IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 69

S1641/1991

Between

Idealnet Trading Pte Ltd

… *Plaintiff*

And

GTS German Tooling Systems (Singapore) Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Version No 1: 29 Oct 2026 (23:45 hrs)

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Idealnet Trading Pte Ltd v GTS German Tooling Systems (Singapore) Pte Ltd

[1994] SGHC 69

S1641/1991
K S Rajah JC
18 March 1994

1 **Judgment:**

2 J U D G M E N T

3 Background to Oral Contract

4 In early 1990 Conner Peripherals Pte Ltd ("Conner") told Polymicro Precision Technology Pte Ltd ("Polymicro") that they required a large number of Assembly Mach Base Model No 65417-001 and Assembly Mach Base Model No 65111-004 ("Assembly Mach Base"). Conner provided Polymicro with specifications.

5 Polymicro required specific parts of the Assembly Mach Base to be drilled and asked for Combi Special Carbide Drills from Alpha Tan Peng Quee ("Alpha Tan"), defendants' then Manager, who was told of the large contract and the need for such drills.

6 Alpha Tan asked for the specifications so that preliminary samples could be made to satisfy Polymicro. Samples were sent in June/July 1990 and in August/September 1990, the requirements for drills were given as being:-

7 (i) 1,281 drills 2.5 x 55 mm (ii) 2,635 drills 2.5 x 56 mm (iii)535 drills 2.5 x 57 mm (iv) 1,584 drills 3.05 x 4 x 60 mm (v) 510 drills 3.05 mm

8 The goods were to be manufactured and delivered, according to Polymicro, to meet Conner's delivery schedule spread over six months from June 1991 to January 1992.

9 The delivery schedule required samples to be delivered by January 1991 for tests over a period of five months. Upon acceptance of the samples and issue of purchase orders, the defendants were to make delivery. Payment was to be made within 60 days for the goods delivered according to the schedule.

10 The defendants, however, did not comply with the schedule and delivered all the goods. When contacted, Alpha Tan requested Polymicro to keep their goods in the premises pending results of the tests to be carried out by Polymicro. Polymicro agreed to do so but Alpha Tan then demanded payment after issuing delivery orders and invoices for $202,553.39. Alpha Tan's evidence was that his Managing Director, Gunter Alexander Zientarski ("Gunter"), insisted that there should be full payment for the goods that had been delivered because he was concerned that Polymicro might not be able to pay for all the items. It resulted in the goods being returned. That is the background that resulted in the oral contract between the plaintiffs and the defendants.

11 The Oral Contract

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12 The plaintiffs and the defendants are trading companies that, inter alia, deal with precision tools. The defendants through Alpha Tan contracted with the plaintiffs' Edan Chan Kean Fatt ("Edan Chan") to purchase 'combi countersunk and drills' ("the goods").

13 Alpha Tan placed the order orally after he had received the drawings from the end user, Polymicro. The drawings set out the specifications and the tolerance levels that were acceptable to Polymicro.

14 The products are custom-made and not common user products and therefore required stricter compliance with the specifications given in the drawings. Alpha Tan's evidence is that he gave a more open tolerance level. The dimensions in Polymicro's drawings, which he faxed to the plaintiffs, were left intact. He merely covered Polymicro's logo, name and address and the tolerance levels, and replaced them with the defendants' name and address but without the tolerance levels so as to appear as if the drawings were the defendants' drawings.

15 Tolerance

16 Alpha Tan's evidence is that the dimensions in AB-11, the drawing for combi countersunk drills: 4,000 pieces diameter 2.5mm/3.175 x 56mm and 2,000 pieces diameter 2.5mm/3.175mm x 55.5mm, should read 2.5 q1 and not the tolerance set out in Polymicro's drawings which is given in two places: one, in the drawing under the heading "All Dimensions Are In Metric -- Tolerance Unless Specified -- Angle = q30~; Decimal: 0.0 = q0.10 and 0.0 = q0.01" and in the drawing (AB-11), it has 2.50 q0.05.

17 The tolerance for AB-12, the drawing for the drill for 2,000 pieces diameter 3.05mm/4.0 x 60 mm, should be 3.05 +0.02 and -0.00 and not to Polymicro's tolerance stated as 3.05 q 0.005.

18 The tolerance for the diameter in AB-13, the drawing for the drills for 2,000 pieces diameter 3.13mm/4.00mm x 59 mm, was 3.13 +0.02 and -0.0. AB-13 shows the tolerance as 3.13 +0.005 and - 0.0. Alpha Tan's evidence was that the specifications he sent to the defendants were the specifications given to him by Polymicro's Lim Juang Seng. The drawings, however, speak for themselves and I reject Alpha Tan's evidence and accept the drawings.

19 It is accepted by both parties that where tolerance is given, strict compliance with it is required. The position where there is open tolerance, however, was not agreed.

20 Alpha Tan faxed the drawings sent to him by Polymicro. In the process of replacing Polymicro's name with the defendants' name in the drawings, he failed to transmit to the plaintiffs the tolerance levels specified in Polymicro's drawings.

21 The defendants had a parent company which manufactured tools but the orders in this case were not placed with the parent company but with the plaintiffs' representative, Edan Chan.

22 On receiving the orders from Alpha Tan, the plaintiffs placed orders with a Swiss company for the manufacture of the goods with the specifications sent to them by Alpha Tan. The tolerance to the angle and the tolerance range that was to apply where tolerance is not specified in Polymicro's drawings were not sent.

23 Alpha Tan giving evidence for the plaintiffs said that the acceptable variation is subjective and depends on the end user. The length of the shank, not being critical, no tolerance was given ignoring the fact that there was in Polymicro's order a tolerance that was to apply where tolerance is not specified. Alpha Tan agreed that the diameter of the flute of 2.55 mm was critical because tolerance was given. The plaintiffs' manufacturers manufactured the goods and delivered them to the plaintiffs. The plaintiffs delivered the goods to the defendants under two invoices, No 0670 dated 15 January 1991 for $108,915.80 and No 0704 dated 1 March 1991 for $83,300.14, totalling $192,215.94.

24 Description of the Goods

25 In invoice No 0670 dated 15 January 1991, the goods were described as follows:-

26 Combi Countersunk & Drills (Carbide) (1) 2635 pcs DIA 2.5MM/3.175 x 56MM (2) 1584 pcs DIA 3.05MM/4.0 x 60MM

27 The delivery order No 0123 is dated 15 January 1991 for the same goods and it is clear, delivery was made on the same day without inspection, to the end user.

28 In invoice No 0704 dated 1 March 1991, the goods were described as follows:-

29 Combi Countersunk & Drills (Solid Carbide) (1) 713 pcs DIAMETER 2.5mm/3.175mm x 55.5mm (2) 960 pcs DIAMETER 2.50mm/3.175mm x 56mm (3) 1489 pcs DIAMETER 3.13mm/4.00mm x 59mm

30 The plaintiffs delivered the goods to the defendants who in turn delivered them to Polymicro. The delivery order No 0138 dated 21 February 1991 is for the same quantity of the goods and I find that the goods in invoice No 0704 were delivered to the end user without inspection. The invoice dated 1 March 1991 was sent after the goods had been delivered to Polymicro packed in boxes.

31 On 1 July 1991 Polymicro returned the goods to the defendants saying that the goods were not in accordance with specifications. Alpha Tan's evidence is that Gunter wanted the goods returned. I find Gunter wanted payment and the defendants in Suit No 1905 of 1991 have instituted proceedings against Polymicro for $202,553.39.

32 Payment

33 The defendants paid the plaintiffs $36,000 on 10 May 1991 and $78,107.97 on 26 May 1991, leaving a balance of $78,107.97 which is the subject of this action.

34 The defence is that the oral contract required the plaintiffs to supply goods with the specifications stated in the invoices and that it was a term of the contract that the goods supplied should:-

35 (a) correspond with the description in the invoices; (b) be of merchantable quality; and (c) be fit for the purpose for which the goods were bought.

36 The defendants did not test the goods when they were delivered to the defendnts but delivered them to Polymicro in circumstances where the plaintiffs

well knew that the defendants, being a trading company, would deliver the precision tools to the end user without inspection.

37 The defendants, however, were forced to test the goods in July 1991 after Alpha Tan resigned giving 24 hours' notice. His letter is in the following terms:- 11/7/91

38 Dear Mr G A Zientarski

39 RE: RESIGNATION

40 I herewith hand in my resignation with effect of today.

41 No payment or any other compensation for in lieu of notice will be payable according to our mutual agreement.

42 My outstanding salary and leave compensation offets the balance of the car loan of S$5,000.00 in full as mutually agreed upon.

43 We will part in good face and relationship and will continue doing business together in the future.

44 Yours sincerely

45 It is clear that Alpha Tan was given an honourable way to leave the company when the defendants were not satisfied with his work.

46 Test

47 When the goods were tested in July 1991 after the defendants' Alpha Tan had resigned, the defendants' in-house engineers discovered that the goods supplied did not strictly comply with the specifications in invoice No 0704, ie for goods valued at $83,300.14.

48 The defendants say they are entitled to reject the goods and are not liable for the goods in invoice No 0704.

49 Counterclaim

50 The defendants had paid the plaintiffs $114,107.97. The defendants now say that there has been total failure of consideration and that accordingly the plaintiffs should pay the defendants $114,107.97 that was paid to them.

51 The defendants have pleaded in paragraph 4 of their defence that tests were carried out on the goods in invoice No 0704 but in paragraph 5 of the counterclaim, they plead that goods supplied under both invoices were not in accordance with specifications and that there has been a total failure of consideration.

52 The defendants paid $36,000 and $78,107.97 on 3 May 1991 and 20 June 1991 respectively for goods in respect of invoice No 0670 and part of the goods in invoice No 0704. They say quality control tests were carried out after payments were made and time was bought by paying half the sum that was claimed by the plaintiffs.

53 The defendants accepted the goods on 15 January 1991 and 21 February 1991, and I find, only tested the goods delivered under invoice No 0704 which were delivered to the defendants on 21 February 1991.

54 In paragraph 7 of his affidavit filed on 30 September 1991, Gunter said:-

55 ... on or around the middle of July 1991, the Defendants' engineers carried out tests on five (5) samples of each classification of the goods in Invoice No 0704 and the results of the Defendants' tests revealed unanimously that the goods did not comply with the specifications as ordered and set forth in Invoice No 0704. ...

56 I am unable to find that it must necessarily follow that the goods delivered under invoice No 0670 on 15 January 1991 were not in accordance with specifications simply because of the evidence that goods delivered on 21 February 1991 under invoice No 0704 were not in accordance with specifications.

57 Specifications

58 The goods are precision drills. The range of tolerance was given by Polymicro to the defendants in more ways than one. The defendants' then manager, Alpha Tan, chose to take advantage of Polymicro's drawings and in the process failed to convey to the plaintiffs the tolerance range that was acceptable to Polymicro. The defendants must take the blame for specifications in Polymicro's drawings that were not specified to the plaintiffs.

59 The question is:

60 (i) whether the plaintiffs delivered the goods as described in the invoices; (ii) whether the goods complied with the specifications given therein; (iii)whether there is a breach of condition; and (iv) whether the defendants can reject them.

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61 Tests By SISIR

62 Besides in-house tests, the defendants sent samples of the goods to the Singapore Institute of Standards and Industrial Research (SISIR). Gerard Teo of SISIR, the defendants' expert witness, gave evidence that the International Standards Organisation (ISO) and Deutsche Industrie Norm (DIN) standards are generally accepted guidelines in the manufacturing industry. The evidence was not seriously challenged by the plaintiffs. Mr Tan Jee Ming, counsel for the defendants, urged upon the court that where open tolerances were involved, the various recognised industrial standards should be applied and that in this case, the ISO and DIN standards, which are similar to each other, should be applied. I accept the evidence of Mr Gerard Teo that recognised standards are accepted in the manufacturing industry but if that is going too far, it is sufficient for me to look at the specifications in the invoices and the results of the tests carried out by the defendants on the goods delivered under invoice No 0704 in AB2-16 for the drills in item 2 and AB2-17 for the goods in item 1. The measurements of the 35 drill bits done by SISIR show the samples (except drill bit 30322/4) did not correspond with the description given.

63 The tables speak for themselves. The tables at AB2-8, 9 and 10 submitted by SISIR for items 1, 2 and 3 are reproduced against the description in invoice No 0704:-

64 Mean Measured Results

65 The figures in A, B, mC, mD are in millimetres. E denotes the angle.

66 Set No: 30320

67 Drill Bit No A B mC mD E~30320/15.5449.8 6 3.173 2.50 81~ 44'30320/25.4649.8 6 3.172 2.49 82~ 18'30320/35.5049.8 1 3.172 2.47 83~ 15'30320/45.4749.9 0 3.173 2.49 81~ 02'30320/55.5149.8 8 3.172 2.50 83~ 14'

68 Set No: 30321

69 Drill Bit No A B mC mD E~30321/16.0150.0 4 3.170 2.50 83~ 20'30321/26.0050.0 3 3.168 2.49 85~ 19'30321/36.0749.9 4 3.169 2.50 82~ 24'30321/46.0050.0 5 3.170 2.50 87~ 26'30321/56.0050.0 7 3.169 2.48 83~ 13'

70 Set No: 30322

71 Drill Bit No A B mC mD E~30322/18.9750.0 0 3.997 3.12 81~ 14'30322/28.9649.9 2 3.996 3.13 88~ 25'30322/38.9649.9 8 3.995 3.12 82~ 34'30322/48.9749.9 5 3.996 3.13 89~ 16'30322/58.9449.9 8 3.995 3.12 82~ 54'

72 The goods, known as "combi countersunk and drills", have specific descriptions. "Countersunk" means that such drills are used to manufacture components which are later assembled. Where the angle, in this case, 90~ is not maintained, assembly pins and screws will not fit or sit into the manufactured components.

73 The results of SISIR's tests were that 34 out of 35 of the sample drills tested did not conform to the 90~ angle. These 34 sample drills range from 76~ 2' to 88~ 25'. Having regard to the requirement that there should be strict compliance of the angular dimension without reference to the tolerance level given in Polymicro's tolerance range that was covered in the drawings by Alpha Tan, the plaintiffs delivered goods that did not conform to the description and are in breach of the implied conditions.

74 The outcome of SISIR's tests on the linear dimensions also shows that the goods supplied did not conform to the contractual dimensions and the goods cannot be regarded as merchantable or fit for the purpose for which the defendants ordered the goods.

75 The plaintiffs accept that it was crucial for the goods to comply with the dimensions in the invoices where they are custom- made for Polymicro. SISIR's tests showed that 18 out of 20 type 3 sample drills were out of specifications. Three out of five type 4 sample drills tested by SISIR were also shown to be out of specifications.

76 I accept the findings of SISIR and find as a fact that the goods delivered to the defendants under invoice No 0704 were not merchantable and could not be used for the purpose for which they were purchased since the plaintiffs were expressly informed by Alpha Tan of the particular purpose for which the goods were being bought, ie for drilling holes for the manufacture of disk drives in the computer industry and the holes were required for tapping purposes. The plaintiffs' Edan Chan would have been aware that they were precision goods for use in the computer industry and that strict compliance with specifications and dimensions was important.

77 The angle of the cutting edge is stated clearly in the drawings sent to the plaintiffs. The plaintiffs failed to supply the goods that were reasonably fit for the purpose.

78 Having regard to the totality of the evidence, I find as a fact that:-

79 (1) Alpha Tan failed to transmit to the plaintiffs the tolerance for the custom-made tools ordered by Polymicro; (2) the plaintiffs's manufacturers did

not manufacture the precision tools ordered by the defendants in compliance with the specifications that were sent by Alpha Tan as described in invoice No 0704; (3) the plaintiffs delivered the precision tools to the defendants in the boxes that they received from the manufacturers in Switzerland; (4) the defendants in turn delivered the goods to Polymicro without carrying out any inspection; (5) the defendants were given cause to suspect that the transactions carried out under the management of Alpha Tan were not in order only after his resignation; (6) the defendants and SISIR carried out tests of the goods delivered to the defendants under invoice No 0704; (7) the possibility that part of the goods delivered under invoice No 0670 on 15 January 1991 did not comply with contract specifications cannot be ruled out but having regard to the pleadings and the evidence, the defendants cannot now say there has been total failure of consideration of goods delivered under invoices No 0670 and 0704; and (8) the reports of in-house tests and SISIR establish that the goods delivered under invoice No 0704 were not manufactured according to specifications.

80 Alpha Tan was not a witness or truth. The plaintiffs' counsel attacked the credibility of Gunter forcefully. The discrepancies in Gunter's evidence have been set out by counsel in the plaintiffs' submission. Both Alpha Tan and Gunter were interested witnesses. After seeing and hearing all the witnesses and the way they responded when their evidence was tested, I accept the evidence of Gunter. Gunter's evidence was more in accordance with commercial considerations and the way things were managed by the defendants' firm. Alpha Tan's claim that Gunter wanted the goods returned is not consistent with the letter Gunter wrote.

81 Consideration

82 Mr Tan Jee Ming, counsel for the defendants, submits there has been total failure of consideration. The procedures followed by Alpha Tan when he ordered the goods, received the goods and delivered the goods to Polymicro on behalf of the defendants placed difficulties in the defendants' way. There is no claim for damages for breach of condition or breach of warranty. Mr Peter Low submits that damages is a remedy the defendants should have set up and cannot now invoke section 53 of the Sale of Goods Act and are precluded from asking the court for the remedy of damages, after the parties were asked to address the court on the consequences of partial failure of consideration. He has also objected to the reference to damages by the defendants in his submission.

83 At common law, payments made under a contract which is subsequently frustrated cannot be recovered if there is only a partial failure of consideration. At first sight, it would appear that nothing can be recovered because there is only a partial failure of consideration but the buyer can recover the amount of the price which is to be attributed to the goods which are not merchantable or not fit for the purpose for which the goods were bought. The reason for this is that the risk in respect of those goods was on the seller and the same principle applies if the buyer has not paid the price in advance so that the buyer should only be liable for the proportionate part of the price (see page 336, The Sale of Goods, 8th Edition, by P S Atiyah).

84 This is a case where the buyer has not paid the price in advance and the defendants are liable for the proportionate part of the price.

85 I now turn to the counterclaim for $114,107.97. The value of the goods in invoice No 0704 is $83,300.14. I find there is failure of consideration in respect of the goods delivered under invoice No 0704.

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86 In Kwei Tek Chao v British Traders & Shippers Ltd < 1954 > 2 WLR 365, a case that dealt with the sale of goods in general and on CIF contracts in particular, the plaintiffs bought from the defendants goods on CIF terms. Payment was to be made under letter of credit against shipped bills of lading, shipment was to take place not later than 31 October 1951. The plaintiffs contracted to resell but the goods were not shipped until 3 November and the bills of lading were altered to show 31 October. The defendants were not responsible for the forgery of the bills and payment was duly made and on arrival of the goods they were taken off by the plaintiffs and pledged to their bank. The plaintiffs lost their contract of resale because of the late shipment and were unable to sell elsewhere because of the fall in the market price. They then discovered the forgery of the bills of lading and claimed:-

87 (a) return of the price; or (b) damages for breach of contract.

88 The plaintiffs did not succeed in obtaining the return of the price because the court held that there had not been a total failure of consideration. The plaintiffs, however, succeeded in obtaining damages for breach of contract because under CIF contract the seller is under two obligations:-

89 (1) to deliver correct documents; (2) to deliver correct goods;

90 and the plaintiff could rescind either by rejecting the documents or by subsequently rejecting the goods. He could also elect to treat the breach of condition as breaches of warranty entitling him to damages.

91 The plaintiffs elected not to reject the goods and they had not rejected the documents but they had been deprived of their right to elect whether to reject the documents or not because the incorrect date concealed from them that they

had such a right. The court accordingly held that they were entitled to recover the difference between the market value of the goods at the date of delivery and the contract price.

92 The plaintiffs were held not entitled to recover their actual loss of profit on the subsale, for although it was in the contemplation of the parties that the goods were being bought for resale, there was nothing to show that it was not contemplated that if the goods were not delivered, the buyers would go out into the market and buy similar goods, justifying the normal market price measure of damages.

93 Devlin J said (at page 384):-

94 There are, of course, cases where that prima facie measure of damages is not applicable because something different is contemplated. If, for example, a man sells goods of special manufacture and it is known that they are to be resold, it must also be known that they cannot be bought in the market, being specially manufactured by the seller. In such a case the loss of profit becomes the appropriate measure of damages. Similarly, it may very well be that in the case of string contracts, if the seller knows that the merchant is not buying merely for resale generally, but upon a string contract where he will resell those specific goods and where he could only honour his contract by delivering those goods and no others, the measure of loss of profit on resale, is the right measure.

95 Return of the Money

96 Devlin J said the plaintiffs' claim for the return of their money is put as a claim for a consideration that has wholly failed. He said (in the same case reported in < 1954 > 2 QB 459 at 475):-

97 ... I confess that I am not quite able to understand how that differs from a claim made in the ordinary way under the Sale of Goods Act, 1893, where there has been a rejection. Of course, if goods have been properly rejected, and the price has already been paid in advance, the proper way of recovering the money back is by an action for money paid for a consideration which has wholly failed, ie money had and received; but that form of action is governed by exactly the same rules with regard to affirming or avoiding the transaction as in any other case.

98 .....

99 (At page 477, quoting from Rowland v Divall < 1923 > 2 KB 500) ... When the buyer sought the return of his money as for a total failure of consideration, it was suggested that he had used the car for some time, and that, therefore, the consideration had not totally failed. In that case quite plainly the property could not have passed, and therefore, ... it could have been decided simply by saying that the property had not passed, and the buyer was entitled to have his money back because the transaction was void. But it was not decided on that basis but as a claim made for breach of an implied condition on the part of the seller that he had the right to sell the goods.

100 Rejection

101 In the case before me, the defendants did not know that the goods were not in accordance with specifications till five months after the goods were received under invoice No 0704 on 21 February 1991 when Alpha Tan had clearly resigned in a huff and given Gunter cause to believe that all was not well.

102 In the same case, Devlin J said (at page 480):- A right to reject is, after all, only a particular form of a right to rescind the contract. Wherever there is a breach of condition there is a right to rescind the contract, and if there are successive breaches of different conditions committed one after the other, each time there is a breach there is a right to rescind in respect of that breach. A right to reject is merely a particular form of the right to rescind, which involves the rejection of a tender of goods or of documents; and a rightful rejection of either is a rescission which brings the contract to an end.

103 In this case, the plaintiffs had to deliver goods that conformed to description and the implied conditions. There was a right to reject the goods when they were delivered. That was not done because there was no inspection. All the parties, however, were aware that there was a delivery schedule and that the goods were to be resold and used by an end user. Where the seller has not delivered the goods, which conform to the contract description and the implied conditions, he has broken that obligation. The question is whether there are distinct obligations.

104 If there are two distinct and separate obligations, there is a right to rescind arising from the breach of any one of them and the matter has to be looked at in the way Greer LJ suggested in James Finlay & Co Ltd v NV Kwik Hoo Tong HM < 1929 > 1 KB 400 as if the two obligations were contained in two separate contracts. According to Devlin J in Kwei Tek Chao, he said (at page 484):-

105 ... I am dealing with two separate breaches, each with their separate remedies, it is not relevant to consider whether the buyers lost their right to reject the goods. In my view they lost their right to reject the documents, and

their right to reject the goods was something different which they could exercise one way or the other whichever way they chose. If there had been only one right to reject it would have been material to ascertain whether the buyers had in any event lost their right to reject by any action taken by them in relation to the documents.

106 In this case, the defendants did not reject the goods but their right to reject the goods after inspection upon delivery is different from their right to claim damages for breach of conditions.

107 In the same case, Devlin J considered Hardy & Co (London) Ltd v Hillerns and Fowler < 1923 > 2 KB 490 and said (at page 488):-

108 ... he physically deals with the goods and delivers them to his sub-buyer, he is doing an act which is inconsistent with the seller's reversionary interest. The seller's reversionary interest entitles him, immediately upon the operation of the condition subsequent, that is, as soon as opportunity for examination has been given, to have the goods physically returned to him in the place where the examination has taken place without their being dispatched to third parties.

109 As soon as the opportunity was given, Gunter took steps to carry out an inspection and obtained a second opinion from SISIR, but I reject the defendants' claim for $114,107.97 calculated on the basis of total failure of consideration.

110 Damages

111 I have to consider whether damages which flow from the breach of contract arising from the plaintiffs' failure to comply with specifications and the

implied conditions can be assessed. The defendants lost the right to reject which they should have exercised had they inspected the goods but Devlin J has also said (at page 494):-

112 So far as the principle is concerned, the buyer is, upon the measure as set out by Wright J (Kwik Hoo Tong's case), entitled to be put in the same position as he would have been in if he had exercised his right to reject. He has the goods, he has parted with his money, and therefore he wants to relieve himself of the goods and recover his money. If that is done he will be in the same position as he would have been in if he had never parted with his money and had never received the goods. Accordingly, the reasonable cause for him is, as soon as he ascertains that he has a right to compensation, in that the bills of lading were false, to sell the goods then, or within a reasonable time thereafter, for what they will fetch, and to obtain from the seller the difference between the price obtained for the goods and the contract price which he pays. In that way he will be put in almost precisely the same position as if he had rejected the goods. In other words, the measure is the difference between the contract price and the price at which the buyer has sold the goods.

113 .....

114 ... the buyer is bound to mitigate his damage, then as soon as he knows of his rights he must sell the goods. He cannot do so before he does know his rights, and "as soon as" means within a reasonable time thereafter. If he chooses not to sell the goods he is not to be put in any better or worse position by delaying for his own purposes, so that, in substance, it is the price which he actually gets on selling them, or the price which he actually could get if he did sell them.

115 The breach for which damage is awarded is in effect the breach of the duty imposed by the contract. The aggrieved person cannot be expected to compensate himself until he has ascertained the fact. Buyers of custom-made precision tools cannot be treated as if they could go out into the market and buy those goods when they had supposed that they had already taken up goods which were in accordance with the contract and they had no notion, and could have had no notion, that they had any rights with regard to the contract, but the remedy does not lie in asking for the price paid.

116 Devlin J gave the answer (at page 498):- I am satisfied, therefore, that the plaintiffs' case is made out when they say that this commodity was virtually unsaleable in the Hongkong market. But "virtually unsaleable" does not mean that the goods have no value for the purpose of the calculation of damages. They have not yet been sold, and it is possible that they may never be sold, but it is also possible that trade may revive and that some sort of a market may be found for them if they are held on to long enough. They therefore have some value, although it may be a speculative one, but that possibility in itself is something which must be valued.

117 Accordingly damages will be calculated on the basis of the difference between the contract price of $83,300.14 in invoice No 0704 less the figure of the price for which the goods are sold. The defendants' counterclaim for $114,107.97 is dismissed and I order:-

118 (1) The plaintiffs' claim for $78,107.97 be dismissed with costs. (2) The defendants' claim for $114,107.97 is disallowed and there be an order for assessment of damages suffered by the defendants for the goods purchased under invoice No 0704. (3) Registrar to assess damages after the defendants

have sold the goods to mitigate damages. (4) Plaintiffs to pay 50% of the defendants' costs of counterclaim.

K S Rajah JC

Peter Cuthbert Low (Peter Low, Seong Tang & Partners) for the plaintiffs
Tan Jee Ming and Joseph Liow (Derrick Ravi & Partners) for the defendants

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