USD30 C3 1000dz Pls gv yr commts.` Nowhere is there any attempt to elucidate the choice supposedly being made between two different models of jeans. In fact nowhere is there anything to even indicate that a choice was being made between two different models of jeans.

13 The defendants` explanations for their own prescience were flimsy and unsatisfactory to say the least. Bhagwandas G Mahtani, a director of the defendants (`DW1`), stated in evidence that the defendants `assumed` the plaintiff had chosen the model of jeans corresponding to the sample DB4 because the sizes asked for by the plaintiff looked similar to the sizes supposedly available for DB4-type jeans (as shown in the price list DB1). Chandrumal G

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Mahtani (`DW2`), another director of the defendants, stated that they `assumed` that the plaintiff must have been contracting to purchase jeans corresponding to the sample DB4 because the contract price of US$30 per dozen agreed on was closer to the price of US$33 per dozen listed in the price list DB1 which the defendants say refers to jeans corresponding to the sample DB4. I find it an absurd proposition, that the defendants, as a business concern of some considerable experience, should have been so quick to assume on such ambiguous evidence the certainty of a first-time customer`s wishes; further that they would have been ready to act on this assumption without even a cursory attempt at clarification. It would have taken but one short telex message to confirm the defendants` vague `assumption`. I find it more than difficult, if not impossible, to believe that the defendants, who took such care to ensure the confirmation of the letters of credit with which they were to be paid (see, for example, the telexes of 20 July, 25 July and 27 July 1983), thought it unnecessary to confirm the exact model of jeans for which they were being paid.

14 Moreover, there is evidence, unchallenged by the defendants, that following the plaintiff`s visit with PW2 to Singapore, DW1 himself went to Indonesia to meet with the defendants` suppliers. The plaintiff claims that during the meeting, DW1 had admitted to having been `cheated` by the defendants` suppliers. The defendants, however, claim that the visit was made for the purpose of following up on the plaintiff`s complaint. Again, I find this exceedingly difficult to believe. If, as the defendants contend, the plaintiff had chosen to purchase jeans corresponding to the sample DB4 and had in fact been supplied with what he had chosen, I do not see why a visit to the defendants` suppliers would have been called for or how such a visit would have assisted in resolving the dispute.

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15 In the light of the above evidence and having regard to the view I have formed of the credibility of all witnesses during the trial, having listened to their evidence and watched them giving it, I find as a fact that the plaintiff received only one sample pair of jeans, ie the sample P3 and that he contracted to buy 1,000 dozens of jeans corresponding to the sample P3. I have examined P3 and the samples taken from the jeans received by the plaintiff. I have also had regard to the evidence of PW1 who surveyed 10% of the jeans received by the plaintiff. This 10% was chosen at random from the consignment received. None of the jeans in this random selection corresponded to the sample P3 which the plaintiff had contracted to purchase. There were material differences in the material used, and in the workmanship and other important features pertaining to quality. There is no doubt that the model of jeans received by the plaintiff was of inferior quality compared to the quality of the model of jeans represented by the sample P3. Indeed PW1 testified that the model of jeans received by the plaintiff would have fetched only about US$13 per dozen whereas the plaintiff had paid US$30 per dozen for the model of jeans represented by the sample P3. Having regard to the evidence before me, I find that the plaintiff had proved on a balance of probabilities that the defendants were in breach of contract in supplying goods which failed to correspond with the sample in quality.

16 The defendants have attempted the argument that since the plaintiff employed the word `samples` in their reply instead of `sample`, they should be bound by this and should not be heard to say that they received only a single sample. There is no doubt as to the general rule that parties are bound by their pleadings. However, having regard to the particular circumstances of the present case, the defendants` argument really amounts to nothing more than a display of the sort of desperate technicality and pedantry which must be discouraged in these courts. The defendants can hardly be unaware that the plaintiff had already

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obtained leave at trial to amend their statement of claim to read `sample` instead of `samples` and obviously the omission to simultaneously amend their reply was an oversight. At no point in the trial was there any danger of the defendants misunderstanding the basis of the plaintiff`s case. Indeed the defendants` defence during the trial was conducted mainly on the basis that the evidence in the case pointed to the plaintiff having received more than one sample rather than on the basis that the plaintiff had conceded in his pleading the receipt of more than one sample. I would also point out that in any case the plaintiff remains free at all stages of these proceedings to seek leave to amend the reply and this again is something that the defendants are aware of. For these reasons, and having regard to the particular circumstances of this case, I find that the defendants` argument must fail. I would stress, however, that there is no doubt as to the general rule on pleadings and that this is in no way to be construed as a precedent for excusing future omissions.

17 In view of the above findings, I would also hold that the defendants have failed to supply jeans which corresponded to the contractual description. In general, a sample is a short-hand way of describing the subject matter of the bargain in question. Since the defendants in the present case failed to supply goods which corresponded with the sample P3, it follows that they also failed to supply goods corresponding to the contractual description which P3 encapsulated.

18 The defendants further rely on cll 3, 10 and 11 of the contract which they claim have the effect of excusing their failure to supply goods corresponding with the sample and with the contractual description. As such, these clauses must be construed contra proferentum and will not be held to excuse the defendants from liability unless the words clearly indicate this is to be the

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intended consequence: see, for example, ***Suisse Atlantique Societe D`Armement Maritime SA v NV Rotterdamsche Kolen Centrale*** .

19 Clause 3 seeks to excuse the defendants from liability for `variations` in quality, quantity and other features within a 10% margin. The 10% margin expressly stipulated for must clearly be adhered to strictly. Thus, assuming the plaintiff had contracted to buy a model of jeans corresponding to a particular sample, the defendants would be excused as regards any minor variations in quality, quantity, etc in the jeans they eventually delivered, but the 10% margin can hardly be interpreted to allow the defendants to deliver jeans of a model which was completely different from the sample. That would make nonsense of the whole concept of sales by sample. I have found as a fact that the plaintiff contracted to buy jeans corresponding to the sample P3 and that the jeans he received failed to correspond to that sample in crucial aspects, being of a decidedly inferior type. I cannot see how the differences in quality can properly be regarded as minor variations falling only within a 10% margin. As such, cl 3 can be of no help to the defendants in the present case.

20 As regards cl 10, its terms do not state that the consequence of a buyer forwarding a complaint other than in accordance with the conditions laid down in the clause is that the complaint will not be entertained. Indeed DW2 stated in evidence that they would have been willing to receive a report from the plaintiff together with the samples of the jeans in question even six months after delivery, in spite of the 24 hours stipulated by cl 10. It would appear quite clear that the conditions laid down by cl 10 are not mandatory conditions. Clause 10 should be construed as doing nothing more than setting out certain guidelines which buyers might follow in making complaints. Failure to follow these guidelines can hardly mean that legitimate complaints will not be heard. Nor can failure to follow the guidelines be interpreted as either a waiver by a buyer of his rights

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or as a contractual promise to waive such rights, for the guidelines are undoubtedly stringent and one can well envisage circumstances in which a buyer could not reasonably be expected to follow them to the letter. Indeed the time limit of 24 hours is clearly derisory since it would have been impossible for any buyer to obtain a Lloyds report and to send this to the defendants by registered mail within that short period of time.

21 I find therefore that, although the plaintiff was unable to adhere faithfully to the guidelines of cl 10, he acted with due expedition throughout. He sent a telex of complaint on the very same day that he received the jeans (22 September 1983). At the same time he contacted Lloyds to engage a surveyor but, having been told that they were short of surveyors and that he would have to wait for an appointment, he acted promptly in contacting ITCS, the surveyors for the defendants` own insurers General Accident. The defendants insisted at trial that they wanted a survey report from Lloyds because Lloyds were `unbiased`. Yet surely the same objectivity may be expected of the surveyors stipulated by the defendants` own insurers; indeed there has been no serious attempt to impugn ITCS`s integrity or that of PW1. The defendants also maintained that the plaintiff has failed to give them any samples of the jeans he received. However, in my view, the weight of the evidence before me makes such a claim incredible. The plaintiff was able to produce, for example, mailing receipts to support his claim that he did forward the requisite samples to the defendants. For the above reasons therefore I find that cl 10 does not have the effect of excusing the defendants from liability in the present case.

22 As regards cl 11, counsel for the defendants has not attempted to show that the clause, properly construed, exempts the defendants from `any responsibility for the quality quality [sic] and make up of the merchandise shipped`. Perhaps that is just as well for I cannot see how one can ascribe much

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sense to a clause which is plainly inconsistent with the whole object and intent of the contract. Not even the defendants, in my view, will challenge the basic premise that this is a contract of sale between the plaintiff as buyer and the defendants as sellers. The defendants are described as `sellers` in all other clauses in the contract. It is true that in the bills of lading they are also named as the shippers, but it is facetious to say that this therefore changes in any way the contractual rights and obligations they have undertaken as the sellers in the contract with the plaintiff. At best, cl 11 adds nothing to our understanding of the contract of sale between plaintiff/buyer and defendants/ sellers. At worst, if its intended effect is to somehow render nugatory the defendants` obligations as sellers by glibly describing the defendants as mere `shippers in transit`, it is nonsensical and would deprive the contract of any real content. It would, for example, render meaningless cl 3 (on which the defendants also rely) which impliedly acknowledges that the defendants ***as sellers*** are liable for any variations in the quality of the goods exceeding 10%. I cannot believe that this would accord with the true common intention of the parties. In this respect, regard may be had to such authorities as ***Glynn v Margetson & Co*** , and ***Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd*** , which establish that a wide exemption clause must not be interpreted so as to run counter to the main object and intent of the contract. For the above reasons I hold that cl 11 cannot have the effect of excusing the defendants from their contractual obligations as sellers in respect of the jeans sold.

23 I come now to the plaintiff`s final contention, which is that the defendants failed to supply goods fit for the purpose for which they were required. The plaintiff claims that his purpose in purchasing the jeans was to resell them at a profit. He contends that the purpose of resale was implicitly made known to the defendants beforehand, because the defendants knew of the

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plaintiff`s business as wholesaler and importer of garments and because of the references in the plaintiff`s telex messages to his `customer` (see, for example, the telex messages of 23 June and 20 July 1983). However, even if the defendants were aware of the plaintiff`s business as wholesaler and importer, this does not automatically establish the plaintiff`s claim, unless the plaintiff can show that he relied on their skill and judgment to ensure that the jeans delivered were fit for that purpose. The defendants had no idea at any stage of the transaction as to the exact identity or whereabouts of the plaintiff`s resale customers or of the resale prices the plaintiff had obtained. Even if the defendants had known that the resales were to occur in Saudi Arabia, the plaintiff as a native of Saudi Arabia would have been far better informed than the Singapore defendants as to the market conditions (in particular the conditions for resale profitability) in Saudi Arabia. As such he could not have relied on the defendants` skill and judgment in this respect: see, for example, the judgment of Diplock LJ in ***Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd*** , at p 560:

> *But where a foreign merchant buys by description goods, not for his own use, but for resale in his own country of which he has no reason to suppose the English seller has any special knowledge, it flies in the face of common sense to suppose that he relies on anything but his own knowledge of the market in his own country and his own commercial judgment as to what is saleable there.*

24 I find therefore that the plaintiff has established two of his claims: that the defendants were in breach of contract in failing to supply goods corresponding to the sample and also in failing to supply goods corresponding to the contractual description. The plaintiff now claims damages amounting to US$26,357.13. This total sum is comprised of three items: US$18,571.43, being the difference between the contract price of the jeans and their eventual resale value; US$7,500 being the estimated loss of profit on resale; and US$285.70

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being the cost of the survey reports commissioned from ITCS. Since the plaintiff failed to establish the claim that the defendants failed to supply goods fit for the purpose of resale for profit, I must disallow the claim for US$7,500 loss of profit. The claims for US$18,571.43 and US$285.70, however, will be allowed. They represent losses genuinely suffered by the plaintiff as a consequence of the defendants` breach and they are substantiated by documentary evidence. In this context I am somewhat surprised by the defendants` continued insistence that the cash receipts showing the resale prices must be proven by the staff members who issued the receipts. It was alleged by the plaintiff at the trial that these particular staff members could not be found. Nonetheless, having regard to the nature of the receipts and the circumstances in which they were made, I found them to be admissible under s 32(b) of the Evidence Act (Cap 97). No objection was then raised by the defendants.

25 Accordingly the plaintiff is awarded a total of US$18,857.13 in damages. Interest will be calculated at 6%pa from the date of delivery, 22 September 1983 to the date of judgment.

26 Plaintiff`s claim allowed in part.

Yong Pung How CJ

Margaret Neo Kee Heng (Joseph Hoo Morris & Kumar) for the plaintiff
P Sivakumar (Wee Ramayah & Partners) for the defendants

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