Monday, July 21, 1952. JUDGMENT. Lord Justice SINGLETON:

This is an appeal from a judgment of Mr. Justice Sellers which reversed a finding of the Board of Appeal of the Seed, Oil, Cake & General Produce Association.

Messrs. James Clark (Brush Materials), Ltd., were buyers, and Messrs. Brauer & Co. (Great Britain), Ltd., were sellers under a contract in writing of Feb. 20, 1951. The contract was expressed to be made on the terms and conditions of sale of the Seed, Oil, Cake & General Produce Association, and disputes arose between the parties. They were referred to arbitration, and by an award dated Aug. 3, 1951, two of the arbitrators found in favour of the buyers. The sellers appealed to the Board of Appeal and asked that the award of the Board should be stated in the form of a special case. The decision of the Board, subject to questions of law raised, upheld the finding of the arbitrators in favour of the buyers. The sellers appealed, and the learned Judge reached the conclusion that they were entitled to succeed, and gave judgment accordingly. The buyers appeal to this Court.

The case stated finds:

(a) By a contract . . . dated the 20th February 1951 the sellers sold to the buyers 90 tons of Bahia piassava comprising 40 tons of Crude Seconds 30 tons of Cut Stiff 7 in. and 20 tons of Cut Stiff 8 in. at the price of £118 per 1000 kilos for Crude Seconds and £163 per 1000 kilos for Cut Stiff 7 in. and Cut Stiff 8 in. both prices being c.i.f. London.

(b) By the terms of the said contract shipment was to be from Salvador/Bahia/Brazil during February/March/April/May/June/July subject to freight space being available to London and the quality of the said goods was to be “Best,” if inferior thereto a fair allowance to be made.

(c) The said contract also contained the following clauses: -

9. Should shipment be prevented or delayed owing to prohibition of export, revolution, riots, strikes, lock-outs, blockade, hostilities, force majeure or plague, shipper shall be entitled at the termination of such cause or causes to an extension of time for shipment of as much time as was left for shipment prior to the outbreak of such cause or causes, but such extension shall in no case exceed one month. In case of non-fulfilment under above conditions the date of default shall be similarly dealt with. Shipper shall give notice by cable within two days after the last day for shipment if he claims an extension of time for shipment. If, from any of the above causes, shipment be not completed within one month after the expiration of the original contract period then this contract is to be void for any unfulfilled quantity.

There was added to Clause 9 of the printed form of contract a further clause in type as follows:

Any freight alterations pro or con for buyer’s account. This contract is subject to a Brazilian export licence. Any import duty for buyer’s account.

The case also sets out Clause 12 of the conditions, which provides for arbitration.
(d) refers to the conditions of sale of the Association, and (e) quoting from a letter of June 20, 1951, finds:

On the 20th June 1951 the sellers informed the buyers that due to the intervention of a section of the Bank of Brazil it was impossible for them to ship the goods mentioned in the said contract on the basis of the prices contained therein and on the same date the sellers wrote to the buyers (inter alia) as follows:

We confirm that due to the intervention of a section of the Bank of Brazil it is impossible for our associates to ship the piassava on the base of the prices contained in the above-mentioned contract.

The department of the Bank of Brazil concerned state that the piassava must be shipped at the minimum f.o.b. prices of £180 a ton for the Cut Stiff and £135 a ton for the Seconds, which would in effect mean an increase respectively of £28 and £40 a ton.

We personally regret this situation most sincerely but frankly we must claim protection under the force majeure clause as it is due solely to the Brazilian authorities that we are unable to fulfil your contract. As we see

the position three courses remain open to yourselves, namely:

(a) You decide to cancel the contract.

(b) You decide to accept the new prices.

(c) You decide to take the matter to arbitration.

A copy of the said letter is contained in the bundle of correspondence annexed hereto and which forms part of this special case.

(f) No goods of any description were at any time shipped declared or tendered by the sellers to the buyers in pursuance of the said contract.

(g) The sellers could have shipped declared or tendered during February, March, April, May, June and July, as it was admitted by them at the hearing before us, goods to fulfil the said contract if they had paid the minimum prices mentioned in the said letter dated 20th June 1951 and on the 12th June 1951 the sellers' associates in Brazil cabled to the sellers as follows:

678 open credit hundred eighty hundred thirty five only way can fulfil.

(h) It was admitted by the sellers at the hearing before us that a Brazilian export licence would have been granted so that the goods could have been shipped on or about the said 20th June 1951 if the sellers had paid the minimum higher prices for the said goods.

(i) Subject to the questions of law raised in the special case the sellers did not dispute the amount awarded under and by virtue of the said award.

(j) Condition Number 13 of the said Conditions of Sale of the Seed, Oil, Cake & General Produce Association provides as follows:

Whenever it is admitted by the seller, or decided by arbitration, that the seller has failed to declare or tender goods to fulfil any contract, the buyer shall close the contract by, at his option, either cancelling the contract or invoicing back the goods to the seller at once at a price and weight to be fixed by agreement, or, failing such agreement, by arbitration (which price shall be not more than 10 per cent. over the estimated market value of the shipment or delivery contracted for on the day upon which the default occurs), the difference to be due to the buyer in cash as from the date of such default. The buyer shall not be entitled to recover any further damages from the seller in respect of his default.

(k) The buyers elected to proceed by way of arbitration as mentioned in recitals (3) (4) and (5) hereof.

(l) The sellers being dissatisfied with the said award appealed as mentioned in recital (6) hereof.
(m) We find and decide subject to the questions of law set out in paragraph (p) of this special case, that the said contract
dated 20th February 1951 was not performed by the sellers, and that the sellers were not prevented from fulfilling
the terms thereof, owing to any of the causes specified in the said contract.

Par. (n) shows the award of the Board; that under Condition 13 they were entitled to fix an amount, and they fixed the
amount to be paid by the sellers at the sum of £3000.

Par. (p) states the questions raised:

The questions for the decision of the Court are: -

(i) Did the refusal of the Bank of Brazil and/or other Brazilian authorities to grant licences for the export of the said goods,
except at prices higher than the prices contained in the said contract, excuse the sellers from fulfilling the said contract by
reason of the provisions of Clause 9?

(ii) Did the refusal of the Bank of Brazil and/or other Brazilian authorities to grant licences for the export of the said goods,
except at prices higher than the prices contained in the said contract, excuse the sellers from fulfilling the said contract by
reason of the clause in the said contract reading: - “This contract is subject to a Brazilian export licence”?

Mr. Justice Sellers was of opinion that the sellers were not excused from performance of the contract by anything in the

The award finds [under (g)] that the sellers admitted before the Appeal Committee that they could have shipped, declared
or tendered the contract goods within the contractual date if they had paid the minimum price. On this admission, the
sellers cannot, in my opinion, rely on force majeure. There was no prohibition, no embargo, no physical or legal
prevention. The goods could have been exported.

But the learned Judge considered that, in the events that had happened, the sellers were relieved within the typewritten
words "subject to a Brazilian export licence"; and he answered Question (p) (ii) - which question was: "Did the refusal of
the Bank of Brazil and/or other Brazilian authorities to grant licences for the export of the said goods, except at prices
higher than the prices contained in the said contract, excuse the sellers from fulfilling the said contract by reason of
the clause in the said contract reading: “This contract is subject to a Brazilian export licence”?" - in favour of the sellers.

I find myself in complete agreement with Mr. Justice Sellers that Clause 9 of the contract, as it appears in print, does not
excuse the sellers from performance of the contract, and I do not propose to say anything further on that part of the case.

The difficulty arises upon the words added in type:

Any freight alterations pro or con for buyer's account. This contract is subject to a Brazilian export licence. Any import
duty for buyers' account.

The question for the Court is whether the refusal of the Bank of Brazil to grant licences for export except at prices higher
than the prices contained in the contract excuses the sellers from fulfilling the contract. Mr. Justice Sellers, taking a
different view from that of the arbitrators and of the Appeal Board, held that it did.

I do not think that his conclusion is right upon the facts stated. The risk of any increase in import duty is upon the buyers,
and so is the risk of an increase in freight charge (which the Judge appears to have overlooked). Prima facie, the risk of
an increase in the price of the goods is upon the sellers; they had a period of about six months during which they could
ship them. The words "This contract is subject to a Brazilian export licence" mean that the contract is to be considered as
cancelled if the sellers are unable to obtain an export licence for goods of the quality and quantity called for by the
contract. The contract was on c.i.f. terms, and both buyers and sellers were English companies, the one carrying on
business at Chadwell Heath and the other in Liverpool. The case finds - par. (g) - that the sellers could have arranged for
the shipment of the goods if they had paid the minimum prices mentioned in the letter of June 20, 1951. I take it that that
means if they had paid the prices to their associates in Brazil. This was a considerable increase (20 per cent. to 30 per
cent.) on the price as between buyers and sellers, but we know nothing as to whether prices varied much in this class of
goods. The statement of facts is meagre in the extreme. We know nothing more than the cable of June 12 and the
letter of June 20. The cable of June 12 reads as follows: "678 open credit hundred eighty hundred thirty five only way can fulfil." The letter of June 20 is as follows:

We confirm that due to the intervention of a section of the Bank of Brazil it is impossible for our associates to ship the piassava on the base of the prices contained in the above-mentioned contract.

The department of the Bank of Brazil concerned state that the piassava must be shipped at the minimum f.o.b. prices of £180 a ton for the Cut Stiff and £135 a ton for the Seconds, which would in effect mean an increase respectively of £28 and £40 a ton.

We personally regret this situation most sincerely but frankly we must claim protection under the force majeure clause as it is due solely to the Brazilian authorities that we are unable to fulfil your contract. As we see the position three courses remain open to yourselves, namely:

(a) You decide to cancel the contract.

(b) You decide to accept the new prices.

(c) You decide to take the matter to arbitration.

Upon these facts I fail to see that the sellers can excuse themselves by reason of the words "This contract is subject to a Brazilian export licence." I agree with the learned Judge that some meaning must be given to the words over and above that which is gained from the words in print. It appears to me that they were introduced to make clear beyond doubt what was to happen if the sellers were unable to obtain an export licence. If the sellers were able to show that they were unable to obtain the necessary licence in time to perform their obligations under the contract, the contract was to be treated as cancelled; there would be no need to consider extensions of time owing to prohibition of export under the printed clause, nor would any argument as to frustration be necessary.

It is, however, necessary for the sellers, who rely on the clause to excuse them from performance, to show that they were unable to obtain an export licence if they are to be excused. They do not do that merely by showing that they were required to pay more for the goods than the price at which they had agreed to sell them; that goes no farther than showing that, in the events which happened, they had entered into an unprofitable contract - which provides no answer. Mr. Justice Sellers took the view that the words protected the sellers, and he said, sup., at p. 389:

If the clause does not protect the sellers in this case, one asks whether it could protect them if the minimum price f.o.b. for an export licence to be granted were raised to the extent of one hundred times the contract price, so that a contract, for instance, at £10 a ton had to be met by the sellers at a price of £1000 a ton. I do not think any such obligation was in contemplation of the parties. What they contemplated was that the sellers would use due diligence to obtain an export licence to fulfil a contract into which they had entered.

If the sellers showed that they had taken all reasonable steps to obtain an export licence and had failed, they would have an answer. They have not done that, nor was that the case put forward, as the question under consideration shows. The only point raised was that the increased price required before export was allowed provided an excuse for non-performance under the words "subject to a Brazilian export licence." We do not know when the sellers' associates applied for a licence, or whether they would (or might) have got one on easier terms if they had applied earlier, nor do we know anything as to market conditions in Brazil, nor do we know how, or to what extent, there had been control of export prior to the date of the contract - though it is to be assumed that there had been some measure of control, or that something of the kind was anticipated, else it is unlikely that the words would have been added.

On the question posed by Mr. Justice Sellers as to what would happen in the event of inability to obtain a licence without incurring a cost a hundred times above the contract price, one can imagine a case in which sellers might be able to show that they had made every reasonable effort, but were unable to obtain a licence except on prohibitive terms or on terms entirely outside the contemplation of the parties; if that position arose they might well have an answer. No such position arises in the present case. No effort was made to show whether or not they could have shipped at an earlier date. No evidence was forthcoming as to whether there was a changing market, nor as to whether it was pointed out to the authorities that this contract had been entered into long before the bank or Government requirement (if in fact it was). Indeed, we do not know from what date the requirement operated, or whether it was something completely new or only an extension.
The sellers would have the clause read as giving them an option to cancel if they found they had to pay more for the goods in order to obtain an export licence; that was not a term of the contract.

It follows from what I have said that I think that the award of the Board of Appeal should be restored. It may be that the members of the Board have much more knowledge of conditions in Brazil at the time than appears in the case - but I do not base my judgment on any such thought. In my opinion, the sellers have not brought themselves within the terms of the clause on which they rely.

For these reasons, I think the appeal must be allowed. Lord Justice DENNING:

The question for decision depends on the true construction of the words: "This contract is subject to a Brazilian export licence."

Those words serve a most useful purpose. The parties to the contract knew that the goods could not lawfully be exported from Brazil without an export licence. If this clause had not been inserted, the buyer might have contended that the seller undertook absolutely to obtain a licence and ship the goods, and that it was no excuse for the seller to say that he could not get a licence. (See what Lord Porter said recently in Partabmull Rameshwar v. K. C. Sethia (1944), Ltd., [1951] 2 Lloyd's Rep. 89, at p. 97, when he commented on In re Anglo-Russian Merchant Traders, Ltd., and John Batt & Co. (London), Ltd., [1917] 2 K.B. 679.)

The printed Clause 9 might not by itself be sufficient to protect the seller. That clause may be said only to apply to causes of delay which arise after the contract has been made, such as a subsequent prohibition of export or a subsequent force majeure. It may not apply to delays caused by an existing licensing system. In order to avoid such contentions, the parties inserted this express typewritten clause so as to protect the seller if an export licence was refused. They inserted the words "This contract is subject to a Brazilian export licence," meaning that the contract only binds the seller if a Brazilian export licence can be obtained.

This still leaves many questions unanswered. Whose duty is it, for instance, to apply for the licence? and what is the extent of the duty? The parties have not themselves provided the answers, and it is for the Court to find them. It is, I think, clearly the duty of the seller to apply for an export licence, and to use due diligence and take all reasonable steps to get it. (See Charles H. Windschuegl, Ltd. v. Alexander Pickering & Co., Ltd., (1950) 84 Ll.L.Rep. 89; Société d'Avances Commerciales (London), Ltd. v. A. Besse & Co. (London), Ltd., [1952] 1 Lloyd's Rep. 242.) If a licence is granted, no trouble arises. The seller must ship the goods. But if it is refused, conditionally or unconditionally, many questions may arise. How far is it the duty of the seller to overcome the difficulties thus presented? Must he fulfil the conditions prescribed by the licensing authorities in order to get a licence? Must he make another application if the first one fails? Ought he to have applied earlier? and so forth.

The answer to all these questions is, I think, that this clause is a special exemption inserted in favour of the seller. In order to enable him to take advantage of it he must show that, notwithstanding that all reasonable steps were taken by him, he could not obtain a licence to export during any part of the shipment period; or, alternatively, that it was useless for him to take any such steps, or any further steps, because it was quite impossible for him to obtain a licence.

The facts stated in the award are not nearly sufficient to satisfy this test. There is nothing to show that the licence could not have been obtained at some time during the shipment period. On the contrary, there is a specific finding that an export licence could have been obtained if the seller had been prepared to pay a higher price for the goods to his Brazilian associates - a price higher, that is, than the price at which he had contracted to resell them.

Was that a step which he could reasonably be expected to take? This depends on how much was the price he had to pay to get the licence. If it was, to take the Judge's illustration, one hundred times as much as the contract price, that would be "a fundamentally different situation" which had unexpectedly emerged, and he would not be bound to pay it. (See British Movietonews, Ltd. v. London and District Cinemas, Ltd., [1952] A.C. 185.) But if the price he had to pay was only the current market price, as we were told it was, then he ought to have paid it so as to get the licence. After all, any person who sells goods forward must be ready himself to bear any increase in the market price. It would be a strange thing if a seller could insist on the contract if the price fell, and could escape his own obligations if it rose. It would do away with the whole point of forward contracts altogether.

In this case it is, I think, implicit in the award that the seller could reasonably be expected to pay the price necessary to get a licence. On that basis I am of opinion that the award was right and should be upheld.
That is sufficient to decide this case, but I must mention one point more. The Judge seems to have been influenced by the reflection that, if the seller had been resident in Brazil, he could not have obtained a licence by paying a higher price himself, because it would not bring in any additional foreign currency to Brazil. Why, then, should it be different when he acts through London associates? My answer is that the seller is liable in each case. It must be remembered that there is often a string of contracts of sale and re-sale for one parcel of goods, all made "subject to export licence." The licence which is contemplated is not a licence for a particular contract or a particular price, but a licence for particular goods. I should have thought that, if a licence is refused solely on the ground of price, the seller is bound to overcome the objection or pay damages. After all, the whole point of a forward contract is to fix the future price. Just as the buyer takes the risk of a fall in price, the seller takes the risk of a rise. There must be an implication to that effect.

I agree that the appeal should be allowed and damages awarded in accordance with the decision of the arbitrators and the Board of Appeal.

Lord Justice ROMER:

I agree with the judgments which my Brethren have delivered, and there is nothing that I myself can usefully add.

The buyers' appeal was accordingly allowed, with costs here and below.

Leave to appeal to the House of Lords was granted.

**Referring Principles:**

VI.3 - Force majeure