BROWN AND COMPANY
v.
STEUART INDUSTRIES LTD.

COURT OF APPEAL
ATUKORALE, J., AND L.H. DE ALWIS, J.
C.A. (S.C.) No. 500/73(F) - D.C. COLOMBO 69000/M
FEBRUARY 24, 25 AND 26, 1982.

Res judicata – Civil Procedure Code, Sections 33, 34(1), 207 – One agreement Two separate and distinct obligations – Two separate actions possible – Sale of Goods Ordinance, Section 49(2) and 49(3) – Available market – Computation of damages.

By an agreement dated 12.1.63 the Respondent granted to the Appellant the sole rights for the sale of and distribution of all Brother and Steuart Sewing Machines assembled or manufactured in Sri Lanka. The appellant in turn agreed to purchase all the Brother and Steuart Machines assembled or manufactured in Sri Lanka and guaranteed to purchase a minimum of 250 machines per month. The agreement was to come into effect on 1.12.64 and was terminable on three months notice. The Appellant failed to purchase the minimum number of machines

per month and by letter dated 30.4.65 gave notice of termination of agreement which terminated on 31.7.65. The Appellant had purchased only 181 machines in December (shortfall 69) and 443 machines for the period 1.1.65 to 31.7.65 (shortfall 1307).

The Respondent had filed action No.66972/M on 12.11.66 in D.C. Colombo for the recovery of half share of total expenditure incurred by the Respondent on publicity in terms of the agreement. Judgment was given in favour of the Respondent. The Appellant contended that since the Respondent failed to include the above claim in that action he was debarred from maintaining the present action. The District Judge held that Res Judicata did not apply and that damages was awarded on the principle of S. 49(2) of the Sale of Goods Ordinance and not S. 49(3).

Held -

1) That the failure to pay the advertisement charges in terms of clause 1(f) of the agreement amounted to failure to fulfil that obligation. The failure to purchase the requisite number of machines under Clause 2(f) of the agreement constituted a failure to fulfil a different obligation which is separate and distinct from the obligation to pay the advertisement charges. Hence the principle of res judicata did not apply.

2) That as the Judge had found special circumstances which made it unjust and inequitable to apply the prima facie rule in Section 49(3) of the Sale of Goods Ordinance the Judge was right in awarding damages on the principle embodied in Section 49(2).

Cases referred to:

(1) *Samichi v. Peiris (1913) 16 NLR 257.*
(2) *Vanderpoorten v. Peiris (1937) 39 NLR 5.*
(3) *Mohideen v. Pitche (1913) 17 NLR 410.*
(4) *Ceylon Estate Agency and Warehousing Co. Ltd. v. de Alwis (1966) 70 NLR 31.*
(5) *Croos v. Goonewardene Hamine (1902) 5 NLR 259.*
(6) *Dunkirk Colliery Co. v. Lever (1898) 9 Ch. D. 20.*
(7) *W.L. Thompson Ltd. v. R. Robinson (Gunmakers Ltd.) (1955) 1 AER 154.*
(8) *Charter v. Sullivan (1957) 1AER 809.*

APPEAL from judgment of the District Court of Colombo.

H.W. Jayewardene Q.C. for the defendant-appellant
C. Renganathan Q.C., for plaintiff-respondent

Cur.adv. vult

May 27, 1982.

ATUKORALE, J.

The appellant appeals from the judgment of the learned Additional District Judge of Colombo awarding the respondent a sum of Rs. 110,000/- as damages for breach of a contract entered into between them. At the hearing of the appeal before us certain facts were

either admitted or accepted as having been established on the evidence in the case.

By and upon Agreement bearing No. 1358 dated 12.1.1965 (marked P8) the respondent granted to the appellant the sole rights for the sale and distribution of all 'Brother' and 'Steuart' sewing machines assembled or manufactured by the respondent in Ceylon subject to certain terms and conditions stipulated therein. The appellant agreed to purchase for cash all the 'Brother' and 'Steuart' sewing machines as assembled or manufactured in Ceylon by the respondent covering the entire importation stocks to be drawn monthly or as mutually agreed upon. The appellant also guaranteed the purchase of a minimum of 250 machines every month from the respondent. This agreement (P8) was to commence with effect from 1.12.1964. It was terminable on 3 months' notice being given by either party. The appellant, in breach of this agreement, failed to purchase the minimum number of machines per month and by its letter of 30.4.1965 (P17A) gave notice of the termination of the agreement. The agreement was therefore terminated with effect from 31.7.1965 and remained in force only for a period of 8 months. Although the parties were at issue on this point in the lower court, it was not disputed before us that P8 constituted an agreement for the purchase and sale of sewing machines and that the relationship that was brought into existence between the parties was that of a seller and purchaser. It was also not in dispute before us that the document P9 set out accurately the total number of machines which the appellant had purchased from the respondent monthly from 1.12.1964 to 31.7.1965 i.e. during the period the agreement was in force. According to P9 the number of machines purchased by the appellant for the month of December 1964 was 181 and for the period 1.1.1965 to 31.7.1965 was 443. There was thus a shortfall of 69 machines for December 1964 and a further shortfall of 1307 machines for the latter period, the appellant having failed to purchase for any one month the requisite minimum of 250 machines. At the trial, however, no claim seems to have been pursued in respect of the shortfall for December 1964 and the respondent's claim for damages on this score was confined to the shortfall for the period 1.1.1965 to 31.7.1965.

It is also common ground that the respondent on 12.11 1966 filed action No. 66972/M of the District Court of Colombo against the appellant claiming the sum of Rs.3,889.43 cts. being the appellant's half share of the total expenditure incurred by the respondent on

account of advertisement and publicity charges for the full period of 8 months the agreement was in force. According to the respondent the appellant became liable to reimburse the respondent in this sum in terms of clause 1(f) of the agreement P8. Certified copies of the plaint, the appellant's answer, the judgment and the decree in this case have been produced marked D9, D9A, D9C and D9D respectively. The respondent succeeded in the case and judgment was entered in its favour as prayed for in the plaint. One of the contentions of the appellant in the instant case, both in the lower court as well as before us, was that the respondent having failed to include the present claim for damages in that earlier action (a claim which admittedly had accrued to the respondent at the time of the institution of that action) is now debarred from maintaining the present claim in the present case.

The learned Additional District Judge in his judgment held with the respondent on the issue of res judicata and awarded the respondent a sum of Rs.110,000/- as damages. He also held that the principle upon which the quantum of damages should be computed is that which is embodied in s. 49(2) of the Sale of Goods Ordinance (Chap.84, Vol 3, N.L.E.) and not the prima facie rule laid down in s. 49(3). It is not in dispute that if the learned judge was correct in holding that the measure of damages is the one set out in s.49(2), the sum awarded constituted a correct estimate of the damages suffered by the respondent.

Learned counsel for the appellant urged before us that the finding of the learned judge on the issue of res judicata was erroneous. His contention was that the failure of the appellant to pay its share of the advertisement charges and its failure to purchase the minimum monthly amount of machines were failures to fulfil obligations arising out of the same contract. They were inseparable obligations, one being tied up with the other. The agreement P8 is an indivisible one and all claims arising out of it constitute one and the same cause of action and must therefore be included in one action. He also submitted that the expression 'cause of action' in s.34(1) of the Civil Procedure Code has been given a broad and liberal construction with a view to giving effect to the principle embodied in S.33, namely, that every action must be so framed so as to prevent a multiplicity of actions and to ensure finality in litigation. He thus maintained that the learned judge was wrong in holding that the two claims in the two actions constituted two different causes of action.

Learned counsel for the respondent submitted that the failure to pay the advertisement charges in terms of clause 1(f) of the agreement amounted to a failure to fulfil that obligation. The failure to purchase the requisite number of machines per month in accordance with clause 2(f) of the agreement constituted a failure to fulfil a different obligation which is separate and distinct from the obligation to pay the advertisement charges. The appellant has thus failed to perform two separate and distinct obligations arising out of the same contract which in turn has given rise to two different causes of action and not to one. He also submitted that the purpose of s.33 is to prevent a multiplicity of actions but in respect of the same cause of action. He therefore maintained that the learned judge was correct in coming to the conclusion that the causes of action in the two cases are different and that as such his finding on the issue of res judicata must be upheld.

On the question whether the two relevant clauses in the agreement P8, namely clause 1(f) and clause 2(f) referred to above, create two indivisible and inseparable obligations or two separate and distinct obligations I am of the view that a perusal of the terms of the agreement clearly shows that the obligations cast on the appellant by the two clauses are quite separate and distinct from each other. Clause 1(f) refers to the sharing of the advertisement expenses between the two parties whilst clause 2(f) refers to the minimum number of machines that the appellant is obliged to purchase. No doubt as pointed out by learned counsel for the appellant the first clause does stipulate that the respondent's (manufacturer's) share of the advertisement expenses is restricted to a maximum of 3% of the appellant's purchase of machines. The maximum amount the respondent is liable to contribute as advertisement charges is thus dependent on and fixed by the value of the machines purchased by the appellant. However the respective obligations of the parties under the two clauses are totally different and independent. I am unable to accept the submission of learned counsel for the appellant that the obligations under the two clauses are tied up with one another. The real question that arises for our determination is therefore whether the claims of the respondent in the earlier action and in the instant case arose, as maintained by the appellant, on one and the same cause of action or, as maintained by the respondent, on two different and distinct causes of action.

As stated above learned counsel for the appellant contended that our courts have given a broad and liberal construction to the words

'cause of action '. He argued that the obligation which the appellant failed to fulfil in the first action was the failure to pay the sum of money claimed as due from it on the agreement P8. The obligation which the appellant failed to fulfil in the instant case was its failure to pay another sum of money also on the same agreement. The obligation in either case was therefore to pay a certain sum of money due on the same agreement. He thus submitted that the cause of action in the two actions was the same. I do not think it is necessary to refer to all the cases cited at the hearing before us. In support of his submission learned counsel for the appellant referred us to the case of *Samichi v. Peiris* (1). In that case a sum of money due to a judgment-debtor under a contract was seized by the judgment-creditor. A claimant claimed that money as the assignee on a deed of assignment of all the debtor's rights under the contract. The judgment-creditor consented to the claim being upheld and the money seized was thereupon released from seizure. A further sum of money accruing later to the same debtor under the same contract was seized by the same judgment-creditor. The same claimant set up title under the same assignment to this money too. Lascelles, C.J. and Wood Renton, J. held that the previous consent order operated as res judicata and that the judgment-creditor was debarred from challenging the claimant's title to the money seized on the second occasion. Lascelles, C.J. in the course of his judgment stated as follows:

> "The expression 'cause of action' has different meanings, as is shown by the not very helpful definition in the Code. But I do not think that, when a question of res judicata arises, the term means merely the denial of a claim. The 'action' was the claimant's claim to the money. It is surely no answer to the question 'what was the 'cause ' of the action?' to say 'The judgment-creditor's denial of this claim'. This carries the matter no further. It merely amounts to a statement that the claim was disputed. The true 'cause of action,' it seems to me, is the right in virtue of which this claim is made; the foundation of the claim which, in this case, is the right claimed under the assignment. This was the true cause on which the action was founded."

Wood Renton, J. in the course of his judgment expressed the same view. He observed thus:

> "I am quite unable to interpret the expression 'cause of action' contained in the explanation to that section (S.207), as being

restricted to the particular subject matter claimed. The cause of action must be held to include the denial of the right to the relief which a litigant claims and, inferentially, a denial of the title by which he claims it."

Applying the test laid down in the above case to the facts of this case it appears to me that the cause on which the first action was founded was the failure or refusal by the appellant to pay its share of the advertisement charges whilst the cause on which the instant action was based was the appellant's failure or refusal to purchase the stipulated minimum number of machines. Though arising out of the same contract, the claims of the respondent related to two separate and distinct obligations which the appellant had to fulfil in terms of the contract P8. As observed by learned counsel for the respondent the decision in the above case seems to assist rather than help the appellant.

Learned counsel for the appellant also relied on the decision in *Vanderpoorten v. Peiris* (2). In that case the plaintiff in a previous action sued the defendant for arrears of rent and for a cancellation of a lease bond on the ground that the defendant had, contrary to the terms of the bond, sublet the premises to another. The defendant during the course of that earlier action consented to a cancellation of the bond and the case proceeded to trial only on the question of arrears of rent. The plaintiff thereafter filed the present action to recover damages from the defendant for failure to keep the premises in proper condition and to restore the compound to its former condition. The action was held to be barred by the decree in the previous action. It will be observed that there was in the previous action a claim by the plaintiff for a cancellation of the bond for a breach of one of its covenants. At the time of its institution the defendant had also committed a breach of the convenant to keep the premises in proper condition which would also have entitled the plaintiff to a cancellation of the bond. In appeal it was urged on behalf of the defendant (the appellant) that as the plaintiff had elected in the previous action to treat the lease as cancelled he should in that case have included all the causes of action which had then accrued to him. In his judgment Poyser, J. (with Soertsz, J. agreeing) stated as follows:

"Having regard to the wording of section 34 of the Civil Procedure Code, I think the appellant's contention must succeed ..... Both in this case and the previous one the cause

of action was the same, viz, the breach of covenants contained in lease No. 1506. If in the first action the plaintiff had not claimed a cancellation of the lease and possession of the leased premises the position would have been different....."

Although the matter is not free of doubt, it appears to me that the Court took the view that where at the time of the filing of an action several grounds exist for the cancellation of a lease but a plaintiff sues for a cancellation and damages on one or more but not on all the existing grounds, he is precluded from maintaining a subsequent action for damages on the remaining grounds. In the instant case no cancellation was prayed for by the respondent. In fact the contract P8 had been lawfully terminated by the appellant by giving due notice. In the above case Poyser, J. himself seems to suggest that if cancellation had not been claimed in the previous action, the later action claiming damages for breach of the covenant to keep the premises in a proper condition could have been maintained.

Another case relied upon by counsel for the appellant is that of *Mohideen v. Pitche* (3). The plaintiff and the defendant in that case entered into an agreement by which the plaintiff was to sell for the defendant in Europe certain produce delivered to him by the defendant. One term of the agreement was that the defendant was liable to make good shortages on the transactions on receipt of the accounts of the sales. The plaintiff sued the defendant to recover the value of some of these shortages. The defendant pleaded that the action was barred inasmuch as in a previous action he had been sued for the recovery of the value of similar shortages under the same agreement but the plaintiff had failed to include in that action the subject-matter of the present action although the plaintiff had received prior to the filing of that action the account sales of the various consignments in question. The present action was held to be barred. The cause of action was held to be the same in both actions, namely, the failure of the defendant to discharge the obligation imposed upon him by the agreement to make good the shortages. It will be seen that the breach complained of in both actions was the breach of the same obligation and not, as in the instant case, the breach of different and distinct obligations. This case which, perhaps, signifies the utmost extent to which our law of res judicata extends can therefore be distinguished from the instant case.

Learned counsel for the appellant referred us also to the case of *Ceylon Estate Agency and Warehousing Co. Ltd. v. de Alvis* (4). In that case L.B. de Silva, J. stated that the expression 'cause of action'

has been given a broad meaning by Wendt, J. in *Croos v. Gunawardena Hamine* (5) in the following passage in his judgment:

> "I think that the word 'obligation' in this definition is to be understood not in the narrow sense in which a parol promise to pay, a promissory note and a mortgage, although given for the same debt, may be described as three different obligations, but in the more generally understood sense of a liability to pay that sum of money. Reading the definition in this cause of action was the same in both cases, namely the failure to pay one and the same debt."

L.B. de Silva, J. applying this test held that though two separate documents had been executed they were in fact one and referred to the same obligation, the obligation to repay the loan of Rs.40,000/-. This case does not appear to me to have much relevance to the instant case.

On a consideration of the above matters I am of the opinion that the learned trial judge was correct in his conclusion that the two obligations contained in clauses 1(f) and 2(f) of the agreement P8 were distinct obligations giving rise to two different causes of action. His finding on the issue of res judicata must therefore be upheld.

There remains for our consideration the question of the assessment of damages. It is conceded that the appellant failed to purchase the minimum of 250 machines per month for any one of the months from January to July 1965. There was thus a breach by the appellant of clause 2(f) of the agreement P8. What then is in the eye of the law the true measure of the damage suffered by the respondent as a result of this breach? Learned counsel for the appellant maintained that the assessment of damages should be based not on the general principle set out in s.49(2) of the Sale of Goods Ordinance (Chap.84) but on the basis of the prima facie rule set out in s.49(3). s.49 reads as follows:

> "49. (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
> (3) Where there is an available market for the goods in question the measure of damages is prima facie to be

> ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted; or, if no time was fixed for acceptance, then at the time of the refusal to accept.

There seems to be a dearth of local judicial authority on the interpretation of the above section. Our Sale of Goods Ordinance is based on the Sale of Goods Act, 1863, of England. The section of the English Act which corresponds to our section 49 is section 50. One has therefore to look to English decisions for guidance on this matter.

It was the appellant's contention that there was in this case an available market for sewing machines of the particular descriptions within the meaning of s.49(3) of the Ordinance and hence the measure of damages should be ascertained on the basis of the prima facie rule in s.49(3). If this contention be accepted as correct, it is not in dispute that the respondent would be entitled to no more than nominal damages. Learned counsel for the respondent on the other hand submitted that there was in this case no available market within the meaning of that subsection and that even if there was, the special circumstances in this case displaced the application of the prime facie rule in favour of the general rule set out in s.49(2) of the Ordinance.

What is an available market has been the subject of a few English decisions. In *Dunkirk Colliery Co. v. Lever* (6) James, L. J. in dealing with s.50(3) of the English Sale of Goods Act said:

> "What I understand by a market in such a case as this is, that when defendant refused to take the three hundred tons the first week or the first month, the plaintiffs might have sent it in waggons somewhere else, where they could sell it, just as they sell corn on the Exchange, or cotton at Liverpool: that is to say, that there was a fair market where they could have found a purchaser either by themselves or through some agent at some particular place."

This definition of a market enunciated by James, L.J. was referred to and accepted as binding on him by Upjohn, J. in *W.L. Thompson Ltd. v. R. Robinson (Gunmakers) Ltd.* (7). He, however, added:

> "Had the matter been res integra, I think I should have found that an 'available market' merely means that the situation in the particular trade in the particular area was such that the particular goods could be freely sold, and that there was a

> demand sufficient to absorb readily all the goods that were thrust on it, so that if a purchaser defaulted the goods in question could be readily disposed of."

Referring to the above definition of a market by James, L.J. and the more extended meaning of the phrase 'available market' given by Upjohn, J. in the above cases, Jenkins, L.J. in *Charter v. Sullivan* (8) made the following observations:

> "I doubt if James,L.J.'s observations in *Dunkirk Colliery Co. v. Lever* should be literally applied as an exhaustive definition of an available market in all cases. On the other hand, I do not find Upjohn, J.'s definition entirely satisfactory. I will not, however, attempt to improve on it, but will content myself with the negative proposition that I doubt if there can be an available market for particular goods in any sense relevant to s.50(3) of the Sale of Goods Act, 1893, unless those goods are available for sale in the market at the market or current price in the sense of the price, whatever it may be, fixed by reference to supply and demand as the price at which a purchaser for the goods in question can be found, be it greater or less than or equal to the contract price. The language of s.50(3) seems to me to postulate that in the cases to which it applies there will, or may, be a difference between the contract price and market or current price, which cannot be so where the goods can only be sold at a fixed retail price."

It is , however, unnecessary to make in this case any pronouncement on the precise meaning of the words 'available market' in s.49(3) of our Ordinance, although I am of the view that the definition of 'market' by James, L.J. in *Dunkirk Colliery Co. v. Lever* (6) appears to be far too narrow and restricted. It is now settled law in England that s.50(3) of the Sale of Goods Act, 1893, provides only a prime facie rule and that if on an investigation of the facts in a particular case it is found that it is unjust to apply that rule then it should not be applied - vide *W.L. Thompson Ltd. v. Robinson (Gunmakers) Ltd.*, p. 160 and Schmitthoff on the Sale of Goods, (2nd Edition) p.181. In the instant case the learned trial judge declined to adopt the prima facie rule given in s.49(3) and awarded damages on the general principle set out in s.49(2). He has adduced cogent reasons for doing so. There was evidence to show that the government had banned the importation of sewing machines in 1961. A system of quotas was then introduced. Initially each manufacturer was granted

a quota of one million rupees in foreign exhange. The quota that each manufacturer was entitled to receive thereafter depended on the amount of machines he had produced and sold earlier. The learned Judge has reached the conclusion that in this case if the purchaser (the appellant) had purchased, as agreed upon, the minimum of 250 sewing machines per month, the respondent would have been able to obtain a higher quota and consequently would have been able to manufacture more machines and earned more profit. There was, therefore, as found by the learned judge, a special circumstance which made it unjust and inequitable to apply the prima facie rule in this case, even on the assumption that there was an available market. The learned judge was in my opinion right in awarding the respondent damages on the principle embodied in s.49(2) of the Sale of Goods Ordinance.

For the above reasons the appeal is dismissed with costs.

L.H. DE ALWIS, J. — I agree.

Appeal dismissed.