

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW

SUIT NO. C.L. 1975/I006

BEFORE THE HON. MR. JUSTICE ROBOTHAM

2/2/76

BETWEEN INTERNATIONAL PURCHASING COMPANY LTD.  
A N D WORLDWIDE PURCHASING COMPANY LTD. PLAINTIFFS  
A N D THE ATTORNEY GENERAL DEFENDANTS

Ronald Williams, Q.C. for both Plaintiffs instructed by Messrs. Clinton Hart & Co.

R.D. Codlin and E.A. Harris and D.G. Edmonds instructed by Crown Solicitor for Defendants.

J U D G M E N T

In this case the plaintiffs are seeking to recover against the defendants the sum of \$57,375.00 for goods sold and delivered as per Invoices 295793-96 dated 1/7/74, plus interest at the bank rate from the date of delivery to the date of payment. The goods which the defendants ordered as spread out in the 4 Invoices were (25) sets Sluice Units.

The defendants are contending

- (1) That what the plaintiffs delivered on 10th November 1975 were 25 "bed pan washers", which were not in accordance with the agreement which was an agreement of sale by description.
- (2) In view of the fact that the sale was by way of description, and that time was the essence of the contract, when the plaintiffs failed to deliver the goods ordered within a reasonable time, they were entitled to repudiate the contract and this they did by letter dated 11th April, 1975, even though the goods had already been delivered.

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- (3) Further on in the alternative, the agreement is unenforceable because at the time the agreement was made, both plaintiffs lacked capacity to contract, they not being then incorporated.

During the course of Mr. Williams' opening of the case for the Plaintiffs, Mr. Codlin for the Defendants sought to have the defence amended to include a claim that

"If which is denied the goods delivered were the goods contracted to be sold the defendant will say that no price was agreed upon and that the price demanded by the plaintiffs for the said goods was unreasonable and exorbitant".

Mr. Williams strongly rejected to this, and not in my view, without good cause. He contended that this defence was an after thought, and could have been raised in the defence which was filed as far back as July, 1975. He was not prepared to meet such a defence and allowing such an amendment would result in hardship and prejudice to his clients when there was no suggestion of any such defence in the correspondence which <sup>flowed</sup> between the plaintiff and the defendants. I upheld Mr. Williams' objection and in the exercise of my discretion I disallowed the amendment. In the final address of Mr. Codlin who appeared for the Attorney General he made the submission that the action was wrongly founded in that it should have been for damages the property in the goods not having passed to the defendants. He relied on Section 49(1) of the Sale of Goods Act which reads:-

"Where the buyer wrongfully neglects or refuses to accept the goods, the seller may maintain an action against him for damages for non-acceptance".

He contended that an action for the price of the goods can only be maintained if it falls within Section 48(1) of the Act where the property having passed to the buyer, he wrongfully neglects or refuses to pay. As was pointed out by Mr. Williams, for the plaintiffs, this was not pleaded and I entertain grave doubt as to whether he should have been allowed to raise what could be a substantial defence, at the stage

when he did the matter not having been pleaded. Mr. Williams however, only made the observation during the course of his closing address and submitted that if the Court should hold that damages was the remedy, that in the exercise of the Courts discretion the claim should be amended to include a claim for damages so that justice could be done between<sup>the</sup> parties, a course I would have had to give consideration to if it became necessary.

The plaintiffs gave evidence that in the first week of January, 1974 he went to the office of the Director of Electrical<sup>and</sup> Maintenance Services and there he saw Mr. Norman Morris, whom he described as a purchasing agent for the D.E.M.S. Morris showed him a list of Hospital parts and equipment and he was asked if he could supply them. He told Morris he could supply all except the last one which was for 25 Sluice Units, for which he would need more specification.

The following day, they both attended at the George V Sanitorium where some sluice units were installed. They were inspected, and the operation was explained to Mr. Millengen (acting for the plaintiffs) and he ~~was~~ told that is what was required.

The units Millengen pointed out were about 15 years old (there is other evidence from Mr. Simpson the plaintiff's expert that they are 35-36 years old) and that they were cracked and leaking. In the light of their age, he told him he might have difficulty procuring them, but he would check it out.

Trips were made to London, Canada, and United States of America between January, 1974 and, the middle of May, 1974 but he was unable to find an exact replica of the sluice units at George V. The difficulty was that they were out of production through age.

On 4/2/74, he informed Mr. Morris of the difficulty he was experiencing and Morris told him to keep on trying. On 18/2/74 he again saw Morris at the office of the D.E.M.S. and Morris handed him an Invoice 228629 - Exhibit 3. Millengen says he told Morris he had not yet located the goods, but Morris none the less told him he should keep on trying as they were urgently needed. Morris admits that this Invoice was drawn in his

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presence, signed by Mr. Hinds a Senior Executive Engineer, and that he (Morris) handed it to Millengen. (It is to be noted that it was not Morris who signed, but a Senior Officer, but none the less it was Morris with whom Millengen was dealing all the while.

Millengen went on another buying trip on 9/3/74, returning on 16/3/74 and again saw Morris at D.E.M.S. Industrial Terrace. He advised him he still could not locate the goods and suggested that he be allowed to find something comparable to the one at George V., the main function of which was to wash bed pans and urinals. Morris agreed to this. There is no evidence from Millengen that Morris consulted anyone on this, and this is all denied by Morris.

In the middle of May Millengen located a supplier in Miami who showed him a photo copy of a type of sluice unit known as a bed pan washer, flusher and sanitizer. This was put in evidence as Exhibit 6. It was contained in a catalogue or brochure which the supplier could not let Millengen have as it was his only copy at the time. On or about 20/5/74 Millengen showed Morris this photo-copy explained its functions, and told him it was a type of sluice unit for bed pan washers. He told him this washer could wash bed pans and it had 3 sprays inside the equipment which would be connected to the hot and cold water system. The bed pan could be put in with the faeces and the washer would wash it away and sanitize or sterilize it with hot water or steam. Mr. Clive Simpson the engineer called by the plaintiffs told the Court that some Hospitals in Jamaica have steam laid on. It was a wall mounted model and could be operated manually or electrically.

The operation of the unit at George V as explained to Millengen by Morris was that the slop was emptied into the drain. The chain was pulled and the bed pan or urinal was placed over the spout or spray head and the water would come up and wash it out.

As the evidence unfolded, it appeared that the basic differences between the two units, were:-

- (1) The one at George V operated with a tank whereas the one shown operated with a flush valve.

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- (2) In the one at George V the faeces had to be first emptied, whereas in the one shown it could be put in along with the pan and flushed away.
- (3) The one at George V operated only with cold water, and could not sanitize, whereas the one shown could operate on hot or cold water and could sanitize, hence its description.

Basically therefore it would seem that both were performing the same primary function, one in more modern, efficient and sanitary manner. Millengen in Cross-examination was asked.

"Do you know that the unit you were shown at George V was used principally for removing certain matters from linen before they are washed".

His answer was NO Sir.

Mr. Simpson the plaintiffs expert admitted that the unit could be used for the purpose of washing linen but that such use would be impractical. He also admits that the units now in question cannot remove matter from linen so in this respect there is an additional difference in their functions. I can hardly conceive, however, in this modern day and age where a laundry is a necessary feature of every Hospital that the primary consideration in purchasing an expensive sluice unit could be the removal of matter from Hospital linen prior to its going to the laundry. Indeed Mr. Simpson said that sluicing is a generic term applying to a function and not a unit. The primary function of a sluice unit in Hospital terms is "some form of equipment that would be used to wash away faeces and slop from bed pans and patient utensils (e.g. urinals and sputum cups) and possibly from materials preferably using cold or warm water." He gave his opinion that the units in question which he inspected were new manually wall mounted bed pan washer/<sup>sanitizers</sup> which could be used for washing bed <sup>pans</sup> and urinals and sanitizing them. He further states that they performed the same function as the one at George V with overall greater efficiency.

To continue, when Millengen showed Morris Exhibit 6 he says Morris appeared happy at the solution, but he wanted to see the catalogue

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or brochure. This arrived a week or so after and was duly shown to Morris. The unit reproduced on Exhibit 6 appeared in the middle of the last page of the brochure which was tendered as Exhibit 7. Millengen recommended the manually operated one because of the frequency of power cuts, and Morris took the brochure saying he would check it out (presumably with his superiors) and let him know. At this stage he told Morris the total cost of the 25 units would be \$48,000 plus freight and insurance. All that Millengen <sup>says</sup> transpired between him and Morris in relation Exhibit 6 and 7 has been denied by Morris.

Nothing further was heard from Morris until 28th June when he telephoned Millengen and told him that "they" (meaning D.E.M.S. ) were going to place an order for the type shown <sup>on</sup> Exhibit 6 and 7 and that the specifications on the original Invoice Exhibit 3 would not match the one shown. Furthermore, they were going to give him 4 Invoice Orders as the department does not pay out so much money on one order. On the strength of this Millengen took back Invoice 228629 - Exhibit 3 to Morris personally. He retrieved his brochure Exhibit 7 and on 2/7/74 he returned to the D.E.M.S. and got 4 new Invoice orders 295793-96 covering the 25 units. Morris in his evidence admits having drawn these Invoices himself and getting them signed by an Executive Engineer Mr. Carless. These are the Invoices sued upon, and they are differently worded from Invoice 228629.

There is a sharp conflict of fact between Morris and Millengen as to the reason why Invoice 228629 was recalled. Whereas Millengen gives <sup>3</sup>/<sub>2</sub> 2 reasons, Morris states that the financial one was the only reason.

To complete the narrative, Morris told Millengen to order the manually operated model. Difficulty was being experienced in obtaining financing in the name of Worldwide Purchasing Company Ltd. and Millengen states that with Morris knowledge the word "Worldwide" was altered to read "International".

The units duly arrived and efforts by Millengen to have them cleared duty free failed. Morris admitted in his evidence that he gave some assistance towards <sup>this</sup> end by completing a document for Millengen

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to take to the Director.

On 10/3/75 they were delivered at Marescaux Road where the Hospital section of the D.E.M.S. was now located. On 15/4/75 Millengen received a letter dated 11th April, 1975 (all letters in agreed bundle Exhibit 2) addressed to Worldwide Purchasing Company Limited stating that several Invoices including those for the 25 sluice units 295793-6 had ~~been~~ cancelled. No mention whatsoever was made in this letter of Exhibit 3 - 228629. The letter cancelling Invoices 296793-6 appears rather strange considering the goods were then lying down in the premises of the D.E.M.S. on 11th April, 1975 when it was written. Millengen replied on 21st April pointing out that the goods had been delivered and accepted from 10th March and asked that the matter be investigated. The D.E.M.S. replied on 30th April stating the matter was under investigation, but in the interim the letter of cancellation stood. The goods remained on the premises of the D.E.M.S. Millengen replied on 6th May again pointing out on page 2 of the letter that the units which were acceptable to Morris, and ordered on that basis had been delivered and accepted as far back as 10th March, 1975. It is only on 15th May that a letter addressed to the Director of International Purchasing Company Ltd. was received which amounted to a rejection of the goods. Subsequent negotiations and <sup>letters</sup> failed to resolve the issue, and the plaintiffs refused to remove the goods and brought the action.

The defence contends that the agreement for sale was by description and that the plaintiffs failed to deliver the goods contracted to be sold. In this respect they rely on Invoice 228629 which was for the delivery of "25 sets complete inch flush, tank, spray, drain traps etc". They further contended that this contract as evidenced by this Invoice was entered into with "Worldwide Purchasing Company" on 18/2/74, and is a different entity from "Worldwide Purchasing Company Ltd" who was only incorporated on the 10th April, 1974. They therefore had no capacity to contract on 18/2/74, and cannot now maintain an action.

They further allege that no contract was entered into with the other plaintiff International Purchasing Company Ltd, who was only incorporated on the 2nd May, 1974 (both these dates were admitted).

They say the Invoice sued upon 295793-6 were not intended in any way to derivate from or abrogate the obligation created by 228629 and these Invoices were merely a substitution to facilitate departmental financing. Further that the substitution of "International" for "Worldwide" was an unauthorised act done unilaterally by Millengen and in any event Morris had no authority to bind the D.E.M.S. - he could only act on instruction of his superiors.

This was not specifically pleaded.

It is significant that the Invoices 295793-6 were written up by Morris himself to Worldwide Purchasing Company Ltd.. They were not signed by him but by a superior officer and each one was for (as/<sup>in</sup>Invoice 295794),

(7) Sets Sluice Units designated to different Hospitals. He could give no satisfactory explanation of how he came to write in the word Ltd.. It is also significant that the description of the goods in these orders differs in substance from that on Invoice 228629, and lends credence to the evidence of Millengen that <sup>one of</sup> the reasons why 228629 was recalled was because the description on that could not fit what in fact was agreed on between Morris and Millengen. I find as a fact that there was an agreement between Morris and Millengen to substitute the sluice unit shown on Exhibit 6 and Exhibit 7 when it was discovered that the ones then at George V could not be obtained and that the 4 Invoices were drawn up to supply 25 of such units. This in my view nullefied the obligation created by 228629 and since it is admitted that International Purchasing Company Ltd. was incorporated on 2nd May, 1974, and Worldwide Purchasing Company Ltd. on 10th April, 1974, then on 1st July, 1974 when Invoices 295793-6 were prepared both these companies were legal ententies. The defence of incapacity to contract therefore fails.

Mr. Morris gave evidence and he was far from being an impressive witness. His <sup>answers</sup> to questions were at times shifty and pointless, and on occasion bordered on prevarication. In cross-examination he did not know the meaning of the words "censure" or "to fix blame". When asked in cross-examination if he knew what a sluice unit was, his answer was

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"I have a vague idea of what a sluice unit is. A sluice unit is something that you can use to wash a sheet, also can empty stool and flush it away, also can wash a bed pan". It is a phrase that can mean many things.

Ques: Why did you not repeat the precise specifications of the Invoice dated 18/2/74 in the four new ones

His Answer was - No reason.

Such an answer could hardly be expected to displace the evidence of Millengen that two reasons were given for the substitution of the 4 new Invoices, which reasons I accept.

Patrick Scott, the Manager of Facey Commodity Ltd, Pharmaceutical and Hospital Division was called by the defence. The burden of his evidence was to try and show the distinction between a sluice unit, (which is what the defendants say they ordered) and a bed pan washer/sanitizer. He gave as his opinion that a bed pan washer/sanitizer can not in his experience perform the function of a sluice unit. There he is in conflict with Mr. Simpson, the qualified Hospital engineer, whose evidence I would rather accept as against that of a Commercial Manager on this vital point. Mr. Scott did admit however, that if a person came and asked for sluice units, he would have to get further specifications as to type or model. He further said that on looking at the specifications on the Invoice 228629 (Exhibit 3) he could not say precisely what was being ordered. Is this not in keeping with the plaintiffs case, bearing in mind that the plaintiff had to be taken to George V to be shown what was required. It is admitted on all sides that there are various types of sluice units, and the plaintiff contention is, that when the one at George V could not be obtained, he consulted with Morris, and a comparable one performing the same primary functions of washing bed pans and urinals was agreed upon.

Mr. Derrick Dunkley a Senior Executive Engineer with the Ministry of Works and a qualified Hospital Engineer gave evidence on behalf of the defence. He stated that he became aware in June, 1974 that there was an outstanding order on Worldwide Purchasing Company Ltd. for 25 sluice units. His definition of a sluice unit is a particular devise used in Hospital, for the purpose of washing or permitting to be washed certain types

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of soiled articles and utensils used in patient care which could include bed pans, soiled linen from bedding, basins and surgical instruments. I expressed some surprise at the inclusion of the latter. He said a bed pan washer is not a sluice unit, as it is only designed to wash bed pans and urine bottles whereas a sluice unit can be used for a variety of washing operations.

When he found out about this outstanding order he saw that from the amount of money involved, it could not be settled on one order, so he gave instructions to Morris and the Invoice 228629 was recalled and the four Invoices 295793-6 were substituted therefor. On 10th March, 1975 it was brought to his attention that the goods were delivered and were awaiting inspection. On opening one crate he discovered it contained a bed pan washer and not a sluice unit as had been ordered. Millengen was summoned by messenger, and told the goods delivered were not what had been ordered. A meeting was arranged and Millengen did not attend. Millengen's evidence on this is that he was not informed. When Plaintiff refused to remove the goods, the letter of 15th May, 1975 was written. At the close of his examination-in-chief he was asked by me if he had any comment to make on the fact that the description of the units on Invoice 228629 differed from that on the 4 Invoices 295793-6. His answer was:-

"The description on the Invoices are different from that on 228629 because at the time everybody was in agreement as to what was required and hence there was no confusion when the term sluice units was used to replace the term used on 228629.

Early in his cross-examination, and following on from his answer he was asked

"Are you aware of the fact that up to 1/7/74 the only person with whom Mr. Millengen had dealt with concerning the goods that were ordered was Mr. Morris"?

His answer was:

whg "Yes I am aware of that. When I say everyone had agreed, on what was ordered, I mean the technical officers, who requested the goods, Mr. Morris would prepare the order, and the supplier were in agreement. The Technical Officer communicated to Morris in turn communicated to Millengen. By inference the only person Millengen dealt with was Morris".

These answers are not in consistent with Millengen evidence that he all along dealt with Morris, and that it was in consultation with Morris that the goods delivered were agreed upon as being a suitable substitute for the one which had been shown at George V. The defendants dispute Morris had any such authority.

The defendants cannot now be heard to say that Morris had no actual or ostensible authority to bind the D.E.M.S. or to alter any order when in fact the negotiations ab Initio were between Morris and Millengen. I find as a fact that the Invoices 295793-96 were brought into being for the two reasons given by Millengen, and that when they spoke of "sluice units" they were referring to the ones agreed upon (as reproduced in Exhibit 6 and Exhibit 7) between Morris and Millengen. These goods were duly delivered on 10/3/75 and the defendants then had no legal right to cancel the Invoice, repudiate the contract, or refuse to accept the goods.

When this consensus was reached between Morris and Millengen, an unconditional contract for the sale of specific goods, namely 25 sluice units of type shown on Exhibit 6 and Exhibit 7 had been made. These goods were then in a deliverable state in that they were in a physical condition in which the buyer could take delivery and in which it was agreed that he should take delivery, under the contract. As I have mentioned before what was delivered was what was agreed upon on the basis of having seen Exhibit 6 and 7.

The defendants contention that the contract was one for the sale of future goods might have had some merit if Millengen had been held to the agreement to procure units similar to the one shown at the George V. The sale would then have been by description pending the goods being manufactured or acquired. When however, Morris and Millengen were ad idem as to what actually was to be supplied, this agreement went by the board.

I therefore hold that Rule 1 in Section 19 of the Sale of Goods Act is applicable to the instant case and that the property passed to the buyer when the unconditional contract for the sale of the specific goods, in a deliverable state was reached between Morris and Millengen. The

proper action therefore is one for the price of the goods under Section 48(1) of the Act.

There will be Judgment for the Plaintiff, International Purchasing Company Limited for the amount claimed \$57,375.00 with interest at the rate of 15% from 10.3.75 up to date of payment with costs to be taxed or agreed, and Judgment for the defendants against the Plaintiff Worldwide Purchasing Company Limited. The defendants could not have incurred any further costs in defending the action against the both Plaintiffs in whose name it was reasonable to have brought action, so there will be no order as to costs.

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