Sony Computer Entertainment UK Ltd v Cinram Logistics UK Ltd [2008] Int.Com.L.R. 08/08

CA on appeal from Commercial Court (HHJ Knight QC) before Rix LJ; Wilson LJ; Rimer LJ. 8th August 2008

Lord Justice Rix :

1. If a manufacturer and seller of goods loses them through the fault of another before he can make delivery and earn the price, can he recover that price as damages for their loss or is he limited to the lower manufacturing cost of replacing those goods, at any rate unless he proves that he could not make good the lost sale to his buyer? That is in effect the issue raised by this litigation.

2. The goods in question are memory cards used in the Sony PlayStation 2. Such memory cards enable games to be saved. The sales were of 4,000 red and 13,000 black such cards. There is no difference in value or function between a red and a black card.

3. The claimants are Sony Computer Entertainment UK Limited and Sony Computer Entertainment Europe Limited. No distinction has been made between them, and they have been referred to indiscriminately as "Sony". I shall do the same. Sony is the wholesaler in the UK of computer peripherals, predominately the PlayStation computer games with their associated hardware and software, including the memory cards just referred to. These memory cards are manufactured in Japan by Sony's Japanese associated or parent company. There is a three month lag between Sony reordering such cards from Japan and receiving them in the UK.

4. Among Sony's most important customers in the UK is Game Stores Group Limited ("Game"). Game operates something like 600 stores in the UK. Sony is a major supplier of Game and because of their close trading relationship sold memory cards to Game at a discounted price. Thus it is agreed that the *"open market value*" of the 4,000 red and 13,000 black cards, that is to say the price at which such goods could normally be obtained from Sony, was £289,170, whereas the favoured customer discounted price at which these goods were sold to Game was £187,989.41. Sony claims only the lower discounted value in these proceedings. However, the cost price to Sony of these goods was the lower figure of £56,246.

5. The defendant in these proceedings is Cinram Logistics UK Limited ("Cinram"). Cinram was responsible for the warehousing and distribution, including carriage, of Sony products. At the time with which we are concerned it was called The Entertainment Network Limited or "TEN". It started life as a company jointly owned by Sony Music and Warner Music, but by the time, in September 2004, of the loss of the cards in question had already become a wholly owned subsidiary of Cinram Inc, a Canadian company. At trial the defendant was called TEN and I shall continue to do so.

6. When Game raised a purchase order with Sony, the order would be logged directly from Game onto TEN's system. At the time due for delivery, TEN would palletise the ordered goods from Sony stock held at TEN's warehouses in Aylesbury, Berkshire, and deliver them to Game's warehouse in Basingstoke, Hampshire, usually by sub-contracted carriers.

7. The cards in question were stolen by being diverted into the possession of fraudsters. They have never been recovered. TEN admitted liability for the losses, and the trial before HHJ Knight QC, sitting as a deputy high court judge in the Commercial Court, was limited to the assessment of damages. The various values described above were agreed, and in effect the issue between the parties was whether the claim was made good for the price to Game of £187,989.41 or only, as TEN contended, for the cost to Sony of £56,246. Sony's claim had been pleaded in contract, bailment and negligence. The judge found that on the balance of probabilities Sony had proved its claimed loss by showing that the sales in question had not been replaced.

8. TEN appeals against that judgment. On its behalf, Mr Alexander Hill-Smith submits that the burden of proof was on Sony to prove its loss by showing that it had lost the sales in question, ie by showing that Game had not replaced its orders. If, as he submitted, the evidence showed that the sales had been replaced and thus had not been lost, it must follow that Sony had earned its profit and so was entitled only to the cost price of the lost goods. On behalf of Sony, Mr Tim Marland submitted that the judge's finding was one that he was entitled to make and was correct. In any event, he also submitted in the alternative that Sony had proved its loss, at any rate on a prima facie basis, by proving the loss and value of the goods, and that if it was to be said by TEN that Sony had after all lost only the cost to it of replacing the goods, then the evidential burden of showing that Game had not replaced the goods lay on Ten and not on Sony, and could not be met. This was either because of a shifting evidential burden, or because TEN's argument amounted or was analogous to an implicit plea of failure to mitigate.

9. These submissions make it necessary to set out further facts about the commercial relationship between Sony and Game.

Game's orders from Sony

10. As a large customer, Game was ordering the memory cards as a continuous product throughout the period in question. Thus in calendar year 2004 Game ordered a total of 268,000 black and 66,500 red cards.

11. The cards which were lost had been ordered on 18 August 2004 for delivery on 8 September.

12. These orders need to be seen in context. On 18 August Game made many separate orders: for the black cards, a total of 137,776, and for the red cards, a total of 50,000. The delivery dates for these orders were staggered from immediate delivery to 1 December 2004. As of the time when the cards in question were lost, a further 103,776 black and 34,000 red still remained on order from the 18 August orders.

13. Following the loss of the 13,000 black and 4,000 red cards the order position was as follows. The first column gives order date, the second quantity, and the third due delivery date:

Black		
15.09.04	1,700	28.09.04
20.10.04	26,500	21.10.04
26.10.04	54,000	28.10.04
20.12.04	20,000	21.12.04
Red		
20.10.04	9,500	21.10.04

14. The situation is complicated by the existence of further orders for blue and silver cards. It is not known when these cards were ordered or for what delivery dates, but it is known that as of 26 October 2004 the total outstanding orders for coloured (ie non-black) cards were as follows:

Red	27,000
Blue	19,300
Silver	32,000

or a total of 78,300 cards. Those 27,000 red cards were made up of three orders: the 18.8.04 order of 4,000 cards which was never delivered because lost; the 18.8.04 order of 18,000 cards for delivery on 1.11.04; and the 18.8.04 order of 5,000 cards for delivery on 1.12.04. On 26 October 2004 there was an e-mail exchange between Sony and Game whereby these outstanding orders for 78,300 coloured cards were cancelled and replaced with a new order for 54,000 black cards for almost immediate delivery. That replacement order can be seen in the list above for *Black* against the date 26.10.04.

15. In sum: (i) there is no sign of any immediate replacement of the lost deliveries being effected by Sony to Game or of any immediate replacement orders given by Game to Sony to make good the lost deliveries; (ii) apart from the small order of 1,700 black cards given by Game to Sony on 15 September 2004 for delivery on 28 September, there were no further orders from Game to Sony until 20 October at the earliest; (iii) on 26 October the outstanding number of 78,300 coloured cards on order were replaced by a diminished order for only 54,000 black cards[1]; and (iv) the fact that the lost delivery of 4,000 red cards was among the still outstanding orders for coloured cards cancelled on 26 October shows that the lost goods had not been replaced as such by that date.

16. It was submitted at trial that the order for 9,500 red cards made on 20 October represented a replacement of the 4,000 lost cards which had never been delivered. However, there was no evidence at trial to support that submission, and the fact that the 4,000 order was still outstanding as of 26 October is evidence to the contrary. Moreover, it is prima facie counter-intuitive to think that an order made on 20 October is a replacement for goods due on 8 September. Much water will have flown under the retail bridges in those 6 weeks of the autumn.

17. It also appears that the financial accounting between Sony and Game and the order book accounting between them were not co-ordinated. Thus, the lost cards, although never delivered and shown (as can be inferred from the case of the 4,000 red cards) to be outstanding orders, were nevertheless paid for in the ordinary way, as part of a bulk periodic settlement on 1 November 2004, pursuant to invoices dated 8 September 2004. In the end, the relevant amounts had to be re-credited to Game pursuant to credit notes issued on 23 March 2005.

18. There was an *"open to buy"* system in operation for Game's ordering of goods from Sony. The system appears to have operated on the basis that once an order had been made, the amount of credit involved in that purchase was committed and could not be used again. Thus if the goods were not delivered the credit allocated to that purchase was still blocked against the original order. It is not clear, however, whether this was a credit limitation system operated by Sony, or a similar limitation operated by Game, this time restricting itself. Mr Geoff Gelbier, the operations manager for Sony who gave evidence at the trial, relied on the *"open to buy"* system as suggesting that Game would be unlikely to be able to find the extra money to replace the stolen stock. However, Mr Gelbier did not have any direct knowledge of these matters, and was to some extent speculating. In his witness statement, Mr Gelbier said this, in a passage cited by the judge:

"Because of the way customers order these continuous products it is virtually impossible to know whether we received orders to replace the stolen stock or whether they were re-orders against a previous forecast. The only thing we can

[1] It is not entirely clear whether the 54,000 black cards then ordered were in addition to the 58,000 black cards then outstanding on order for delivery in November, or also in replacement for them as well. That 58,000, which is mentioned in the e-mail from Sony to Game of 26 October 2004 (*"You have 58K black…on order for Nov 1st"),* did not include the lost 13,000, which had of course been due for delivery in September. Game's reply e-mail of the same day is to cancel the 78,000 coloured cards and replace with "*ONE order for the Black memory card (54,000 units) which can be shipped immediately*".

establish is that a customer's "open to buy" allocation will have been used as soon as they have placed the order. Therefore if they wanted to make an entirely new additional order to replace the stolen goods then they would have to pay again for the additional goods and have capacity within their "open to buy" allocation for the month. For this reason, there is no evidence to show that a replacement order was made and I suspect that the stolen goods were not replaced."

19. There was some evidence about Sony's (ie TEN's) stock position, but none about Game's. Sony had very little spare capacity in black cards throughout the period from June to October 2004. A snapshot of the stock position as of each Friday gave the total amount of stock, but gave no insight as to allocations to customers. Even so, the Friday snapshot remained at about only a maximum of 2,000 black cards from June to September. Throughout the period up to 10 September Sony had received only two small inputs of black cards, namely 2,000 in mid July and 4,000 in late July. Then in the week ending on 10 September Sony received 70,000 black cards. The lost 13,000 cards would have been part of the deliveries then made which that receipt would have permitted. Even so, as of 10 September itself, there were only 10,428 cards remaining in stock. As of 17 September, there were only 3,000 black cards in stock, but in the following week there was a receipt of 20,000 more, so that as of 24 September there were 23,000 black cards in stock, but that position did not last long because by 1 October there remained only 3,730 in stock, and on 8 October only 1,995. It was only in the week ending 15 October that black cards began to reach Sony in substantial quantities, namely 56,000 in that week and 188,000 in the following week. It may not be surprising therefore that it was only on 20 October and subsequently that Sony began to make further orders. The judge, however, recorded that Mr Gelbier accepted that Sony could have replaced the lost black memory cards from stock following the loss: but it is not clear to me how he could have known that. Miss Gail Bamforth, finance director of TEN, for her part appeared to accept, said the judge, that on the basis of Sony's stock levels in September it was not in a position to replace the 13,000 lost black cards to Game.

20. The position as to the red cards, however, was different, for there appear to have been good quantities of red cards throughout September, and the stock position fell away to zero only towards the end of October, at the very time when the black card stock situation was becoming easier.

21. Both Sony and TEN contacted Game for its assistance in their dispute. Of course, the position was delicate and in the event neither party called Game to give evidence at trial. However, two e-mails were produced. One was from Mr Steven Barker, Game's assistant product manager for Sony and Nintendo, who e-mailed TEN's solicitors in October 2007 as follows:

"As discussed, I can confirm that further orders were definitely placed for the memory cards in question. These products are and have been an ongoing feature in our stock holding since they [were] released and as such ordered on a regular basis.

Also, as mentioned, whilst we do not have an exact replica PO for the quantities in question, we do have subsequent orders. Due to the nature of our product and customer demand, we are continually re-forecasting our sales which in turn [a]ffects our intake. Therefore, after the stock in question had been reported missing/stolen, we would have re-forecast and taken in a different quantity to reflect the time period in which we didn't receive the stolen stock, which explains why the subsequent order quantities do not match the original order."

On 17 October 2007 Mr Ben White, reporting and acquisitions director at Game, commented on Mr Barker's e-mail in his own e-mail to Sony's solicitors as follows:

"Further to our conversation, I think Steven's email below (to the solicitors for Cinram Logistics) states clearly our position on this issue – i.e. that we made a "further" order for memory cards but not for a "repeat" order for memory cards. It could be speculated that the further order was made to cover the lost order (following the theft) but we cannot prove this.

To establish whether financial loss was suffered by not having the stock we would have to look at our stock levels at the time of the theft and the sell through of the product both before and after the event. Given the time period that has elapsed this analysis cannot be undertaken immediately and it would not serve to establish Sony's loss."

22. All of this information was ultimately rather elusive and inconclusive. So much so that TEN sought to rely strongly on the further information given by Sony at the pleading stage when it said this:

"The position is not as straightforward as a simple 'one-for-one' stock replacement, owing to the ongoing and high volume nature of the transactions between the Claimants and Game. To the best of the Claimants' knowledge the shortfall between the Claimants and Game may have been replaced from stock and added to pre-existing and/or future orders shipping to Game."

23. Both sides complained about the poor disclosure of the other: but at the end of the day, neither side submitted that there had been any improper failure of disclosure. It was merely that such further documents as might at one time have been available for disclosure were no longer available.

The judgment

24. The judge treated the issue before him as entirely one of fact, and he decided the issue on the basis that Sony had the burden of proving on the balance of probabilities that it had lost sales (and therefore the full wholesale value of the lost goods) because the stolen deliveries had not resulted in replacement sales.

25. This decision was made in the light of competing submissions both as to where the burden of proof lay and what the evidence showed. The judge recorded the nub of these submissions as follows:

"4. Mr Alexander Hill-Smith for TEN submitted that the fundamental issue for the Court is whether or not Sony had established as a result of the theft of the 17,000 memory cards that it has lost sales to Game so as to be able to recover the net value of the memory cards; and in the event of Sony failing to so satisfy the Court, it is only entitled to recover the replacement cost of the memory cards in the sum of £56,246. He submitted that the burden of proof is on Sony to establish its quantum of loss, reflected in the order made by Christopher Clarke J made on the 29th September 2007 that it was for Sony to show that there was a loss of overall sales as a result of the theft of the consignments of memory cards…

5. Mr Tim Marland for Sony submitted that the onus was on TEN to prove that the damages should be limited to the cost of replacement memory cards. He submitted that Sony had established their primary case in that it was not disputed that the original sales were lost and there was no serious dispute that the value of the sales was as set out in Sony's invoices. He characterised TEN's submissions as an artful way to attempt to reverse the burden of proof in what otherwise would be a plea of avoided loss or mitigation of loss…"

26. Ultimately the judge adopted the position that Sony had in any event discharged the burden of proving that sales had been lost to Game. He put his conclusions in this way:

"12. In my judgment the available facts and inferences to be drawn from them satisfy me that Sony lost the sales in respect of the two stolen consignments of red and black memory cards. It is true that Mr Gelbier could not rule out the possibility that Game did not incorporate the quantities of red and black memory cards lost as a result of the theft in subsequent orders, as reflected in Sony's response to the Request for Further Information. On the other hand there is no subsequent order or circumstances which suggest that these quantities of memory cards were the subject of replacement orders or incorporated in subsequent orders by Game. In my view it is reasonably clear that the number of red memory cards cancelled on the 26th October reflected the two cancelled orders of 23,000 and the non-delivery of the 4,000 stolen red cards. This would militate against any assumption that the order of 9,500 memory cards included the lost 4,000 memory cards. Furthermore, it is probable that the 9,500 red memory cards would have been delivered before the cancellation on the 26th October 2004. With regard to the black memory cards there is no evidence to suggest that these were the subject of a specific replacement by Game, notwithstanding Mr Hill-Smith's criticism of Sony's disclosure. It also appears to me that Sony's stock level of black memory cards in September was such that they could not have replaced the 13,000 black memory cards had they wished to do so at that point in time. There is force in Mr Marland's point that the order of 54,000 black memory cards (interchangeable with red), showed a reduction of 23,300 on the pre-existing and cancelled orders for coloured memory cards. There is some support for this conclusion in the nature of the particular market in that forecast of stock requirements would usually be decided some months in advance, and would be matched with a customer's "open to buy" allocation with the consequence that a replacement purchase could not be made. I accept Mr Marland's submission that on the balance of probabilities these sales were not replaced. There is no suggestion that in the circumstances Sony were able or minded to divert orders placed by other customers to satisfy the loss of these cards to Game. Accordingly in my judgment Sony is entitled to recover the net value of the memory cards."

The submissions

27. On this appeal, Mr Hill-Smith on behalf of TEN submits that the judge was right to place the full burden of proof on Sony, to show that the stolen goods represented sales lost to Sony and not replaced by re-ordering on the part of Game, but that the judge was wrong to find that that burden had been met. On the other hand Mr Marland on behalf of Sony submits that the judge was right to find as he did, and that in the alternative he could have put the effective burden of proof on TEN, to show that Sony had recovered its profit on replacement sales.

28. In support of his submission that the judge came to the wrong conclusion on the facts, Mr Hill-Smith makes the following points. First that this court is as well-placed as the trial court to draw the correct inferences from primary facts which are either common ground or not seriously in dispute: see ***Datec Electronics Holdings Ltd v. United Parcels*** [2007] 1 WLR 1325. Secondly, that where a continuous product such as memory cards is in question, the natural inference is that a failed delivery will be re-ordered because Game's stock levels would reflect the relevant lack of stock: Game's orders would inevitably be adjusted to reflect the fact that stock levels would be lower than they would otherwise have been. That inference was recognised in Sony's further information, and also in Mr Gelbier's evidence.[2] Thirdly, there was no evidence of any orders placed by Game which Sony was unable to fulfil. If that had been the case, Game would have complained, and there was no evidence of that. Fourthly, the lack of complaint also suggests that Game's own stock levels would support its sales without any loss pending the arrival of further orders and deliveries. There was no evidence of any stock shortages at Game or of any lost sales at Game. Fifthly, the order of 9,500 red cards on 20 October presumably would have been only 5,500 had the 4,000 cards not been lost; alternatively the 54,000 black cards ordered on 26 October (in replacement of the coloured cards) would have been smaller but for the lost 4,000 red cards. Sixthly, that the same point could be made with respect to the lost 13,000 black cards, both in connection with the order of 54,000 cards, and in connection with the earlier order on 20 October of 26,500 black cards. In sum, there was insufficient evidence to conclude that there were no replacement orders, especially in the absence of any evidence of loss of sales on the part of Game.

[2] Q. "*…as a matter of common sense…they are going to order replacements to replace the ones that have gone missing*?" A. "*That is true, but whether or not we can fulfil them at the time, I don't know.*"

29. As for the burden of proof, Mr Hill-Smith submitted that the judge's approach was the right one. Sony's prima facie loss was not the sale price to Game, but only the cost of replacing the goods to Sony. To do better, Sony must therefore prove that it had lost the relevant sales. This case was exactly like ***Charter v. Sullivan*** [1957] 2 QB 117, where the seller failed to win his profit from his buyer, who had wrongly refused delivery, because the seller was unable to prove that he had not earned his profit by selling the same goods to another buyer. There was no question of any complaint of lack of mitigation on the part of Sony: it was simply that Sony had earned its profit by supplying replacement goods to Game as part of the continuous product re-ordering stream, and Sony could not prove otherwise.

30. On behalf of Sony, on the other hand, Mr Marland submitted that the judge's factual findings in favour of Sony were ones that he was well entitled to come to and should not be disturbed by this court. The natural inference was that Game would keep its stock levels as low as possible, on a "*just in time*" philosophy, since that was the efficient and cost-effective way to conduct business. Therefore there was every likelihood that loss of stock had caused loss of sales. As for the absence of complaint, there were no witnesses who had any knowledge of the actual state of affairs between Sony and Game at the relevant time, and the poor state of disclosure made any inference on that basis a dangerous one. In any event, where there were no re-orders until late October at the earliest, the natural inference was that there were no replacement sales, only a new forecasting situation which would have to take into account many different factors, in a retailing situation which was inevitably much changed from that which had obtained some six weeks earlier.

31. Alternatively, the burden of proof should really lie on Game, not on Sony. The loss of the goods, which had been sold at a price discounted below their market price, represented the prima facie loss, and it was for TEN to prove that that loss, or part of it, could have been recouped by further replacement sales. Therefore, even if the judge could be said to have erred in saying that Sony had proved that there were no replacement sales, TEN could not in any event sustain the burden of showing that there were.

Issue 1: Can the judge's conclusion on the facts be sustained?

32. In my judgment one begins with the loss of the cards themselves. That loss meant that Sony could not use them to earn the price at which those goods had been sold to Game. Of course, Game could have immediately required Sony to replace the lost goods: they could have required their 18 August orders due for delivery on 8 September to be fulfilled. But they did not. Instead, those orders were paid for as though they had been fulfilled, when they had not. In due course, those payments had to be reversed by credit notes, but that did not happen until 23 March 2005. Alternatively, if Game did not require *those* orders to be fulfilled, they could have *re-ordered* the missing cards for immediate delivery, but they did not. There is no further ordering by Game until 20 October (apart from an insignificant order of 1,700 cards made on 15 September for delivery on 28 September: the small number and the lack of any requirement for immediate delivery suggests that it has nothing to do with the lost cards). Moreover, there was in general insufficient stock of black cards in Sony's hands to enable any immediate replacement.

33. There was therefore no immediate replacement, and no replacement at any time of those specific orders. In due course, the order of 4,000 red cards is actually cancelled (as part of the cancellation of all outstanding orders for coloured cards on 26 October). Although there is no similar direct evidence of the cancellation of the order for 13,000 black cards, the evidence tends to show that it was also cancelled or regarded as having been discharged by payment, even if that payment was not in fact due. Indeed, when on 26 October there is talk of outstanding orders for November of 58,000 black cards, there is no suggestion whatsoever on either side that there is in addition an outstanding order to be carried over from September deliveries in the form of the missing 13,000. Moreover, when on 26 October the orders for the coloured cards are cancelled, the substitute order is for a lesser number of cards, namely 54,000 (in place of 78,300). That is wholly inconsistent with the idea that the loss of the stolen cards has increased Game's future requirements.

34. The fact is, that when Game started ordering again in late October, it was not replacing its lost September deliveries, but calling in (in lesser numbers) its November deliveries. September was by now water under the bridge. Its forecast or re-forecast of its November requirements would itself have depended on a whole number of factors: sales reports in September and October; sales forecasts for November; the ability to source memory cards from other suppliers; the availability of credit; as well as, perhaps, the absence of delivery of those stolen cards.

35. On the other side, there is nothing positive to meet these factors, only the suggestion that, all other things being entirely equal, and on the assumption that Game could survive with reduced deliveries and stocks without any loss of sales, or would not obtain any further needed supplies from other sources, lower than forecast deliveries in early September would still feed through into consistently higher orders and needs towards the end of October. But all other things are not entirely equal, and the inference is a very weak one.

36. In my judgment, all these considerations combine to justify the judge's judgment that Sony had succeeded in proving that it had in fact lost, what prima facie it had clearly lost, namely 17,000 cards which would have earned it their sale price to Game, a price discounted from their general market value, and that that price was not recovered or earned by substituted replacement sales for the lost deliveries.

Issue 2: On whom in any event did the burden of proof lie?

37. The judge was content to treat the burden of proof as resting on Sony. However, in my judgment the evidential burden of proof rested on Ten. Of course, the legal burden rests on a claimant to prove his loss: but the evidential burden shifts, and on these facts rested, as I think, on Ten.

38. Mr Hill-Smith relied on ***Charter v. Sullivan*** [1957] 2 QB 117 (CA) as deciding otherwise, but that case arose on its own different and special facts. There, the defendant had ordered but refused to accept delivery of a car. The seller was a dealer. This occurred at a time when dealers could sell every car they could obtain, for cars were in short supply. The buyer's failure to accept delivery of the car did not cause the seller to lose his car, only his sale. On the facts before the court, the car was within ten days sold to another customer, and the dealer made his profit on that substitute sale. If therefore he had also been able to obtain his profit from the original buyer, he would have obtained a double profit on the one car. That would not have been in accordance with the law of damages, for the seller there would have received more than an indemnity against his loss. Thus the seller sought to argue that he could retain the profit he had made by reselling the car to his new customer and in addition obtain from the defendant the same profit which he would have made if his first sale had been successful. There was no evidence, however, that the dealer could have obtained a second car in order to make a second sale. The defendant had nevertheless lost before the county court judge and appealed on the ground that, pursuant to section 50(3) of the Sale of Goods Act 1893 his seller was entitled to no more than the difference between the market price and the sale price, which was nothing.

39. Section 50 of the 1893 Act provided that in the case of wrongful non-acceptance of goods –

"(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."

40. In this court there was some discussion of what amounted to a market price. In the particular circumstances then obtaining, which were that there was a fixed retail price for the car, a situation where demand exceeded supply, and the seller gave evidence that he could sell every car he managed to get, Jenkins LJ put on one side the question whether there could be said to be an "available market" (ie one that might be said to fluctuate with supply and demand) and held that it was section 50(2) that directed the solution: and that in the circumstances the seller could not prove that he had lost anything. Jenkins LJ put the matter in this way:

"…the measure of that loss must, in my opinion, be the amount, if any, of the profit the plaintiff has lost by reason of the defendant's failure to take and pay for the car he agreed to buy. This accords with the view taken by Upjohn J in ***Thompson (W.L.) Ltd. v. Robinson (Gunmakers) Ltd.,*** *[1955] Ch. 177 and also with the principle stated in* ***In re Vic Mill Ltd****. [1913] 1 Ch. 465 which Upjohn J. applied…" (at 128)*

"The matter therefore stands thus. If the defendant had duly performed his bargain the plaintiff would have made on that transaction a profit of £97. 15s. The calculation therefore starts with a loss of profit, through the defendant's default, of £97 15s…That loss was not cancelled or reduced by the sale of the same car to Wigley…But the matter does not rest there. The plaintiff must further show that the sum representing the profit he would have made if the defendant had performed his contract has in fact been lost. Here I think he fails, in view of Winter's evidence that the plaintiff could sell all the "Hillman Minx" cars he could get" (at 129/130).

"But it was for the plaintiff to prove that he did in fact sustain the loss of profit claimed, and this to my mind he wholly failed to do. The mere assertion by Winter "We have lost sale of a car" is clearly not enough, particularly when read in conjunction with his "Can sell all 'Hillman Minx' we can get." Accordingly there was in my view no evidence on which the judge could hold that the plaintiff had suffered the damage claimed, and I would allow this appeal."

41. On the other hand, Sellers LJ put the matter somewhat differently. Having found that there was no available market, he continued (at 134/5):

"The plaintiff has the duty to act reasonably and mitigate the damages as far as he reasonably could. What he did resulted in a resale at the contract price, but the question is whether that resale mitigated his loss, and the same question would arise if a sale could have been made in an "available market."…

If a seller can prove that a profit has been irretrievably lost on a sale of goods by the buyer's default it would in my opinion be recoverable as damages in accordance with section 50(2). But where there has in fact been a resale of the goods, the seller has the burden of proving a loss of profit beyond that which on the face of it has been recouped in whole or in part by the resale.

In my view the plaintiff has failed to give adequate proof of such a loss in this case. The sales manager of the plaintiff has said that he had lost the sale of a car, but he also said that he could sell all the "Hillman Minx" cars he could get…

The matter cannot be worked out ad infinitum but would be decided on the probabilities of the case and having regard to the nature, extent and circumstances of the dealer's trading. If a dealer has 20 cars available for sale and 25 potential buyers he still would make his full profit if he sold the 20 cars notwithstanding that two or three purchasers defaulted."

Hodson LJ agreed – *"on the ground that the plaintiff has failed to prove a loss beyond that which has been recouped by the resale of the motor-car in question" (at 132).*

His analysis, therefore, brief as it is, is in line with that of Sellers LJ rather than Jenkins LJ.

42. In my judgment, the proper analysis of this case is that prima facie the seller proved his loss by showing that the buyer had refused to accept the car, but that prima facie he had fully mitigated his loss by selling the same car at the same price and profit to another buyer. It was in these circumstances that the seller still had to explain why his resale of the car was not a complete mitigation, and this he could not do where he accepted (in the evidence of his sales-manager, Mr Winter) that demand outstripped supply and there was no evidence that he could have obtained another car. I observe that *Chitty on Contracts*, 29th ed, 2004, Vol 1, at para 26-098 and *Benjamin's Sale of Goods*, 7th ed, 2006, at para 16-050, treat *Charter v Sullivan* in this respect as a case on mitigation.

43. It seems to me therefore that this authority does not assist Mr Hill-Smith. It illustrates the way in which the evidential burden may shift depending on the circumstances. The case also differs from the present in that there the car remained in the seller's hands for him to resell and recoup his profit, whereas in the present case the memory cards were stolen and no longer in Sony's hands to sell either to Game or elsewhere. Sony could of course acquire new cards from Japan, but that would have taken three months (up to the very gates of Christmas).

44. On the contrary, in my judgment the general principle in such sale of goods cases is that laid down in ***In re Vic Mill Ltd*** [1913] 1 Ch 465 (CA). There the company in liquidation had repudiated the purchase of some machines that it had ordered and the question was the amount for which the seller might claim in the liquidation by way of damages. As to one machine, it was never built and the seller claimed its loss of profit. As to another machine, the seller spent a relatively small amount (£5) to adapt the machines for an alternative customer and sold it to him for only £23 less than the agreed sale price to Vic Mill. The liquidator of Vic Mill submitted, as to the first machine that there was no evidence that the seller could not have earned his profit elsewhere, and as to the second machine that the seller's claim was limited to the £28, and not to the full profit which the seller would have earned on the original sale. This court disagreed. There was no available market and no evidence that the seller could not have enjoyed the profit on any contracts that they obtained. Hamilton LJ said in relation to the first machine (at 472):

"Certainly the case is not one in which the very nature of the undertaking shews that they could not carry on more than one contract at one time. No authority has been cited for the contention that it rests upon the maker who is claiming damages by way of lost profit, not only to prove that he was ready and willing to perform, but that he was able to utilize his time, as he did, and in addition to have taken on and carried through these particular appellants' contract. As the evidence stands, there was a prima facie case that the makers could have made this profit as well as the profits on all the other contracts that they had."

At 473 Hamilton LJ dealt with the second machine thus:

"That was a reasonable mode of mitigating the damages, but it by no means follows that damages are confined…The fallacy of that is in supposing that the second customer was a substituted customer, that, had all gone well, the makers would not have had both customers, both orders, and both profits."

Buckley LJ agreed and put the matter in relation to the first machine succinctly thus (at 474):

"the respondents are I think entitled to the whole profit, because the appellants failed to produce any evidence to shew that if the works had been employed to execute the orders under the contract they would have been unable to execute other orders which they had received."

45. Thus ***Vic Mill*** would seem to illustrate that the effective burden of displacing the prima facie loss of profit from a lost sale rests on the defendant.

46. That is also the view of *Benjamin's Sale of Goods*, at para 16-079, where it states:

"*The burden of proof lies on the defaulting buyer to show that the seller could not have earned the second profit but for his breach of the first contract*"

citing ***Hill & Sons v. Edwin Showell & Sons Ltd*** (1918) 87 LJKB 1106 (HL).

47. In ***Hill & Sons*** the claimant sued for the loss of profit which they would have earned under an abortive sale of cartridge clips to the defendant. The sale went off because the defendant failed to provide the claimant with the agreed supply of steel needed to make the clips. The sole question was one of quantum. The trial judge stopped any cross-examination of the claimant as to whether the claimant could have recouped his lost profit by other orders, and awarded the claimant his claim in full. This court ordered a new trial. The House of Lords upheld the court of appeal, pointing out that the trial judge's decision could only be upheld if the claimant's use of his mill to earn profits in other ways could under no circumstances be admissible. Lord Finlay LC said (at 1107):

"It may be that the foundation for such a reduction could not have been established in point of fact, but the respondents' counsel should have been allowed to pursue his cross-examination on the point, and might conceivably have been able to adduce relevant evidence when the case for the defendants was gone into."

Lord Haldane said (at 1108):

"…such enquiry was wholly denied the respondents. No doubt the burden of proof lies on them to make out such a case, and it may be a difficult burden to discharge. The person who sues for the breach of a contract such as this is entitled to be placed, so far as money is concerned, in as good a position as if the contract had been performed. He can therefore prima facie claim what would have been his profit."

Lord Parmoor said (at 1114):

"There is no doubt that the plaintiffs were justified in putting forward the loss of profits, consequent on the fault of the defendants, as the quantum of damages to which they were prima facie entitled, and the defendants did not question the accuracy of the figures. Beyond this there is no obligation on the plaintiffs to bring affirmative proof that other orders executed by them

were not inconsistent with the execution of the contract work, or that they acted reasonably, and in the ordinary course of business, in any action that they took as a consequence of the breach of contract."

Their Lordships approved ***In re Vic Mill***.

48. Mr Hill-Smith also sought to rely, in the context of a contract of carriage case rather than a sale of goods case, on ***The Pegase*** [1981] 1 Lloyd's Rep 175, where the claimant consignee sued on the basis of delayed delivery for loss of profits due to the absence of a buffer stock. That, however, was a typical ***Hadley v. Baxendale*** [1854] 9 Ex 341 case of remoteness of damage, and is of no assistance here, where there was no remoteness issue.

49. Of course, this case is not about a claim for breach of a contract of sale, but Mr Hill-Smith submits nevertheless that the principle is the same, namely that the seller of stolen goods, like the seller of non-accepted goods, must prove that the prima facie loss of profit on the sale was not recouped on a further sale. In my judgment, whether the matter is looked at in this way, by analogy with the case of the seller who sues his buyer for non-acceptance, or whether the matter is looked at more directly, asking what an owner of goods has lost by reason of having his goods lost or converted by a bailee, in breach of contract, there being as in this case no problem on the ground of remoteness or lack of knowledge of the profit in question, the answer must be that prima facie the owner is entitled to the value of his goods; and that if the defendant wishes to say that the loss is less because the profit could have been earned in any event by a substitute or replacement sale, at the cost only of the expenditure of a lesser sum for the purpose of manufacturing or buying in further goods, then the defendant bears the burden of proving that case. It is not for the claimant to prove a negative, that he has not recouped the profit by a substitute sale, but for the defendant to prove a positive, that the profit has been recouped and thus the loss of profit not suffered after all.

50. It seems to me that this conclusion is equally confirmed by the common ground agreement that, aside from the discount available to Game as a large and favoured customer, the market value of the lost cards was even greater than the amount claimed. I do not see why market value should not be a good guide to what Sony has lost, at least prima facie, even if Sony was content, and might (or might not) have been obliged, to limit itself to the profit on the sales to Game in question. See *McGregor on Damages*, 17th ed, 2003, at paras 27-003ff and 27-017ff. However, neither party here rested on market value, but on a choice between sale price and (an essentially) manufacturer's price.

51. If therefore I had been persuaded that the judge had been too generous to Sony in finding that it had proved on the balance of probabilities that there were no substitute sales to Game, I would nevertheless have been willing to find in favour of Sony that the burden of proof, for the purpose of proving that there had in fact been substitute replacement sales on which Sony had recouped its lost profit, rested on Game rather than on Sony. On that basis, although there would have been similar submissions to take into account on the facts to those which I have considered above, I would have considered it impossible to think that Game would have come close to meeting that burden.

Conclusion

52. In sum, for these reasons I would dismiss this appeal.

Lord Justice Wilson:

53. I agree.

Lord Justice Rimer:

54. I also agree.

Mr T Marland (instructed by Messrs Waltons & Morse) for the Respondent/Claimant
Mr A Hill-Smith (instructed by Brookstreet Des Roches Llp) for the Appellant/Defendant