

**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN
[RAYUAN SIVIL NO. BA-12BNCvC-43-10/2023]**

ANTARA

**1. MUHAMMAD MAHFUZ BIN
MOHAMAD YASSIM
(NO. K/P: 850617-04-5411)**

**2. O&G TRANSPORT (KLANG)
SDN BHD
(NO. SYARIKAT: 1110470-U)**

... PERAYU-PERAYU

DAN

**HORECA FOODS (M) SDN. BHD.
(NO. SYARIKAT: 807000-U)**

... RESPONDEN

**[DALAM MAHKAMAH SESYEN DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN
GUAMAN SIVIL NO. BA-A52NCVC-117-03/2020]**

ANTARA

**HORECA FOODS (M) SDN. BHD.
(NO. SYARIKAT: 807000-U)**

... PLAINTIF

DAN

**1. MUHAMMAD MAHFUZ BIN
MOHAMAD YASSIM
(NO. K/P: 850617-04-5411)**

2. O&G TRANSPORT (KLANG)**SDN BHD****(NO. SYARIKAT: 1110470-U) ... DEFENDAN-DEFENDAN]****GROUND OF JUDGMENT****Introduction**

- [1] The action filed by the Respondent at the Sessions Court was to recover damages for negligence and/or breach of a commercial guarantee by the Appellants in the transportation of 4 pallets comprising 112 packages of Ballantyne Parmesan Cheese Powder (**“Goods”**) from Shah Alam to Melaka.
- [2] On 19-9-2023, the Sessions Court found the Appellants liable after full trial, and ordered them to pay the following sums:
- (a) Special damages in the sum RM119,491.06;
 - (b) General damages in the nominal sum of RM2,000.00;
 - (c) Interest at 5% on the judgment sum for special damages from 5-11-2019 until the date of payment;
 - (d) Interest at 5% on the judgment sum for general damages from the date of the Writ of Summons until full payment; and
 - (e) Costs of RM13,000.00 payable by the Defendants to the Plaintiff.
- [3] The Appellants filed a Notice of Appeal against the entire judgment of the Sessions Court. On the hearing day of the appeal, Counsel confirmed that the Appellants would only be pursuing the appeal against the quantum of special damages.

Background Facts

- [4] For convenience, I will refer to the parties as they were in the Sessions Court in this Judgment.

- [5]** The Plaintiff manufactures, imports and distributes goods used in the food industry. The 2nd Defendant is a land transport and logistics service provider and the 1st Defendant is a lorry driver employed by the 2nd Defendant.
- [6]** On 4-11-2019, the Plaintiff engaged the 2nd Defendant to deliver the Goods supplied by the Plaintiff to Julie's Manufacturing Sdn Bhd ("**Julie's**"). On 6-11-2019, Julie's complained that the Goods received were wet and on 7-11-2019, Julie's rejected and returned the entire consignment.
- [7]** The facts as found by the Sessions Court on the question of liability, are that the Goods were:
- (a) collected by the Defendants' lorry at about 11 am on 5-11-2019;
 - (b) not covered during transport and consequently, they got wet when it rained;
 - (c) thereafter left overnight in the lorry along with various other goods (including chemical non-food items); and
 - (d) only delivered to Julie's in Melaka at about 3 pm on 6-11-2019.
- [8]** The Session Court found the Defendants liable:
- (a) for breach of contract i.e. the 2nd Defendant breached its contract with the Plaintiff which terms included a written guarantee about the condition of the vehicle to be used in the delivery of the Goods; and
 - (b) for negligence i.e. the 1st Defendant was negligent in failing to take proper care of the Goods during the delivery; and the 2nd Defendant was vicariously liable for the negligence of the 1st Defendant.
- [9]** It should be highlighted that the Sessions Court Judge who decided the

matter did not hear the oral evidence given at trial as the original trial Judge had been transferred and the case was not heard *de novo*.

- [10] As such, the case was decided on the pleadings, trial documents and transcripts of oral evidence as well as closing submissions of counsel. It was thus pointed out that the Sessions Court Judge did not have the advantage of seeing or hearing the witnesses testify either.

Grounds of Appeal

- [11] The Defendants raised various grounds of appeal, but the crux of the appeal on quantum can be distilled down to 2 points argued :

(1) Proof of loss

- a) There is no proof that the entire consignment of Goods returned by Julie's was damaged.
- b) The measure of loss applied should be the cost of the Goods and not the value of the Goods at the point of delivery.

(2) Failure to mitigate loss

- a) The Plaintiff failed to insure against loss.
- b) The Defendants were denied the opportunity to test the Goods and prove the Plaintiff's failure to salvage the Goods and mitigate the loss.

Analysis of Issues

- [12] It is trite that before interfering with an award of damages by the Sessions Court, this Court should be satisfied that the judge of the Sessions Court had acted on a wrong principle of law, or misapprehended the facts, or had for these or other reasons made a wholly erroneous estimate of the damage suffered.

(1) Proof of Loss*Totality of loss*

[13] It seems to me that the main controversy in this case revolved around whether the Goods were entirely or only partly damaged. These are degrees of damage and where the subject is Parmesan Cheese Powder, the question must be whether the Goods were damaged such that they were all rendered unfit for sale in the market.

[14] In its e-mail of 7-11-2019, Julie's reported as follows:

Kindly be informed that there was a delivery of **Parmesan Cheese Powder** supplied by **Horeca Foods** to our **Factory 2** on **06.11.2019**. However, **all pallets were found wet** by our QA Inspector during incoming inspection. For your information, the water seeped onto the shrink wrap and affected several bags in all pallet.

Please find below the details and pictures of the complained item for your better understanding.

[15] On 11-11-2019, the Plaintiff's employee conducted an inspection of the Goods and reported in a Non-Conformance Report dated 12-11-2019 ("NCR") as follows:

During unloading, the goods on the pallet wet and water vapour can be seen inside the stretch film. Ants colony were also found at the bottom of pallet.

During one by one inspection, more ants found inside the box and between bags. Each affected bag was blown using an air gun to remove the ants from packaging. Besides that, few bags were found mouldy, this might be due to the bags was kept in wet condition for few days.

Due to the wet, severely torn and mouldy condition, total 35 bags (26 bags with severe torn and wet and 9 bags found mouldy) will not be accepted by our customer.

[16] To summarise:

- (a) All 4 pallets were rained on sometime on 5-11-2019 and arrived wet at Julie's on 6-11-2019;
- (b) Water had seeped through the shrink wrap in all 4 pallets or condensation in hot climate would have had the same effect;

- (c) All 112 packages were stacked and in contact with each other inside the shrink wrapped pallets;
- (d) The amount of water seepage was so severe that 26 packages were torn and mould had grown on 9 packages;
- (e) The 4 pallets had been stored overnight with containers of non-food chemicals; and
- (f) There were ant colonies in the pallets and on the packages.

[17] The NCR was prepared by the Plaintiff's QAQC Executive. She testified at the trial that the other packages could not be used for their original purpose because it could not be ascertained whether they were contaminated. Her evidence is as follows:

Aduan bungkusan basah pada semua palat adalah berlaku seawalnya pada 6.11.2019. Keadaan 35 bag tersebut adalah berdasarkan pemeriksaan dijalankan pada 11.11.2019 (yang mana 4 hari telah berlalu) dan berkemungkinan kandungan cecair telah kering atau meresap dan merebak ke lain-lain bungkusan yang bertindih. Dalam apajua keadaan, kesemua bungkusan Pannesan Cheese Powder tersebut telah terdedah kepada keadaan basah dan persekitaran lembap yang boleh menyebabkan pembiakan dan perebakan kuman. Selain itu terdapat kumpulan semut pada pallet dan beg. Semut yang berada di beg tidak dapat dipastikan sekiranya ianya telah masuk kedalam bag. Penggunaan produk untuk tujuan asal (i.e produk makan) membawa kepada 'food safety concern' yang mana mempunyai risiko kontaminasi dan boleh menyebabkan keracunan makanan.

[18] The Defendants produced no evidence to rebut the views expressed by the Plaintiff's QAQC executive whose evidence was unimpeached during cross-examination, even if she is an employee of the Plaintiff. It was open to the Defendants to produce its own expert witness in the food industry to rebut the views of the Plaintiff's QAQC executive on the risks of contamination based on the available facts.

[19] Thus, the Plaintiff had taken the position that any resale of the Goods

was not an option by reference to the visual inspection of the Goods, the apparent contamination on the packaging by foreign matter and the provisions of the **Food Act 1983**. The following provisions were highlighted:

Section 13A

- (3) *Any person who **prepares or sells any food** whether manufactured or not that is **enclosed in a sealed package and the package is damaged and can no longer ensure protection to its contents from contamination or deterioration**, commits an offence and shall be liable, on conviction, to a fine not exceeding thirty thousand ringgit or to imprisonment for a term not exceeding five years or to both.*

Section 13C

- (2) *Notwithstanding subsection (1), **it shall be the duty of any of the persons in section 24, if he knows or has reason to believe or it has come to his knowledge that any food imported, manufactured, packed, farmed, prepared or sold by him has contravened section 13, 13A or 13B, to recall, remove or withdraw from sale such food from any food premises with immediate effect.***

[20] As it relates to the Goods, Julie's had rejected it. The Plaintiff could not ensure that the packaging of the 77 packages that were not torn and mouldy were uncompromised. Thus, the Plaintiffs could not ensure that their contents were free from contamination or deterioration.

[21] It is reasonable to conclude that there is no market for *potentially* contaminated packaged food products. Accordingly, there is no reason for me to disturb the finding of the Sessions Court judge on the probable loss of all the Goods in the sense that I have described.

Measure of Loss

- [22] The general object underlying the rules for the assessment of damages is, so far as is possible by means of a monetary award, to place the plaintiff in the position in which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract. Different measures can be employed to assess such loss.
- [23] The Sessions Court held that the measure of loss should be based on the value of the Goods at the destination, namely the amount invoiced to Julie's in the sum RM115,584.00. In doing so, the Sessions Court relied on *Sony Computer Entertainment UK Ltd v Cinram Logistics UK Ltd* [2008] EWCA Civ 955; *AG of the Republic of Ghana (Ghana National Petroleum Corp) v Texaco Overseas Tank Ships Ltd* [1994] CLC 155 (***“Republic of Ghana”***).
- [24] I find no error in the reliance on these authorities. The House of Lords in the *Republic of Ghana* case observed that:
- "It has long been established that, in claims by a goods owner against a carrier for non-delivery of the goods, the damages recoverable by the goods owner are such as will put him into the position he would have been in if the goods had been duly delivered, and are therefore the value of the goods at the time when, and the place where, they should have been delivered."*
- [25] In this case, the Defendants had custody of the Goods to be delivered in the intended sale of the Goods to Julie's when they were damaged due to the Defendants' negligence. The measure of damages recoverable by the Plaintiff is not limited to the cost of the Goods because the Plaintiff lost not just the Goods at cost, but the sale as well (reflected as either the profit margin or wasted expenses).
- [26] There is evidence that the Plaintiff cleared customs and took delivery of the Goods, which could only reasonably happen if the Plaintiff had paid for the Goods in the ordinary course. Thus, the invoiced amount is the market price for the Goods on the date when it was to have been

delivered and an accurate measure of the Plaintiff's actual loss.

- [27] As for the sum of SST paid by the Plaintiff for the intended sale in the sum RM3,907.06, the Sessions Court found that it is recoverable as an amount expended by the Plaintiff in the lost sale. According to the Plaintiff's witness, the Goods ordered by Julie's were imported by the Plaintiff from Melbourne and the Plaintiff had been exempted from customs duties and SST because of an exemption letter that Julie's had issued. However, the Goods were returned by Julie's and therefore the Plaintiff had to pay the SST on the imported Goods.
- [28] No alternative authority was offered to challenge the recoverability of the invoiced amount and SST paid as the measure of loss. In the circumstances, I will also not disturb the finding of the Sessions Court on the measure of loss.

(2) Failure to Mitigate

- [29] The basic rule is that a plaintiff must prove his loss. Where a defendant contends that that loss should have been mitigated, the onus of proving the possible mitigation is on the defendant.

Duty to Insure

- [30] The Defendants' contention that the Plaintiff failed to insure against their loss can be briefly dealt with. The Plaintiff owed no duty to the Defendants to insure the Goods. Further, the benefit of any premiums paid by the Plaintiff in anticipation of a contingency should not accrue to the Defendants as the tortfeasors in this case, whether to reduce the damages recoverable from the Defendants or otherwise.

Recoupment of Loss

- [31] Again, it seems to me that the main controversy is whether the Goods were entirely or only partly destroyed because according to the Defendants, the Plaintiff ought to have recouped some loss by re-selling some or all of the 77 packages of the Goods that were not (as

at 11-11-2019) torn or mouldy.

- [32] The Plaintiff in discharge of its mitigation duty is only required to take reasonable steps as a matter of law. Reasonableness of the steps taken is a question of fact. In *Malaysian Rubber Development Berhad v Glove Seal* [1994] 4 CLJ 783, the Court held:

"In the sale of goods, the principle of mitigation is a foundation of the normal rule for the measure of damages which requires the innocent party to act immediately upon the breach, to buy or sell in the market, if there is an available market. Even in the absence of an available market, the innocent party must act reasonably to mitigate his loss (Benjamin's Sale of Goods, supra, para 16-044). The question what is reasonable or whether the plaintiff has acted reasonably in mitigation of his damages in every case is a question of fact and not law (Payzu Ltd. v. Saunders [1919] 2 K.B. 581, 588; The Solholt [1983] 1 Lloyds Reports 605 CA)."

- [33] The Plaintiff had taken steps to segregate the wet bags but on 21-11-2019, Julie's sent the following email to the Plaintiff:

"Noted that several efforts have been done by you team in sorting and segregation of the wet bags. However, we still could not accept this batch of Parmesan Cheese due to the unacceptable condition of goods at the point of receipt and also other potential problems from wet bag."

- [34] The fact is that it will never be known for certain whether some or all of the 77 other packages suffered from cross-contamination. Based on the evidence, the Defendants only requested for access to samples after their insurers were notified in May 2020 and this was denied by the Courts on 5-10-2020 (and on 1-3-2021 after appeal).
- [35] Although the Defendants could not take a sample of the Goods to be tested, no evidence was proffered by the Defendants as to how every exposed package in the consignment of Goods could have been

effectively tested for cross-contamination and certified safe for consumption, and still be in a state fit for sale. Presumably, testing entails opening unopened packaging and removing samples for testing.

Conclusion

[36] Taking the evidence as a whole, the Defendants have failed to show that the assessment was wrong in principle and/or wholly unreasonable. I therefore dismiss the appeal with costs of RM7,000.00.

Bertarikh: 18 NOVEMBER 2024

(ELAINE YAP CHIN GAIK)

Pesuruhjaya Kehakiman
Mahkamah Tinggi Malaya
Shah Alam

Counsel:

For the perayu-perayu - Ivan Ho Fook Keong; M/s Ho dan Rakan-Rakan

For the respondent - Lily Chua & Raja Nurul Farah; M/s Lily Chua & Associates

Cases referred to:

AG of the Republic of Ghana (Ghana National Petroleum Corp) v Texaco Overseas Tank Ships Ltd [1994] CLC 155

Malaysian Rubber Development Berhad v Glove Seal [1994] 4 CLJ 783

Payzu Ltd. v. Saunders [1919] 2 K.B. 581, 588

Sony Computer Entertainment UK Ltd v Cinram Logistics UK Ltd [2008] EWCA Civ 955

The Solholt [1983] 1 Llyods Reports 605 CA